The Madras Law Journal

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[*The following is the full text of the address delivered by the Hon'ble Mr. T. V. Seshagiri Aiyar at the Vakils' gathering of 1913 held in Mr. K. Srinivasa Aiyangar's bungalow on Friday the 8th August.*]

GENTLEMEN,—I am not addressing you on any question of jurisprudence; I want to talk to you about ourselves to take a bird's eye view of our past and of our future, or to use the language of the merchant, to take stock of our situation. I shall thereafter endeavour to draw your attention to a few subjects which ought to engage your attention.

EFFICIENCY AND INTEGRITY.

The admission of Vakils to practice in the High Court dates from 1863. Since the establishment of the High Court, the work of the Vakil has shown a steady and continuous onward course. A feeling of jealousy and ill-will towards us, as a class, has been the natural result: we can derive some consolation from the fact that Lawyers all over the world and in all ages have been looked down upon with disfavour by the lay public. It is not easy to analyse the contributory causes which have led to this distrust. I do not agree with the writer in that excellent liberal periodical, the *Nation* that the dislike is due to a belief that the work of the Lawyer hinders and does not help justice. I think that is a baseless criticism; and from all that one knows of the standard of efficiency and integrity which the Bar has reached in England, it is absolutely incorrect to speak of Advocates as not furthering the cause of justice. We, in this country, in this as in other matters look up to the guidance and example of England and many of us, not on a few occasions, feel consoled and encouraged by the sturdy independence, sobriety and rightmindedness of the English legal profession. In the matter of maintaining a high standard of the ethics of the profession, we ought to be even more aplomb, more circumspect, and more anxious to advance the cause of justice than our compeers

in England. The reason is this: In England the legal profession does not occupy the same conspicuous place in the work of political and social regeneration as it does in India. The fact that the present Cabinet is largely composed of practising Barristers ought not to blind us to the fact. But, as a rule, the landed aristocracy and the wealthy middle class furnish men who rule and guide the destinies of the Empire. I hope that the time may not be far distant in this country when other independent professions will take their full share of responsibility in reshaping and remodelling India. At present there are very few of this kind; and however much Mr. Lily, who, I understand, drew his official salary in Madras, and persons of his way of thinking may feel upset by the possibility of political power remaining in the hands of lawyers in India, there is no disputing the fact that we have endeavoured our best to serve our motherland in every department of human activity; and we have succeeded beyond our expectations. We are proud of our share in the noble work that has been achieved; and we look forward to rendering even more signal service in the time to come; and we may feel sure when the history of new India comes to be written the impartial historian's verdict will be that amidst calumny, in spite of dislike and dissuasion, and notwithstanding the supineness of a few whose lives have been supremely selfish and self-centered, the legal profession has striven patriotically to serve the motherland and to gain for it a due recognition among the nations of the world. If I am right in this estimate of our share in the work of regeneration, it follows that we on whom so great a responsibility rests should be *Sans reproche*, that our ideal should be high and our conduct should be above suspicion. (Cheers).

Rectitude and Honesty.

Now, gentlemen, although it is true that our career in the past has been such as to satisfy the most exacting critic, you must not forget we are increasing daily; and young men of the highest university distinctions are joining us in increasing numbers. To them we owe the duty of directing their energies in the path of rectitude and of honesty. We ourselves—I am now speaking of the senior members—have sat at the feet of men who have raised our profession to its present high level; and we owe it to ourselves that in our turn we impart to our juniors those lessons in professional ethics which have served us to float up and on. I am not afraid of being misunderstood when I say that mere intellectual eminence in the profession is not the only thing that is expected of us. It must be possible to speak of us in the language which Mr.

Bonar Law recently used with reference to the late Mr. Alfred Lyttleton, himself, a practising Barrister. The leader of the Opposition said "The great position to which he had attained, both in this House and out of it, was due, not so much to ability as to character, which still counts, and I hope will always count, far more in our political life than even ability. There are many men of whom we can say with confidence that they would never do a mean action. There are some men, but they are few, of whom we know, not only that they would not, but that they could not do anything small or mean, and Mr. Lyttleton was one of these." That must be the standard of morality which should animate us. The ways of winning a case as those of earning money are many and various; but in our career through life a few accepted ideas should govern all our dealings. We must assist the course of justice and not make its path difficult; we should not encourage litigation. It has been our boast and this we have inherited from England—that no man shall go undefended, but this does not mean that we shall engineer the work which we are to assist in grappling with. We are in the habit of training apprentices and taking work from juniors. By no act or conduct of ours should these young men be led to believe that the work of the Lawyer is not of the highest morality as of the highest utility. We have to hand down to others traditions which shall render our profession respected and looked up to. If those that look to us for guidance are impressed with the idea that the exercise of the calling does not demand the highest qualities of the head and of the heart, we will be false to our profession, false to the training we have received, and false to the best interests of the country. I have spoken out frankly because I am convinced that we need not be afraid of criticism, because fearless introspection can only result in good and can do no harm, and because I am anxious that we should do nothing to make our work and usefulness in the future less commendable than heretofore.

Etiquette of the Profession.

Before I leave the subject I wish to draw your attention to the fact that at present we have no rules regulating the etiquette of the profession. Generally we are prepared to follow the traditions of the English Bar; but the conditions under which we follow our profession are somewhat different, and what was said by Sir Courtney Ilbert, of the British House of Commons, is equally true of the English Bar, namely, if it is a model to be followed, it is also a museum of curiosities. We are not bound to observe rules of eti-

quette which are relics of by-gone days—we have to make our own rules—which shall oblige us to observe the best dictates of morality of right conduct and of fearless advocacy. There are dangers which threaten us on all hands. The Judicial Committee of the Privy Council have taken it for granted that our position approximates to that of Solicitors in England. There are in this country men in high position who are inclined to brand as sedition honest expression of opinion by Lawyers on political subjects. On the other hand, there are practitioners who carry on their work as if they are not bound by any code of morality. It is therefore necessary that we should at once frame a set of rules which shall be regarded as binding upon all professional men. Naturally enough this association in the city of Madras is looked up to by the Mofussil Bar for example and guidance; and I sincerely hope that before we meet again, this question will have been settled.

ADVICE TO JUNIORS.

May I say a word also to our young friends who are assembled here in such large numbers? It is believed that a spirit of want of respect is observable in them; they probably think their mental equipment compares favourably with that of the seniors. But they must not forget that it is true of the soldier as of the young practitioner that he who has not learnt to obey can never learn to command. If they show want of respect, they cannot expect to receive it from others when their turn comes. If, on the other hand, they show that while not yielding a single point in favour of their seniors, they are not unwilling to consider some respect to age and experience, they will strengthen the bond of union amongst us all and render themselves loved and respected. Remember my young friends, that you have now before you brighter careers than we had. Remember also that you are subject to more hostile criticism than we were. You have therefore to be circumspect; after all, if you are honest in the work that you do, firm but respectful in your behaviour, steady and not spasmodic in your application to the work that lies before you, you will raise the profession to a higher status than it has yet attained and to a higher degree of efficiency than before.

CORPORATE RESPONSIBILITY.

Pardon me, gentlemen, the liberty I have given myself in addressing you these words. I am convinced that the training received by a Lawyer, if it is rightly understood and conscientiously acted upon will fit him to cope successfully with the heavy responsibilities

which good citizenship involves; and I am equally sure that a Lawyer who forgets what is due to the profession will be a canker in society. Let us all co-operate to enable Lawyers as a class, not only to get rid of the general disfavour which attaches to them, but to enable them to gain the confidence and good wishes of the general public. We must develop a feeling of corporate responsibility. It is instinctive in us to feel commiseration when any man is charged with an offence; and more so when one of our brethren is accused of any misconduct; we are anxious to help him. But assistance to a client or to any erring professional man should not blind us to the duty which we owe to the profession as a whole. Our first allegiance is to the profession, and we are bound to see that its name is respected. We have now reached a stage in the life of the profession when a keen sense of what is due to it and a feeling of resentment against those who misuse their opportunities while in it, should inspire our conduct. I do not want you to understand that in our profession there have been many men of the class to which I have referred. But in a growing profession like ours, we must expect to find some men with shady reputations and with inclinations to behave in a manner inconsistent with the true ideals of a Lawyer. The learned Judges of the High Court have shown a disposition to consult us as a body in matters pertaining to the conduct of legal practitioners. I ask you all to assist the Association in discharging these new duties to our own satisfaction and to the satisfaction of those who are inclined to place trust in our wisdom and capacity. It must be our duty under such circumstances to unflinchingly hand up the erring man to punishment. No false sense of compassion should deter us from performing an obvious duty. The lopping off of a dying or dead branch would give vigour and vitality to the tree. The self-evident truth should not be forgotten.

URGENT LAW REFORMS.

I shall now draw your attention to a subject which deserves your careful examination. As I said before, we have put our hands nobly and well into many departments which have contributed to the welfare of the people, but we have left severely alone the sphere of work most germane to our profession. Apparently it has not struck most of us that the law of this country stands in need of urgent reforms: and it is in that department our contribution is practically nil. Every day in court we come across cases which show that some of the pronouncements of the Smiriti writers are incompatible with modern conditions of society. We are often confronted by omissions which ought to

be supplied and by directions which ought to be ignored. The task of reforming law has never been attempted as becomes the importance of the subject and the gravity of the situation. It has been left to Judges to declare that some texts of Smriti writers are obsolete and ought not to be regarded as binding authority. It is time that the subject of Law reform engages our serious attention; I shall not on this occasion go into particulars, but it will not be amiss to mention a few instances by way of illustration. Take the case of widows. The law relating to their rights in the property of their husbands is almost barbarous. The Benares School of Law is the worst offender in this respect. Take again the place assigned to sisters and their children in the scheme of inheritance. One begins to lose faith in the longsightedness of our sages when you contemplate their position in the table of heirs. Look at the position of the daughters when there are sons. Look at the way persons born blind or lame are treated by the lawgivers. I am not going into legal history. I am not endeavouring to see what justification there may have been for the law as it stands. I wish to impress on you this. It behoves you as belonging to a profession which has done so much for India to devote a portion of your time to the state of the law. You cannot expect our Government to move in this matter. It is never a congenial task for a Government to attempt to change the laws of inheritance. The British Government in India labours under a great disadvantage in this respect. They have no means of knowing what the wishes of the people are. They have no idea how far these laws are felt to be outlandish and oppressive. It is the duty of Indians to place before the Government the collective opinion of the people. You have your representatives in the Legislative Council and they might take up this subject. In order to do this they must have your support. My suggestion to you is this: There ought to be a Committee of the association which should be engaged in studying the reform of laws. That Committee should centre its attention upon special departments of law each year. It ought to invite the opinion of laymen and Lawyers on the question. The columns of newspapers, and especially Vernacular papers should be availed of to invite suggestions; and to each gathering of the Vakils annually a blue book containing the volume of evidence and the opinion of the commission should be presented. I have no faith in Government being asked to appoint a Law Commission. Government is not likely to accede to this request. This blue book should be in the hands of the Government and of every member of the Legislative Council; and I feel no doubt that some of the members at least will be

willing to bring the matter in a concrete form before the Legislative Council.

The above suggestions are by no means exhaustive. I have given expression to what comes uppermost in my mind. I have an idea that the time will not be far distant when the initiative of Madras will be followed by other provinces and when there will be annual conferences of Lawyers from the whole of India to consider the steps that ought to be taken to reform law and legal procedure and to bring about uniformity as to succession and inheritance throughout the whole of India.

BENEFIT FUND FOR VAKILS.

Gentlemen, I have indicated the lines along which you should proceed and I feel no doubt that before practical effect is given to the suggestion, the matter will receive fuller consideration.

There is another matter to which I would make a passing reference and then close. If I have you with me in my exhortation to eliminate from the profession the undesirables, I think I can also count upon your support to inaugurate a system of Benefit Fund for the Vakils. Many a man is stranded in life for reasons which bring him no discredit. Many a young life is snatched away early. It is the duty of those who are in the profession to make provision for the family of these unfortunate brethren of ours. I soon expect to have a copy of the rules which have been framed in England on this subject. I ask each of you to resolve to contribute his share towards providing some annuity to the widows and children of such of our fellow practitioners as have left them destitute behind.

After all, forms and rules will not secure for an organisation like ours respect from outside and safety within. We must realise that we have a mission to fulfil. We are Officers of Court and Servants of Justice not only for the purpose of submitting ourselves to disciplinary jurisdiction, not only to claim privilege for words spoken in the cause of the client, but officers and servants in its truest sense, namely, we exist to succour the weak in obtaining justice and to help the Court in rendering that justice. That is the ideal which we shall always keep in mind. If we are guided in life by this lofty resolve, the country will have cause to be proud of our

profession and we shall have the satisfaction of feeling that we are discharging our duties honestly and fearlessly. (Cheers).

BOOK REVIEWS.

The Law of Libel by Valentine Ball, M.A., published by Stevens and Sons Ltd., 119 and 120 Chancery Lane, London. Price 6s.

This little book is specially useful to newspaper writers and journalists. It purports to deal with the law of Libel as affecting newspapers and journalists. The author was invited to deliver a course of lectures by the Faculty of Law of the University of London at the Institute of Journalists, and these lectures have been published in the form of a book. So far as it goes the law has been fairly and accurately stated and only such leading cases as may throw light upon the principles have been referred to. We have no doubt the book will be found useful to the lawyer and specially to those for whom it has been intended.

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VALUATION OF SUITS FOR PARTITION.

A Full Bench of our High Court, has recently decided in *Challasami Ramayya* v. *Challasami Ramaswamy*[1], that the valuation made by a plaintiff of the relief sought by him in a suit for partition of properties of which he claims to be in joint possession along with the other co-parceners, cannot be revised or rejected by the Court on the ground that the valuation is arbitrary and not *bonafide*. In coming to this conclusion, their Lordships followed the previous decisions of this Court in *Guruvajamma* v. *Venkatakrishnama Chetty*[2] and in *Chinnammal* v. *Madarsa Rowther*[3] and expressed their unwillingness to alter the longstanding practice prevailing in this Presidency. With respect to the resulting anomaly pointed out by *Mukherjee* J. in the case in *Krishnadas Lala* v. *Haricharan Banerjee*,[4] *viz.*, the anomaly of suits for partition of very large properties having to be tried by Courts of the lowest jurisdiction, their Lordships thought that it could be avoided by framing rules under S. 9 of the Suits Valuation Act.

As the matter is a very important one affecting suits of frequent occurrence in this country, and as it is desirable that the following matters should be borne in mind before framing rules, it is proposed to discuss the history of the legislation on the subject and the extent of the necessity which exists at present for framing such rules.

Before entering into this discussion it may perhaps be well to make a few general observations on the existing state of the law in this Presidency. It has been held by a Full Bench in this Court in *B. Rengiah Chetty* v. *B. Subramanya Chetty*[5] that a suit for partition, where the plaintiff alleges to be in joint possession of the properties along with the defendants, falls under Section 7 (iv) of the Court Fees Act, and that the plaintiff is entitled to put his own valuation on the relief sought by him for purposes of Court Fees.

1. (1912) 24 M. L. J. 233.
2. (1900) I. L. R. 24 M. 34.
3. (1903) I. L. R. 27 M. 480.
4. (1911) 14 C. L. J. 47.
5. (1910) 21 M. L. J. 21.

And in the case reported in *Chalasani Ramiah* v. *Chalasani Ramaswamy*[1] their Lordships held on a construction of the sections of the Suits Valuation Act that the same valuation determines jurisdiction also. On these decisions the further question arose whether in such cases the Court has power under Order 7 rule 11 (b) of the Civil Procedure Code (corresponding to Section 54 of the Code of 1882) to call upon the plaintiff to correct the valuation he puts on the relief claimed by him. At first sight it looks as if the two powers are inconsistent with each other and cannot have been intended by the legislature to co-exist. If the matter stood alone one would have little hesitation in coming to the conclusion that it was hardly likely that the Legislature would have conferred on the plaintiff the liberty to value the relief sought by him in the classes of suits dealt with in Section 7 (iv) of the Court Fees Act and at the same time to have given power to the Court to correct such valuation. It looks like giving with the one hand and taking with the other. But that the powers mentioned above were originally conferred by the Legislature on the parties and Court respectively in the same classes of suits, would appear from the express words of Section 7 (iv) of the Court Fees Act. "In all such suits the plaintiff shall state the amount at which he values the relief sought *and the provisions of the Code of Civil Procedure* 1859 *Section 31 shall apply as if for the word 'claim' the words 'relief sought' were substituted*" as they stood before the repealing and amending Act of 1891 repealed the words in *italics*. If these words did not originally exist in the section it may very well be argued that the rule of the Civil Procedure Code [order 7 rule 11 (*b*)] does not qualify or govern the Section of the Court Fees Act, the two Acts not being in *pari materia*, the one being a fiscal enactment passed with the object of computing the Court fees payable in particular classes of suits and the other regulating the procedure to be observed in the trial of suits etc. It has now to be seen why the words referred to above were repealed and what the effect of such repeal would be on a construction of the sections as they exist at present. In the case reported in *Musst Bibi Umatul Batul* v. *Musst Nauji Kuar*[2] *Mukherjee* J. dealing with this question lays down two broad propositions as the result of his reasoning based on the history of Legislation on the subject, viz., (1) that when S. 7 of the Court Fees Act was originally passed the Legislature intended that the right of the plaintiff to state the value of the relief claimed by him should be exercised subject to the power and duty of the Court to ascertain if

1. (1912) 24 M. L. J. 233. 2. (1907) 6 C. L. J. 427.

the valuation was proper and (2) that the Legislature subsequently repealed the concluding portion of the clause, because the language of the Code was modified so that the altered provision of the Code became applicable of its own proper vigour without an express provision in the Court Fees Act. It may be observed here that in S. 31 of the C. P. C. of 1859 (corresponding to Order 7 Rule 11 of the present Code) the words were " if it appear to the Court that the *claim* is not properly valued.....the Court shall reject the plaint ". In the Code of 1877 the word ' claim ' of the old Sec. 31 was altered into ' relief sought ' in Sec. 54 of the latter Code and this was reproduced without alteration in the Code of 1882. It is from this that *Mukherjee* J. draws his second inference stated above. To the first proposition it is not necessary to demur. The second proposition, it is submitted with all deference to the learned judge, does not appear to be accurate for the following reasons :—

(1) The change in the language of the section of the Code effected by the Code of 1877, did not render it necessary that the whole portion of the clause should be repealed as was done by Act XII of 1891. It was enough if the words " *as if for the word 'claim' the words 'relief sought' were substituted*" only were repealed. From the repeal of the whole portion in italics it may safely be inferred that the words were omitted not for the reasons stated by the learned judge but for some other reason which we have to find out. The solution is to be found in the provisions of the Suits Valuation Act as explained below.

(2) The Court fees Act and the Civil Procedure Code not being enactments in *pari materia* as already stated, one cannot be held to control the other in the absence of express words in either enactment connecting the two.

(3) If the Legislature thought the words in question were unnecessary by reason of the change in language of the section of the Code, it would have repealed the words in 1877 alone when the Code of 1877 was passed and not waited for 14 years to find out that those words were unnecessary.

(4) It does not appear that the language of the section of the Code was altered in 1877 with the object of bringing it into conformity with the language of the Court Fees Act and this could hardly have been intended, because the power of the court to correct the valuation was certainly not confined to cases falling under S. 7 clause iv. alone, which would be the result if the view of *Mukherjee* J. is to be accepted, but exists with greater reason in the classes of suits referred to in the other clauses of S. 7.

(5) The change again in the language of S. 54 (*b*) of C. P. C effected by the Code of 1908—"Relief sought' is again altered into 'relief claimed,' again rendering the language dissimilar to the language of the Court Fees Act. If the language of the Code was altered in 1877 so as to bring it into harmony with the language of the Court Fees Act and if the concluding portion of S. 7 (iv) of the Court Fees Act was repealed in 1891 for the above reason as being no longer necessary, the Legislature would not have altered the language again in the manner it did in the Code of 1908.

(6) The real reason for the repeal appears to be this, viz., the giving to the High Court, by S. 9 of the Suits Valuation Act in 1887, power to frame rules if necessary for the valuation of Suits dealt with by S. 7 (iv) of the Court Fees Act. This power when exercised (and it has been exercised by this court in particular classes of suits) would render the other power conferred on the courts under Order 7 Rule 11 (*b*) of the Code superfluous and it is quite possible that the Legislature itself saw the inconsistency and inconvenience of giving this power to the Courts, in conferring the power on the High Court under S. 9 of the Suits Valuation Act to frame rules for the valuation of suits falling under S. 7 (iv) of the Court Fees Act. And the reason therefore for the repeal of the concluding portion of the above section should have been the conferring of the power to frame rules on the High Court and not the change in the language of the Code in 1877. This, it is submitted, fits in better with the whole scheme of the Legislature in making the various enactments and repeals above referred to than the reasoning of *Mukherjee* J. in *Musst Bibi Umatul Batul* v. *Musst Nauji Kuar*[1]. The anomaly which the learned Judge was struggling to surmount would be better met in the mode adopted by this Court than by placing the interpretation put upon the section of the Court Fees Act by the Calcutta Court.

It may also be mentioned here that there is nothing in the Bombay and Allahabad cases which conflicts with the above view. The only Bombay case which takes a different view from that of Madras is that reported in *Dayaram Jag Jivan* v. *Gordhan Das Dayaram*[2], and the view there taken that the word "determinable" in S. 9 of the Suits Valuation Act means "determinable by the court" is, it must be said with all respect to the learned judge who decided the case, obviously wrong, because the section is not confined to suits falling under S. 7 (iv) alone where the value is left to be determined by the party, but to various other classes of

1. (1907) 6 C. L. J. 427. 2. (1909) I. L. R. 31 B. 73.

suits where it is neither the function of the court nor of the party to determine the valuation. 'Determinable' simply means "determinable by the rules laid down in the Court Fees Act." Any other construction would lead to anomalies. And the case reported in *Zair Husain Khan* v. *Khurshed Jan*[1], proceeds on what the learned judges consider to be the practice of that Court and is no authority for the general proposition that courts have power under S. 54 (*b*) of the code to correct the valuation put by the plaintiff.

It becomes therefore clear that apart from the anomaly of questions relating to property of considerable value having to be determined by Courts of the lowest jurisdiction, the view taken in the previous Madras Cases is not open to attack.

Next as to the extent of the necessity for framing rules, the Suits Valuation Act gives power to frame rules for valuing the relief sought both for the purposes of Court Fees and jurisdiction. It is submitted that there is no necessity for the valuation of partition suits for Court fee purposes. There is no anomaly at all in allowing the plaintiff to value the relief sought by him in any manner he chooses. The exhaustive reasoning of their Lordships in the Full Bench case in *B. Rangiah Chetti* v. *B. Subramanya Chetty*[2] in support of their view that suits of this class fall under S. 7 iv (*b*) of the Court Fees Act clearly shows that the relief sought is susceptible of no other than an arbitrary valuation and the value of such relief bears no proportion to the value of the property or the plaintiff's share in it. This view receives support from the following other cases :—

Rajendra Loll Gossami v. *Shama Churn Lahoori*[3], *Kirti Churn Mitter* v. *Annath Nath Deb*[4], *Bidhata Roy* v. *Ram Charitra Roy*[5] and *Monohar Ganesh* v. *Bava Ramachurn Dos*[6] and also from the definition of the word 'partition' contained in the Mitakshara which is to this effect. "Partition or *Vibhaga* is the adjustment of divers rights regarding the whole by distributing them on particular portions of the aggregate". Power being given to the plaintiff to value such relief in any manner he chooses and Courts not being in a position to value it in a better manner and on a more satisfactory basis, such power ought not to be taken away by the High Court by framing rules for the purposes of Court Fees. Moreover the stamp revenue is not defrauded by computing Court Fees

1. (1906) I. L. R. 28 A. 545.
2. (1910) 21 M. L. J. 21.
3. (1879) 4 C.L.R. 417. s.c. I.L.R. 5 C. 188.
4. (1882) I. L. R. 8 C. 757.
5. (1907) 6 C. L. J. 651.
6. (1877) I. L. R. 2 B. 219.

on the valuation put by the plaintiff, as the definition of " Instrument of Partition " in the Stamp Act now in force includes final order or decree of a Civil Court decreeing partition. Though the plaintiff escapes with a light fee at the time of the institution of the suit he has, before obtaining possession of his share in suits of this sort where he is in joint possession, to pay full stamp duty on the market value of his share. And it seems hard to tax the party twice in suits of this sort for getting exclusive possession of his share in joint property. It is no doubt true that as the law at present stands a plaintiff out of possession in a suit for partition has to pay stamp duty twice, once on the plaint, Court fees on the value of the share claimed by him computed in accordance with the rules contained in Section 7 (V) of the Court Fees Act, and again before obtaining possession of the share decreed to him, stamp duty on the market value of his share. This provision works hardship on poor litigants and it is hoped that the legislature will take steps for remedying it by exempting parties who paid Court Fees on the value of the share at the time of instituting the suit from the further stamp duty payable in execution, or at least by providing for their paying only the difference between the stamp duty payable under the Stamp Act and the Court Fees paid under the Court Fees Act. And the fact that this hardship exists in certain classes of suits is no reason for extending this hardship to other classes of suits. And as stated at the outset there is not only no anomaly in allowing the plaintiff to put his own valuation on the relief sought by him in such cases but there is every reason for giving this power to the plaintiff, and therefore no necessity, as in the case of valuation for jurisdiction purposes, exists in the case of valuation for Court Fees purposes. It is therefore hoped that the learned judges of the High Court will confine themselves to the framing of rules for the valuation of suits for partition, *for jurisdiction purposes only*. Otherwise the whole reasoning in the F. B. Case in *B. Rangiah Chetti* v. *B. Subramanya Chetti*[1], which is quite unexceptionable will lose its weight and any rules that might be framed for Court Fees purposes would have the effect of running counter to the above reasoning and conclusion when there is no need or justification for it.

T. RAMACHANDRA ROW,
High Court Vakil.

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1. (1910) 21 M. L. J. 21.

NOTES OF INDIAN CASES.

Suraj Narain *v.* **Iqbal Narain.**—I. L. R. 35 A. 80.—Syed Amir Ali in pronouncing the Judgment in the above case while holding that it must depend on the facts of each case to say what will amount to separation or what conduct on the part of the members of a joint family will constitute such makes the following rather startling observations. " A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed." It was indeed contended on behalf of the appellant's counsel that an oral expression of intention on the part of one member was sufficient and that one person could 'separate himself against the wishes of the rest of the family' and one or two cases apparently supporting this contention were cited. We hope the Privy Council have not subscribed to any such proposition. Of course it is open to one member to sue for separation against the wishes of the rest of the family. A partition can also be effected by agreement of the parties and such an agreement necessarily implies the consent of all the members of the family. It has been held that a decree or award effects a severance. It has also been held that severance is not necessary by metes and bounds but that the members may agree to become separate in interest without an actual division by metes and bounds. In the case of such an agreement it is necessary to see what is the intention that may be gathered from the acts and declarations of the parties. The agreement to become divided may be express or implied from the conduct of the parties. In all such cases unless there is an intention to become divided in status there can be no partition. Where however there is only an intention or a desire such an intention on the part of only one member to become separate while the others do not agree to divide or give the member a share we know of no principle by which it can be held that such a mere intention or desire to become separate effects a severance. The only remedy of such member is to institute a suit for partition.

That is the principle laid down by *Bashyam Aiyangar* J. in *Sudarsana Maistri* v. *Narasimhalu Maistri*[1] also cited before their Lordships. We hope the judgment of the Privy Council in this case will not be taken as affecting the said principle. In the case before the Privy Council their Lordships were considering the effect of a compromise between the members. They hold that such

1. (1901) I. L. R. 25 M. 149 at 156.

compromise can not be taken as effecting a severance. In considering whether there was severance the Privy council looked to the intention of the parties as appearing from the compromise and their conduct thereafter. Evidently therefore the attention of their Lordships was directed to the conduct of all the parties and the intention of all of them as appearing from such conduct and compromise which is not a unilateral act. If expression of intention on the part of one member is sufficient to effect a severance notwithstanding the dissent of others the bringing of a suit for partition must be enough to constitute a severance but this has been held not to be sufficient (See *in the matter of Phul Koeri*[1]) and it is the decree in the suit that effects a severance. There was some doubt whether a decree effects a severance when there is an appeal but it has now been settled that it has that effect. See *Subbaya Mudali* v. *Manicka Mudali*[2]. An agreement in which all parties concur will equally have that effect as already stated; see *Muktakasi Debi* v. *Umapati*[3] and *Ashabai* v. *Haji Tych Haji Rahimtulla*[4].

Narain Dei *v.* **Durga Dei.**—I. L. R. 35 A. 138.—We should think that the question decided in this case requires re-consideration. The learned judges held in this case that the plaintiff who claimed as the reversioner to recover property as appertaining to the estate of the last holder on the ground that the property purchased by the defendant in the case was really purchased by the widow of the last holder was not claiming through the widow and that therefore S. 66 of the New Code of Civil Procedure did not bar the suit. It should be observed that in arriving at this decision their Lordships were not giving effect to the words in the section "on behalf of some one through whom the plaintiff claims" or to the cases decided under S. 11 where similar language is employed. S. 66 says that no suit shall be maintained against a person claiming title under a purchase certified by the Court on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims. In this case the purchase was alleged to have been made by the widow. If it was out of her savings it would be her absolute property which she could dispose of at her pleasure and the subsequent incorporation into the estate would in no way be inconsistent with her absolute rights at the time of the purchase. If it was the corpus of her husband's estate the property would appertain to the estate from the moment of her purchase and no question of incorporation could arise. Even in this latter case a question may

1. (1869) S. C. L. R. 388.
2. (1896) I. L. R. 19 M. 345.
3. (1870) 8 B. L. R. 396 (Note).
4. (1882) I. L. R. 9 B. 115.

arise whether the widow does not represent the estate and in such a case it has to be seen whether he is not a person claiming under her. In the former case where the purchase was made out of income or savings of the husband's estate and the plaintiff should claim that by reason of her act she incorporated it with her husband's estate there could be no doubt that the plaintiff must claim through her. Apparently a distinction seems to be drawn between a person claiming through another and under another. If the widow herself cannot maintain a suit against the certified purchaser on the ground that it was made on her behalf, a person who should claim after her death that the property by reason of the widow's act of incorporation became part of the estate of the last owner could hardly be said to be in a better position. Where a widow purchases a property in a Court sale out of the corpus of her husband's estate in the name of another in order to defeat the reversion such act on her part would be fraudulent and S. 66 could be no bar in such a case. It may be observed that the language of S. 11 is only "under whom they or any of them claim" and yet the courts have held that a decision against a widow binds the reversioners.

SUMMARY OF ENGLISH CASES.

In re **Vic Mill Limited**: [1913] 1 Ch. 465. (C.A.)

Contract for purchase of manufactured goods—Damages for breach of—Principle of assessment—Profits lost—Entitled to, in the absence of proof of inability to meet all orders.

In this case, a nice point as to the principle of assessing damages in a case for breach of contract for the purchase of manufactured goods arose. The goods were of two classes: one class had been manufactured by the time the purchaser had declared his inability to purchase; the other class had not been manufactured, only some materials were in the maker's hands. In the one case it was agreed that the goods were used to meet another order after making slight alteration and therefore all that the seller was entitled to was the difference between the price under the contract and the price realised by the re-sale. In the other case, the argument was that the sellers were even otherwise fully engaged and therefore were not entitled to the whole profit they would have made under the contract.

Held both by Neville J. and the court of appeal that in the absence of evidence that the seller was unable to meet all the orders, or would not have got all the orders that they actually got, they were entitled to the profits they would have made if the contract had been kept.

In re **Seymour : Fielding** *v.* **Seymour :** [1913] 1 Ch. 475. (C. A.)

Deed of gift—Void for want of authority in agent—Re-delivery by principal—What amounts to—Knowledge of want of authority not essential.

Where a deed of gift executed by a lady in favour of her daughter was bad as the attorney who had executed it for her had no authority under seal to do so,but the lady asked the solicitor when the deed was brought to her, to keep it for her daughter and declared that the property belonged to the daughter it was held both by Joyce J. and the Court of Appeal that there was a second proper delivery by the lady and the title passed as from that date to the daughter.

To validate such re-delivery their Lordships held that it was not necessary that the lady should have known that the deed as first executed was void and should have intended to deliver it herself with a view to ratify the transaction.

In re **Midland Express, Limited : Pearson** *v.* **The Company :** [1913] 1 Ch. 499.

Floating charge—Debenture holder's action—Holders paid interest when company going concern-Effect of—Rateable distribution in respect of principal and interest.

In a debenture holder's action to enforce their floating charge on the assets of a company, it was found that some of the debenture holders had received interest when the company was a going concern while others had not. It was held however that this gave no right to those that had not been paid interest to any preference in respect of such interest; they were bound to go rateably in respect of the whole money due to them with the rest.

In re **Ackerly : Chapman** *v.* **Andrew.** [1913] 1 Ch. 510.

Will—Construction—Two powers-Special power and general power—Appointment by will-Construction of—Exercise of special power.

A lady had two powers of appointment, a special power to appoint for the life of her husband, and a general power to appoint to the reversionary interest contingent upon no children of her living long enough to take a vested interest in the property. The lady who died leaving a daughter, by her will appointed her husband guardian for the child and then proceeded to "give, devise, appoint

and bequeath all my estate, property and effects which I have a power to dispose of by my will to my husband absolutely." *Sargant* J. held upon a construction of the will that the appointment was under the special power and not under the general power.

Sutton *v.* **Bowden**: [1913] 1 Ch. 518.

Factum Valet, doctrine of—Consecration at the instance of managing body acting without authority, effect of.

In this case, *Farwell* L. J. was prepared to apply the *factum valet* doctrine to the *consecration* of a chapel though it should be found that it was made at the instance of the managing body of an institution acting beyond its powers.

In re **Simcoe**: **Vowler-Simcoe** *v.* **Vowler**: [1913] 1 Ch. 552.

Will—Technical words—To be given their legal effect—To issue male—Words of explanation—Effect of.

In the construction of the words used in a will, technical terms or words of known legal import should have their proper legal effect attributed to them although the testator uses inconsistent terms or gives repugnant and impossible directions. To deprive the technical words of their appropriate sense there must be sufficient to satisfy a judicial mind that they were meant by the testator to be used in some other sense and to show what that sense is.

Applying this rule, Swinfen Eady J. held in a case where the testator gave his estate to " J. W. and his issue male in succession so that every elder son and his issue male may be preferred to every other younger son and his issue male and so that every such son may take an estate for his life with remainder to his first and subsequent son successively according to seniority in tail male etc.," that the intention to give an estate in tail male shown by the words " to J. W. and his issue male in succession" was not rebutted by the words that followed as they were merely words explaining the nature of the estate that each would take if the entail was not barred.

In re **Gordon and Adams' Contract**: *In re* **Pritchards Settled Estate**: [1913] 1 Ch. 561.

Power—Appointee under—Takes under original instrument—Trustees of original settlement trustees for new disposition.

Where an appointment is made under a power conferred by a will or deed, the appointee takes under the original instrument and where there are trustees under the original document they become trustees for the appointee and a good title can be made for the purpose of the Settled Land Act without any further appointment of trustees.

Manks *v.* **Whitely** : [1913] 1 Ch. 581.

Charge—Action for sale—Order declaring charge, directing accounts and sale in default of payment within time fixed—Power of extension by court of first instance.

By an order of the Court of Appeal, plaintiff was declared entitled to a charge and an account was ordered to be taken of what was due on the mortgage and a time was fixed for payment of what is found due, in default a sale was directed to take place. Pending an appeal to the House of Lords, one of the defendants made an application for extension of time for redemption to the court of the first instance. *Sargant* J. held that though the court where stay of execution was ordinarily to be had was the court of appeal, having regard to the fact that it was a Chancery action and the time fixed was not of the essence but merely fixed for the purpose of the working out of a complicated order, the court of the first instance had power to extend the time.

In re. **Finlay** : **C. S. Wilson & Co.** *v.* **Finlay** : [1913] 1 Ch. 565.

Principal and agent—Stock broker—Right to close account—Sale—Taking over at fair valuation, permissible, if sale impracticable—Sale to agent himself,—Impropriety of.

An agent can under no circumstances sell to himself but where there is an open account between a broker and his client, on the death of the client, the broker who is entitled to close the account may where he finds that the sale of the shares would be detrimental to the interests of his client, take over the shares at the market price. The burden of proving that the shares were taken at a reasonable and fair price is on him.

JOTTINGS AND CUTTINGS.

Stories of English Law and Lawyers.—The prolixity of Counsel has provoked much good-and-bad humoured interruption from the Bench.

In Mr. Darling's Court a few years ago, counsel in cross-examining a witness, was very diffuse and wasted much time. He had begun by asking the witness how many children she had and concluded by asking the same question. Before the witness could reply, Justice Darling interposed with the remark.

"When you began she had three."

Of the same genial order was the retort of Justice Whiteman to Mr. Ribton, when that Counsel, in addressing the Jury, had spoken at some length, repeating himself constantly and never giving the slightest sign of winding up. He had been pounding away for several hours, when the good old Judge interposed, and said, "Mr. Ribton, you've said that before." "Have I, my Lord?" said Ribton, "I am very sorry; I quite forgot it." "Don't apologize, Mr. Ribton," was the answer. "I forgive you, for it was a very long time ago."

With these two creditable specimens of kindly, spontaneous humour, compare the remark of a United States Judge, which was much praised in the press at the time it was made, but which in our opinion is far inferior to Justice Darling's impromptu. The American visited the Court of Appeal, and was invited by the late Lord Esher to take a seat on the bench. A certain Queen's counsel was addressing the Court. "Who is he?" asked the Yankee. "One of her Majesty's Counsel," replied Lord Esher. "Ah," said the American, "I guess now I understand the words I hear very often since I have been in your country, "God Save the Queen."

Bethel, afterwards Lord Westbury, confessedly adopted as a ruling principle the maxim, "Never give in to a Judge," and his overwhelming egotism enabled him to successfully carry off situations that would have brought a less fearless man to grief. All his sayings have a touch of bitterness and cynicism, and in reading those accounted most brilliant, one somehow feels that they savor of what might be termed colossal cheek rather than legitimate repartee. "Take a note of that," he once said in a stage aside to his junior. "His Lordship says he will turn it over in what he is pleased to call his mind." The discursive habits of Lord Justice Knight Bruce he detested. "Your Lordship," he once pointedly cut short an obser-

vation of that Judge by declaring, "Your Lordship will hear my client's case first, and if your Lordship thinks it right, your Lordship can express surprise afterwards." And all the gratitude that fell to the successful suggestion of one of his juniors was the *Sotto Voce* remark, "I do believe this silly old man has taken your absurd point."—*Canada Law Times.*

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Constructive Murder.—A recent ruling of Mr. Justice Darling at the Central Criminal Court as to the distinction between Murder and Manslaughter has raised some comment in the Profession. A woman charged with the wilful Murder of another woman, by shooting her, raised the defence that, having received great provocation from her husband and the woman, she intended to shoot him and herself, but by mistake shot the other woman. It was contended on her behalf, and the learned Judge charged the jury to the same effect, that such facts, if proved, might amount only to manslaughter if the husband were killed, and must justify a verdict of manslaughter in the case in question. The tendency of the Courts to narrow, rather than to enlarge, the cases which come within the category of "constructive" murder is well known, but the old rule still obtains that if a person, whilst doing or attempting to do another act, undesignedly kills another person, if the act amounted to felony, the killing is murder, if merely unlawful, manslaughter. Manslaughter is a felony, and it seems somewhat difficult to reconcile the above ruling with the old established rule of law.—*Ibid.*

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WORKMEN'S COMPENSATION.

Mary Ann, while cutting bread,
Cut her finger. With elation
Mary Ann went off to bed,
Claiming compensation.

William Jones, while carting coke,
Bruised his shin. With jubilation
William cried: "A happy stroke!
One year's compensation."

Charles, the waiter, dropped the cheese
Hurt his toe, retired from waiting.
Six months' claim. At Brighton he's
Now recuperating.

Jane, while cooking, trod and slid
On some fat, and fell obliquely ;
Interesting invalid,
Drawing two pounds weekly.

Jack, the hodman, scratched his wrist,
Scratched it with a scaffold splinter ;
On the compensation list,
Resting for the winter.

On a job at Maida Vale
With his hammer, Green, the plumber,
Hit the wrong nail, (finger nail),
Resting till next summer.

Bless the goodness and the grace,
And the thoughtful legislation
That conferred upon our race,
Workmen's compensation.

The Green Bag.

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The worm turned.—Dr. L. M. Thompson, formerly Superintendent of the Home for the feeble-minded at Marshall, Missouri, was on the stand the other night as an expert witness in a case where one side claimed the testator was of unsound mind. In answer to the long hypothetical question of the attorney who called him, Dr. Thompson gave it as his opinion that the testator was afflicted with " Senile dementia ".

Across the room sat a young attorney with formidable battery of medical books close to hand. It was his duty to cross-examine the expert and to show his opinion was at variance with the books. The stenographer sweat blood while the young lawyer fired interrogatories with ten jointed italic words at the witness's head. In varying forms the same questions were asked and re-asked at wearisome length. Dr. Thompson was good natured and stood the ordeal without complaint until nearly midnight. Then retribution came as simply and as naturally as an infant's smile.

" Doctor, " said the young cross-examiner, pointing a severe finger at the witness, " you have given it as your judgment that the testator was suffering from what you are pleased to term ' senile dementia. ' Now, I wish you would repeat to this jury some of the evidences of ' senile dementia ' in a patient. "

There was just the ghost of a gleam in the doctor's eyes as he replied.

Well, the books say when a man has 'senile dementia' one of the symptoms is to ask the same question over and over again after it has been clearly answered. "—*Ibid.*

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Humours of German Courts.—In Berlin not long ago an iron worker was sent to prison because he had laughed at a policeman. It appears that, as this man was proceeding along a street one day, his risibilities were aroused by the sight of a particularly stout policeman giving a chase to a dog. The offender was promptly hauled into Court and " sent up " for " scandal. "

A German, in attempting to board a moving train, fractured his leg. After six months in a hospital, he was discharged ; whereupon the State Railway Department at once prosecuted him for " infringement of regulations. " He was fined a sum equivalent to five dollars.

Upon entering an Omnibus a man trod on the foot of a woman who was so incensed by the accident that she remarked that he walked like a hen. For this term of reproach the lady was fined twenty marks.

Claire Waldoff, the Berlin singer once cleverly outwitted the Police. She had been warned that if she sang any of her songs on Easter Sunday there would be trouble. But announcement was, nevertheless, made that Claire Waldoff was positively to appear. She did so; so did the police : and she sang the German National Anthem. The promised prosecution did not take place.—*Ibid.*

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Bombay Gazette.—An Indian Judge, when first appointed to his position was not well acquainted with Hindustani. He was trying a case in which a Hindu was charged with stealing a " nilghai. " The judge did not like to betray his ignorance of what a nilghai was, so he said, " produce the stolen property. "

The Court was held in an upper room, so that the usher gasped " please, Your Lordship, it's down stairs. "

" Then bring it up instantly " sternly ordered the judge.

The official departed, and a minute later a loud bumping was heard, mingled with loud and earnest exhortations. Nearer came the noise, the door was pushed open and the panting official appeared dragging in the blue bull.

The judge was dumb founded, but only for an instant.

" Ah ! That will do, " said he. " It is always best, when possible, for the judge personally to inspect the stolen property. Remove the stolen property, usher. "—*Ibid.*

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The Adalphomacheus Cat.—Here is a story that illustrates some fine points of law and equity that arose in the carrying out of an amicable contract, and if it is not a new one it is no fault of ours. The editor would be pleased to have readers send him any facts of its pedigree.

There were four brothers who had inherited a storage warehouse from their father. He had divided the property equally among them.

Among the appurtenances was a cat a fine animal, excellent for mousing. This too, was divided, the eldest brother owning the right front quarter, the second brother the left front quarter, and the younger brothers the two hind quarters.

Now, unfortunately, the cat, in one of its nocturnal prowls, injured the right front paw, and the eldest brother attended to that portion of his property by binding the injured member with a greased rag.

The cat, thankful for this relief to its sufferings, went to sleep contendedly before the fire ; but in the midst of its slumbers a falling coal ignited the rag, and the animal, howling with agony, dashed through the warehouse, and coming in contact with some combustibles, set the building on fire.

When the loss came to be figured out, three younger brothers wished to throw it all upon the eldest, on the ground that had he not tied up his part of the cat with the inflammable rag, the building would not have been destroyed.

He, on the contrary, contended that had the cat only had possessed of the right front paw, his property, it would have stood still and burned to death. It was the three other paws that caused the damage.

The brothers argued the case until they died, but they never reached an agreement.—*Ibid.*

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STOGENICS.

The report of a posthumous case recently heard before all in Court,
By Sabivins Benedictus.

When the clerk was arranging the docket one day,
Several groans from above made him look up that way,
Where Judge Stogy's picture, though he's long since dead,
Was perplexed by frowning and shaking his head,
When that ancient man with visage most grim
Bestirred himself slowly and thus spoke to him:—
"Youngman," quoth he, with accents grave,
"I cannot make my ghost behave,
For there's just one case, I could not solve,
When I was dwelling here above:
When riding one night on the B. & O.,
To relieve my mind of care and woe,
I checked my brand new pair of pants,
Lest I should lose the same, perchance;
On awaking, I tendered the porter the check,
And gruffly demanded my breeches back,
But the porter merely grinned at me,
For the pants he wore conspicuously
And said he had become trustee.
To wear those splendid pants for me."
Then the clerk replied. "It's very clear,
This little trip has cost you dear,
But the All-in Court will sit to night,
And no doubt relieve you from your plight."
(*Cur. ad. vult. The opinions were delivered seriatim*).
This the opinion of Snagoby J:—
"None can my knowledge in law gainsay,
Volenti non fit injuria—
The pants were stolen now who mast pay?
Why! *Qui facit per alium facit per sa*,
This is as easy, as easy can be
The railroad's stuck most certainly,
For pants and outraged modesty."
Then up spake Chancellor Guppy:—
"This cause should be in Equity
For the porter said he was trustee
But *Vigil antibus non dormientibus acquitas subvinit.*
Which says as plain as plain can be.
That *sleepers* get no equity
The Fool-man Company works this plan,
If the railroad does then this court can."
Judge jobling spoke quite learnedly:

"I agree with the reasons of Brother Guppy.
But from them the opposite conclusion deduce.
That the defendant here has no excuse."
Seeing how the opinions went
Judge Fogg sprang up, shricked, "I dissent!
For with all respect to Stogy, J,
He owes money and he must pay
The presumption is he forgot the trip,
He owed the porter on a former trip
So the porter had a lien you see
And thereby got the pants in *fee*.
Since he went through the pants he now produces
Like seisin through the feoffee to uses
A warranty Judge Stogy broke
And so he is the man to soak!"
Good Sergeant Buzzfuzz thought the chance
For a coon to get some brand new pants
Was an Act of God, so an exception
Relieving a carrier from compensation.
Then Lord Chief Justice Weevle awoke,
And with kindly beenevolience he spoke,
"Great Plaintiff, good defendant, share
The friendly law's impartial care;
A leg for him, a leg for thee
This is the rule of Admiralty,
And for their use, I would surmise
De minimis non Curat lux, applies."
The Court adjourned them without day,
While Stogy's ghost in dire dismay,
Shivered once—then passed away.

—(*The Green Bag*).

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LIPPINCOTT'S.

"I'm certain, William," she began,
"When Johnny grows to be a man,
And his mind's biar finds expression.
He'll choose the medical profession.
Last night I noticed at the table
How thought fully he cautioned Mabel
About the hurtfulness of pie."
"His talents." William answered, "lie,
Judging from what I heard and saw,

Rather along the lines of law
Though all he told her might be true,
He ate his pie and Mabel's to."

(*The Green Bag.*)

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HAPPENINGS IN COURT.

A motion for an injunction and receiver was being resisted before Judge Adelor Petit of the Circuit Court in Chicago, a Judge that has acquired quite a reputation because of continual newspaper attacks upon him.

"This is simply a political intrigue to kill my clients's hopes as aldermanic candidate of the 7th Ward!" exclaimed his political attorney, handing a newspaper clipping to the Judge. "Just look that article about him."

The Judge glanced at the long article, pushed it aside, and with a smile said, "Ah! that is nothing, nothing. It isn't a hundredth as bad as they say about me every once in a while. He will get used to that."

The lawyer withdrew with his client from the Court room after a very bitterly contested motion for temporary alimony. In the hall he turned to his client and asked:—

"Say, you heard your husband in there make some very serious charges against you and threaten to file a cross-bill. Can he prove anything like that?"

"Well, I should say not! Every word of it was a lie."

Then after a few months of silence, she added, meekly, "Say, how many witnesses would he have to have?"

The military courts had been more or less interrupted in their session, and all the officers on it had become more or less irritated. Finally the Judge Advocate asked for a short recess until a certain witness for the prosecution would arrive, as otherwise there would be a break in the chain of evidence.

"Don't you think," interrupted one of the officers on the court, rather sarcastically, "that the intelligence of this court is sufficient to supply that link in the testimony if it is introduced later?"

The Judge Advocate reddened, he hesitated and then sputtered out, "Perhaps—perhaps, Sir,—it is possible, Sir.

The accused was on trial before a military court and was seated near his counsel, when a witness was brought in and asked the formal question :—

"Do you know the accused ? If so state who he is."

The witness looked at the prisoner, and then at his counsel, hesitated a moment and sputtered. "Which one Sir—?"

In one of the southern States a colored gentleman had succeeded in getting elected Justice of the Peace.

One day when he was holding court, he discovered he had no Bible to swear the witnesses by. After looking all over the room, in his despair he spied the colored parson, and his face instantly glowed with a smile.

"Reverend Dr. Johnson," he courtesied, "I sure have lost my Bible, and I can't swear my witnesses by having them place their right hand on the Bible, but another section says that I must follow the spirit rather than the letter of the law, and if you wouldn't mind coming up here and letting the witnesses put their right hand on your brow, I know the statute will be complied with, for you sure's get the Bible in your head."—*Ibid.*

***

A fatal answer.—A representative in Congress tells of an experience when, as an attorney for the defendant, he was examining the complainant in a certain case.

His client, one Wheelock, had got into a quarrel with a certain Mc Donald, during their negotiations for the trade of horses. The quarrel had gone so far that Mc Donald had made applications to a magistrate to have Wheelock bound over to keep the peace, alleging that he had threatened to do him, Mc Donald, bodily injury.

When the case was called, Mc Donald testified to the circumstances under which Wheelock had threatened him. The cross-examination began.

"Now, Mr. Mc Donald," the lawyer said, "you declare that you are under the fear of bodily harm ?"

"I am, Sir."

"You are even afraid for your life ?"

"I am, Sir."

"Then you freely admit that Wheelock can whip you, Pat Mc Donald ?"

The question aroused Mc Donald's "Irish" instantly.

"Bill Wheelock whip me? never!" he shouted. "I can whip him and any half dozen like him!"

"That will do, Mr. Mc Donald," said the attorney. The Court was already in a roar, and the lawyer rested the case without further testimony or argument. The case was dismissed, for it was evident that Mc Donald could not be under serious bodily fear of a man whom, in his own opinion, he had only to use one seventh of his strength to whip.—*Ibid.*

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THE LAWYER'S BRIEF TO HIS LOVE.

Priscilla, it is more than wrong,
To keep me in suspense so long!
(See Bigelow's "Torts" and Wharton's "Crimes,"
And Callahan *v.* Grimes!)
Now, while the year is at the May,
You ought the happy "Yes" to say,
Conforming to the well known rule.
("Ex-parte James O' Toole!")
Too long I have been at call and beck
(Smith *v*, Jones, Page 9, et seq.),
I tell you dear, it is no't right!
(See Gibbons *v.* White!)
Should you refuse to grant my prayer,
I'll have to find a girl elsewhere;
Relying on the well known case
Of Simkins *v.* Chase!
But I'm assured that when you've read
The cases cited just ahead
You'll recognize with mind profound,
That my opinion's sound;
Which done, you'll enter, blithe and free,
A large "*nolo contenderce*!"
And marry me to save, to boot,
The further costs of suit!"

(*The Green Bag.*)

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Resignation of Farwell L. J.—Lord Justice Farwell's resignation must weaken the Court of Appeal. All will regret the cause, which is stated to be ill-helath. His Lordship is sixty-eight; he has been a judge fourteen years—seven in the Chancery Division and seven in the Appeal Court. He was Chairman of the Royal

Commission on War Stores in South Africa, and his most famous judgment was in the Taff Vale case, which was upheld by the House of Lords. His name will always be remembered in connection with his great book "Farwell on Powers." Lord Justice Farwell was not the type of judge whose name is always in the papers. He did his work quietly. Probably the only occasions on which his name came prominently before the public were the War Commission, the Taff Vale case, and when he declined to read Daudet's "Sapho" in a dramatic case which he heard. May resignation restore his health!

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Judicial changes.—Judicial changes have been numerous during the past month Mr. Justice Swinfen Eady will add greatly to the strength of the Court of Appeal on its Equity side. Mr. Astbury's appointment as a Chancery judge was more or less anticipated. He has had a large practice as a special in Chancery, and is a great authority on patent law. These appointments are generally approved by the profession.

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The appointment of Mr. J. R. Atkin, K. C. to the Bench was approved by the legal profession. To the public Mr. J. R. Atkin is not much known. His work lay chiefly amongst commercial men. The way to the Bench at the present time seems to be through the portals of the Commercial Court. His Lordship will prove a success. By birth he is an Australian.

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Solemnity of Oath:—Mr. Justice Bailhache deserves much commendation for his effort to restore some solemnity to the administration of the oath. Last month his Lordship asked Sir Frederick Low, K. C., to cease speaking while a witness was being sworn, saying: "I have strong views regarding the solemnity of the oath. It is sometimes disregarded, and that is partly due to the fact that people do not pay sufficient attention to it while a witness is being sworn." Sir Frederick Low apologised, remarking that he was not aware the witness was in the box.

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A difficult task:—The papers have been much exercised with a case which was heard last month in the German Imperial Court. A lady commissioned an artist to paint a fresco in the hall. The artist turned out an island and some nude figures of Sirens, to which figures the lady took objection, and employed another artist to drape them. The first artist brought an action for the restoration

of the painting. The Court ordered that the Sirens should be immediately undressed. Nude Sirens can have clothes painted over them, but it must be a difficult job to take "the oils" off a Siren.

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Burglary and punishment:—That burglary is a crime not properly punished has long been advocated in these columns. A burglar is a man who generally speaking, is prepared to effect his object with violence, and our judges are unduly lenient. He is generally an habitual criminal. Unpremeditated burglary is a rare crime. Mr. Neame, a very competent authority, quoted by the late Mr. Tallack in his "Penological and Preventive Principles," estimated the number of burglars in London alone at a score of thousands. This was some years ago, and their number has been constantly increasing. In the year 1911, of the 916 persons sentenced by the Courts to penal servitude only 118 had not been previously convicted, the vast majority of old offenders having from six to twenty convictions against them. Further, the Prison Commissioners, in their report, observe:—"The proportion of persons having previous convictions has, in the last few years, risen from 78 to 87 per cent." Surely Society is justified in taking extreme measures to protect itself from lawlessness of habitual criminals.

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Sir Rufus Isaacs and Judicial Office.—Nobody with a sense of propriety and fairness can fail to deplore the renewed attack on the Attorney-General. Lord Alverstone is, unfortunately, not likely to resume his judicial duties, but the office of Lord Chief Justice is not yet vacant, and the declarations in certain quarters of the Press concerning the fitness of Sir Rufus Isaacs to succeed him are as unseemly as they are unfair. All the members of the Marconi Committee, as well as both parties in the House of Commons, have expressly stated that nothing in the Attorney-General's conduct has cast the slightest reflection upon his honour. Yet his persistent adversaries in certain journalistic circles, having signally failed to assail his honour, are now meanly seeking to deprive him of his legitimate claim to promotion. From one dilemma they cannot escape. If Sir Rufus Isaacs has been guilty of conduct which renders it undesirable that he should be appointed to the Bench, he ought not to continue to be the official head of the Bar. If, on the other hand, he is fit to be Attorney-General—and even his most malignant critcis have refrained from asserting that he is not—his appointment as Lord Chief Justice could not be unbecoming. The inopportune

comments upon his possible promotion to judicial office are the outcome of a paltry vindictiveness which the Bar will strongly resent.

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The Attorney-General and the Lord Chief Justiceship.—Whenever the Lord Chief Justiceship does become vacant the Attorney-General will have a traditional claim to the office. Nearly all the modern occupants of the office—Mansfield, Kenyon, Ellenborough, Denman, Campbell, Cockburn, Coleridge, Russell, and Alverstone are among them—filled the office of Attorney-General before they reached the Bench. Some of them it is true, were not promoted direct to the Lord Chief Justiceship from the post of Attorney-General. Lord Russell of Killowen, for instance, was a Lord of Appeal for a few months before he became Lord Chief Justice, and Lord Alverstone filled the position of Master of Rolls before he was appointed to his present office. But it may safely be assumed that ultimate promotion to the higher position was an understood thing. 'The cushion of the Common Pleas,' Coke once said, 'belongs to the Attorney-General to repose upon.' Upon the resignation of the Lord Chief Justiceship by Lord Denman in 1849, Sir John Jervis claimed, in a correspondence with Lord John Russell, that he had, as Attorney-General, a claim by usage to the vacant post. Lord Cottenham, who was appealed to, ruled that the Chief Justiceship or the Common Pleas was the only Chief Justiceship to which the Attorney-General had a traditional right. This incident, so far from weakening the Attorney-General's claim to the Lord Chief Justiceship, strengthens it. It emphasises the fact that the Attorney-General had a recognized right to the important office of Chief Justice of Common Pleas. That position, which was scarcely inferior, to 'the chair of Mansfield,' having been abolished by the Judicature Act, the Lord Chief Justiceship is the only office remaining that is akin to it. The Lord Chief Justiceship absorbed the offices of Chief Justice of the Common Pleas and Chief Baron of the Exchequer, and, since the Judicature Act can scarcely have been intended to destroy the Attorney-General's traditional rights, they must have been transferred to the surviving office.

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The claim of woman for Admission as Solicitors.—There never was any doubt as to the result of the attempt of women to get admitted on the Roll of Solicitors by a forced interpretation of the Solicitors Acts; and Mr. Justice Joyee made short work of the contentions raised on behalf of the plaintiff when the matter came

before him this week in the action by Miss Bebb against the Law Society claiming (*a*) a declaration that she was entitled to be admitted to the preliminary examination held by the Society under the Acts ; (*b*) a *mandamus* directing the Society to admit her to the examination ; and (*c*) an injunction to restrain the Society from refusing to examine her for the purpose of qualifying as a solicitor. The claim was endeavoured to be supported by a series of logical inductions derived from the fact that the interpretation clause of the main Act of 1843 (section 48) enacted that ' every word importing the masculine gender only shall extend and be applied to a female as well as a male ' ; but this was qualified by the proviso ' unless there be something in the subject or context repugnant to such construction. ' There was nothing repugnant in the context, but was there not something in the subject ? The short answer was that before the Act there was no known instance of a woman practising as an attorney or solicitor, and the new legislation proceeded on the footing that it was dealing with men, and men only, who, up to that time, had acted as solicitors. Mr. Justice Joyee went further and indicated his opinion that women were disqualified by their sex from acting as solicitors ; but in that he was only expressing the view of the Common Law that women were incapable of exercising public functions. That point was established nearly fifty years ago in *Chorlton* v. *Lings* [1868], where, in an attempt to assert the right of women to vote under the Representation of the People Act 1867, all the Judges held that there was a ' legal incapacity ' established by the uninterrupted usage of centuries ; and Mr. Justice Willes, of whom it was said that a more learned Judge never lived, laid down the proposition that neither by the Common Law nor by the Constitution of this country, from the beginning of the Common Law until the present time, could a woman be entitled to exercise any public function. The case went even further, for it decided that such being the Common Law of England, it is to be taken that a statute dealing with the exercise of public functions, unless it expressly gives power to women to exercise them, is to be construed as conferring such powers on men alone. An attempt was made by the lady litigant's counsel to get out of that difficulty by pretending that solicitors do not exercise a public function, but there is no doubt that, whatever may have been the case in ancient times (an instance in the time of Edward II, was cited), the office of a solicitor is now and has long been a public one, and it is for that very reason that it is so carefully controlled by the Legislature. What was proposed by this action was to bring about a revolution in the status of women, but that cannot be done by the application of a

spices of chop-logic to the existing law, which was enacted on quite other considerations. If it is to be done at all, it must be done by a change in the view of the State, and that can only be indicated by a change in legislation.

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Trial of Nullity Suits.—Important as was the decision of the House of Lords in the *Scott Case*, there are few considered judgments of recent times which have contained so many *obiter dicta*, and there is some inclination to forget already that the direct points involved, on which only it is a fully binding authority, were but two in number: (*a*) Whether the publication of proceedings in camera after the close of the case was contempt of court; and (b) if so, whether such contempt was of a criminal nature, so as to be unappealable. Among the questions raised in the course of the case for the elucidation of one or other of these points was, naturally, the foundation of the current practice of the Divorce Court to order the hearing of certain cases *in camera*. Great stress was laid on the undoubted fact that before the Matrimonial Causes Act, 1857, which constituted this Court, it was not usual to make such orders; that for some years after the passing of the Act these cases were heard, like others, in open Court, it being assumed that, whatever power the old Ecclesiastical Courts might have exercised in special cases, they were superseded by the new system; and that it was in 1875 for the first time that, by an assertion of plenary powers derived from the old Courts, Sir James Hannen established the rule for the trial *in camera* of nullity suits. A later President, Sir Francis Jeune, extended this claim to make orders for private hearings under the assumed 'inherent jurisdiction' of the Court, so as to include ordinary suits for dissolution (D. *v.* D. [1913]; and the growth of these exceptional powers, which led to the extravagant judicial claims in *Scott* v. *Scott*, made it necessary for the House of Lords to deal with the whole subject. After his elaborate historical survey of the authorities, Lord Shaw came to the conclusion that there was not only no foundation for the alleged claim, but that the Court had no power to order the private hearing of any suit. But there were indications in the judgments of other learned Lords that this was rather a personal view, and it certainly did not amount to a deliberate and settled decision of the whole House on the points at issue. The result was, undoubtedly, a strong rebuff to the exceptional claims to the Divorce judges, and the question has arisen for them—What is to be done with the hearing of nullity suits? Rather than invite another defeat they have decided, apparently, to

make no more orders for hearings *in camera*, even with the consent of all parties, and on Monday last, on the first nullity suit since the Scott judgment being brought to trial, it is reported that Sir Samuel Evans 'invited all women, boys, and girls to leave the Court; and, these people having left, the learned President intimated that all men who wished to leave the Court and an opportunity of doing so.' They may be all very right and proper; but we doubt whether an entire abdication of power and authority to control the hearings of nullity suits, even in the most nauseous cases, is likely to further the cause of justice. That, after all, is the over-riding consideration; and we fail to see in the Scott judgment any necessity, or excuse, for ignoring it.

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Lord Lindley writes to the Times.—'No one acquainted with the practical working of the trial of civil actions by juries can be ignorant of the unsatisfactory consequences of a failure by a jury to agree on their verdict. Unless the litigants agree to accept the verdict of the majority, the trial and all the annoyance and expense to jurors and witnesses and the parties concerned will have been thrown away and their time and that of the Judge will have been wasted. The litigants may still come to terms or drop further proceedings altogether, or have a new trial with another jury. This involves calling witnesses all over again and further trouble, annoyance, and expense to all concerned. Attention was called to this important matter by one or two of the gentlemen consulted by the Committee presided over by Lord Mersey, whose admirable report on juries has recently been published (see Part II., 1.561 and 1,636-1,644). The report itself, however, contains no recommendation on this particular subject. It reports in favour of trial by jury of 12 (or of 11 in case of death or accident), but it does not allude to what ought to be done when juries are not unanimous. It is to be hoped, however that when Parliment deals with the report it will also take the opportunity of dealing with this important matter. All that is wanted is to enable the judge who tries the case to decide it on the evidence before him if the parties do not agree to accept the verdict of the majority of the jury or if the jury are equally divided. An appeal would still lie from the decision of the Judge, and if the Appeal Court could not come to a satisfactory conclusion without further evidence it could obtain such evidence, or as a last resource decide the case against the litigant on whom the Court considered the burden of proof ultimately to fall. A further great improvement in jury cases would be to abolish motions for new trials and substitute for them appeals from the judgments finally pronounced. The

Court of Appeal could then deal with such cases as above mentioned. The recommendation of the Committee that the whole law relating to juries should be consolidated in a single statute will, it is hoped, lead to so desirable a result. Provision should then be made for taking the verdict of a majority; and, in my opinion, both in criminal and in civil cases. The majority should be a fixed proportion of the whole; and in capital cases, if 12 are to concur, the number of jurors should be increased so as to allow for two or three dissentients.'

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Land Law Reform.—Two Bills of considerable importance have been introduced by Lord Haldane with the view of amending the law of real property and simplifying transfer of land. And, if these pass, we are promised a Consolidation Bill which will provide a code of modern statute law relating to land, and form the basis of a genuine attempt for the reform of the land laws. We welcome this programme of regulated reform all the more because it is to proceed by steps and is not put forward, as have been some earlier legislative proposals, as a panacea for all the troubles and difficulties which surround the subject. An old conveyancer himself, Lord Haldane knows that most of these difficulties are of historical origin, and while imbued with the spirit of progress which he finds abroad, he still proceeds with the deliberation of the expert, so that his new and improved system may not only meet the demands of the hour but stand the test of time. Disdaining all appeals to vulgar prejudice and recognising that all the great reforms of recent times in real property law have been moved within the ranks of the legal profession itself, he has sought the assistance of conveyancers of high standing and now offers his proposals to the general scrutiny, with the view not of forcing them on an unwilling public, but of getting his Bills into such a shape that they will be adopted by common consent. That is right spirit and the right policy, and the Lord Chancellor may be assured that if it is pursued throughout the different stages of his legislative programme there will be no need for compulsion, but that any system really beneficial to landowners will be welcomed and furthered by all ranks of the profession.

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The Lord Chancellor's Proposals.—Lord Haldane's outline of his proposals, brief as it was, in introducing his two Bills indicates a determination to deal drastically with the present systems both of land tenure and land transfer. Under the Real Property Bill it is proposed to abolish copyholds and other special tenures and perpe-

tually renewable leaseholds, and to give to life tenants an absolute power of dealing with the fee simple or settled term of years. The Conveyancing Bill adopts substantially the late Mr. Wolstenholme's scheme for shortening titles and abolishes as legal estates life and other particular interests, leaving all such lesser interests to take effect in equity by way of trust, with protective provision by means of cautions and inhabitions. But there is more than this. The Memorandum which accompanies the first Bill shows that it will embody among other things (*a*) the amendments of the Settled Land Acts contained in the Law Society's Bill of 1912; (*b*) the recommendations of the Royal Commission as to the automatic conversion of land of copyhold tenure into land of freehold tenure, and the abolition of all special customs of descent; (*c*) provisions for the absolute extinguishment of all manorial incidents of tenure subject to proper compensation; (*d*) amendments of the general law rendering acknowledgments of deeds by married women and the enrolment of disentailing deeds unnecessary, simplifying the transfer and discharge of mortgages, and giving powers to the Courts to discharge obsolete restrictive covenants; (*e*) extensive alterations in the present system of land transfer in the direction mainly of a recognition of deeds off the register, particularly as to mortgages. On this last point the greatest possible latitude is given to the registered proprietor for dealing with his registered estate by way of mortgage or charge, the *clou* of everything being still the register, but cautions or notices or mere deposit of the land certificate being substituted, where desired, for registered charges. There is also a Memorandum to the Conveyancing Bill which indicates as near an approximation as possible to the ideal of the land transfer reformers; that is, to assimilate the sale of real property to the sale of stock. With this object it is proposed that there should be two kinds of estates or interests in land—the proprietary and the subordinate; and the former would be the only estate with which a purchaser would be concerned. The owner of a 'proprietary estate' (a fee simple or term of years absolute) is to be empowered to convey to a purchaser for value subject to all 'paramount interests' but free from all 'subordinate interests,' *i.e.*, all interests taking effect by way of trust, except so far as protected by cautions or inhibitions. A purchaser will not be concerned with any subordinate interests which are not so protected, and then only to see that the cautions or inhibitions are removed before he takes his conveyance. It is too early yet to criticise these various proposals, but this at least is apparent, that we have here a carefully thought out and comprehensive scheme,

and one which we believe it will be the wish, as well as the interest, of the profession to render workable.

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The Great Seal in Commission.—During the Lord Chancellor's absence from England in the Long Vacation, when he will deliver an address before the American Bar Association at Montreal, the Great Seal, it is announced, will be placed in commission. Lord Haldane will, it is said, be the first Lord Chancellor to leave the Kingdom on an official visit since Cardinal Wolsey went on his famous mission to France. Not, of course, that all the modern occupants of the Woolsack have refrained from going abroad. Lord Loreburn, for instance, paid a visit to America during his term of office. But these journeys abroad of the holders of the Great Seal have been for purposes of health or pleasure. Lord Haldane will be the honoured guest of the American Law Association in his capacity as Lord Chancellor, and it is fitting that the official character of the occasion should be ceremoniously recognised at home. When the Great Seal was placed in commission on the resignation of Lord Cottenham in 1835, owing to the unexampled difficulties of the Government in choosing his successor, the Lords Commissioners were Lord Langdale (Master of the Rolls), Vice-Chancellor Shadwell, and Baron Rolfe. It is hardly likely on this occasion that the Master of the Rolls—if he himself be selected—will have two puisne judges for his colleagues. The Law Lords will afford a more fitting choice.

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Law and Education.—Sir John Macdonell, whose election as a member of the British Academy is a fitting tribute to the position he holds as an exponent of the scientific side of the law, has been declaiming before the Society of Public Teachers of Law against the abandonment, in favour of other studies, of that large field of philosophic inquiry and scientific truth which falls within the province of jurisprudence. We have gone a long way back from the position which the study of the law held in the education of an English gentleman even in the Middle Ages, not to speak of the dignified place which Locke assigned and Blackstone secured for it in a later generation, and even the high example of Bentham and Austin, which revived the interest in the law as a science a century ago, has failed to be maintained. Much of this neglect, no doubt, is due to the keener struggle of competing studies, but it must be confessed a large part of it must be attributed to the attitude which, nowadays, those who are engaged in the practice of the law take towards it as a science. Our studies are directed too much to the

wants of the practitioner, and so we lose touch, so far as law is concerned, with the liberal side of education, and law becomes a 'mystery' of the few, instead of an object of intellectual interest for the whole body politic. The change is exemplified even in our legal literature—'Hail to Halsbury' has taken the place of 'Back to Blackstone.' But there are graver symptoms even than that. The latest scheme for the reconstruction of London University finds no place for a Faculty of Law; and this is only one of many indications of the tendency to expel law wholly from the curriculam of liberal studies. Sir John Macdonell does well to invite the public teachers of law to undertake a combat for their science. No time could be better than the present for the renewal of the movement to establish a legal University—a General School of Law—for in Lord Haldane, English law has at its head one who is a jurist as well as a lawyer.—*Law Journal.*

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The Privy Council and Convictions for Murder.—It is related that a traveller in India recently found the inhabitants of a village doing worship to a new deity, and on inquiry found that the god who had been installed was named 'The Judicial Committee of the Privy Council.' The story bears witness to the beneficent influence which the Judicial Committee has exercised for the better part of a century upon the administration of justice in our Eastern Empire. Perhaps no better illustration of that beneficent influence could be found than the recent judgment of the Board in an appeal from the capital conviction for murder which came from the Madras High Court *Vaithianatha Pillai* v. *The King-Emperor.* The appellant was under sentence of death passed by a district court in India and confirmed (though by a divided judgment) in the Appellate Court, and he received special leave to appeal to the Privy Council on the ground that there was a *prima facie* case of the miscarriage of actual justice. It is rare for the Judicial Committee to allow appeals against criminals convictions; it is rarer still for them to allow appeals against a conviction for murder; it is rarest of all, but not absolutely unprecedented, for them to quash a capital sentence. But the rule in *Dillet's Case* (1883), which is the leading authority for the exercise of the prerogative in Criminal appeals to the Privy Council, supports the authority of the Board to review any case where the procedure of the lower court has rendered possible a denial of justice. In the present instance it was urged that the Judicial Committee had no precedent for quashing a conviction on the ground that it was against the weight of evidence, but the Board refused to accede

to any technical plea, and, holding that the conviction was broadly unjust, admitted the appeal. There are obvious grounds for restricting narrowly the right of appeal to the King in Council in criminal cases, and in several of the self-governing dominions, notably in Canada, the prerogative right of granting special leave in such matters has been taken away by statute—though whether validly or not, is doubtful. But, on the other hand, the ultimate right of the Sovereign to prevent any abuse of legal process against his subjects in his Eastern Empire in matters touching their persons is more than a symbol of the unity of justice throughout the Dominions. It is one of its most real safeguards. And the constitution of the Committee in this case, consisting of an English, and Irish, an Anglo-Indian, a Mahommedan, and an Australian Judge splendidly typified the Imperial character of the Sovereign's Judicial Council.—*Ibid.*

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The Bench and the Empire.—The judicial bonds of the Empire have been illustrated in apleasing and unprecedented fashion during the past few days. Lord de Villiers, the Chief Justice of South Africa, exercising for the first time the right to take part in the judicial work of the House of Lords which he acquired when he was made a Peer three years ago, has been sitting with the Lords of Appeal to hear appeals from the Scottish courts, while Sir Samuel Griffith, the Chief Justice of Australia, has been engaged on the Judicial Committee in hearing Indian appeals. Lord de Villiers, whose right to sit as a Law Lord in the House of Lords is derived from his membership of the Judicial Committee, personifies the connection which already exists between the two tribunals, and has imparted a fresh significance to the oft-repeated proposal for amalgamating the two tribunals into one Supreme Court of Appeal for the whole Empire.—*Ibid.*

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The Marconi Inquiry.—Judicially regarded, the one thing which counts in the findings of the Marconi Select Committee is that which is common to all the three reports which have been published—the finding that 'no Minister, official, or member of Parliament has been influenced in the discharge of his public duties by reason of any interest he may have had in any of the Marconi or other undertakings connected with wireless telegraphy, or has utilised information coming to him from official sources for the purpose of investment or speculation in any such undertaking.' That is the wording of the Minority Report, and although it does not go to the

whole length of that of the Majority, nor even as far as that of the impartial Chairman, it is conclusive on the single substantial issue as stated by Lord Robert Cecil—'whether there were any financial transactions of an improper character by Ministers or others with the Marconi Company or anyone connected therewith.' With the unanimous verdict of all the members on this issue the legal interest in the whole question is solved, and the Marconi Committee, notwithstanding all its unjudicial lapses and irregularities, may be said to have fulfilled its judicial functions with effect. With the political bearings of the Inquiry we have here no concern. But there is another aspect which does touch us—the professional one involved in the original gross attacks on the Attorney-General's action and the suggestions of 'impropriety' or 'indiscretion' to which those attacks were later on attenuated. It is now universally admitted that there was no foundation for the personal charges to which nobody in the profession ever gave a moment's credence, and the mover of what was practically the vote of censure on the Report was careful, when challenged by Sir Rufus Isaacs, to exclude even 'indiscretion' from the category of his complaints. The frank and courageous statement of the Attorney-General in the debate on Mr. Cave's motion has won for him the sympathy of the whole country, and there must be few indeed now who, in the significant words of the tribute recently rendered to Sir Rufus Isaacs by Sir Edward Clarke, the *doyen* of the Bar, 'would, for personal or political motives, make use of an error of judgment to check or to deflect from its natural course a long career of private honour and of public service.'—*Ibid.*

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The Independence of the Bar.—Sir Edward Carson, the heir contingent to the position of leader of the Bar now held by Sir Rufus Isaacs, has not escaped the effects of the blindness of prejudice and distortion of view which have marked every development of the various campaigns arising out of the Marconi contract. Like the Attorney-General, he is acquitted by his assailants of 'any deviation from the very highest standard of professional honour.' But, says the *Times*, which has opened its columns to this new inquiry into the independence of the Bar, 'plain people' may be forgiven for not understanding how men so distinguished 'came to be in a position which might prevent them in possible developments from having a perfectly free hand as Parliamentary critics.' That is very like the sort of language which is held after every specific charge has been exploded and abandoned in the case of the head of the profession, for defending whose honour at the bar of justice

these scandalous attacks are levelled against his great rival and probable successor. Sir Edward Carson has not been wanting in supporters both from the Bar and the Bench, and there are no two opinions in the profession as to the perfect propriety and regularity of his conduct. It would have been strange, indeed, and, if not a positive breach of duty, an abandonment of the highest traditions of the Bar, if he had refused his professional services in such a case because of any political considerations. It will be a bad day for the English Bar when the freedom of the advocate is exchanged for the trammels of party, or, we may add, when the standard of duty fixed by the traditions of a great and honourable profession is displaced by the uninformed opinion of the man in the street.'—*Ibid.*

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Advocacy and Politics.—In the discussion on Sir Edward Carson's action in the *Matin* and *Chesterton* cases Sir Harry Poland has cited with effect the famous pronouncement of Erskine on the duties of an advocate when he was assailed by every art of calumny for having undertaken the defence of Tom Paine in a Crown prosecution for the publication of the 'Rights of Man.' A pendant to that notable precedent was furnished only a few years later by Erskine himself when he appeared as counsel for the Crown on the prosecution of a bookseller, Williams, for the circulation of the same author's 'Age of Reason.' The principles on which the great advocate acted in both these cases were confirmed and put on record formally by Lord Chancellor Eldon thirty years later in a reported case (*Exparte Lloyd* [1822] in the following terms:—'A barrister ought not to exercise any discretion as to the suitor for whom he pleads in the Court in which he practices. . . . He is, however he may be represented by those who understand not his true situation, merely an officer assisting in the administration of justice, and acting under the impression that truth is best discovered by powerful statement on both sides of the question.' The Bar Council has recently expressed its view of the rule of etiquette still binding the profession thus:—'A barrister is bound to accept any brief in the Courts in which he professes to practice, at a proper professional fee,' and he can only be excused from this general obligation if 'special circumstances' arise of such a nature as to justify his refusal of a particular brief. Mr. F. E. Smith, who shares with Sir Edward Carson the credit of having made a stand against the demand that they should have set the claims of party above the obligations of the Bar, has shown in his trenchant reply to the *Times*' criticisms that there were no special circumstances in either of the

cases in which their action is impugned to relieve them of the duty which is the correlative of the monopoly they are permitted to enjoy as advocates. The only special circumstance was that the persons they were called on to serve were the subject of attacks by their own political party; but if that is ever to be regarded as a bar to forensic service the functions of the advocate will be confused in those of the politician, and the 'plian people' to whose judgment the *Times* appeals will be the first to lose by such a result.—*Ibid.*

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Enforcement of Foreign Judgments.—That a plaintiff must sue in the Court to which his defendant is subject at the time of suit (*actio sequitur forum rei*) is a good general rule, and it carries with it the corollary that 'when the action is personal the Courts of the country in which a defendant resides have power, and they ought to be resorted to, to do justice' (per Lord Selborne in the *Faridkote case* [1894]. So that our Courts will not enforce a German judgment against an English subject for damages for breach of contract to be performed abroad, unless the defendant was either resident in Germany at the time of issue of process or has submitted to the jurisdiction of the courts of that country, for he can be sued on the contract in his own courts, which will do justice. But what if the circumstances are such that the courts of the country where the defendant resides will not do justice? That was the problem discussed in a considered judgment of Mr. Justice Scrutton delivered last Tuesday in an action to enforce a judgment of a foreign court (the High Court of Bengal) for 7,200*l.* damages awarded to the plaintiff as petitioner in a suit for divorce in which the defendant was co-respondent (*Phillips* v. *Batho*). The Indian Divorce Act, 1869, authorises the provincial courts of that country where (*a*) the petitioner professes the Christian religion and resides in India at the time of presenting the petition, and (*b*) where the marriage shall have been solemnised in India (both of which conditions were fulfilled in this case), to act and give relief on principles and rules as nearly as may be conformable to the principles on which the Divorce Court in England gives relief. The defendant, who had resided for many years in India, left that country shortly before the filing of the divorce petition in which he was a co-respondent, but he was duly served in England with process of the Indian Court, and damages were awarded against him in his absence. Could payment of these damages be enforced here in an action on the judgment? In *Emanuel* v. *Symon* [1908] the Court declined to give effect to a judgment of the High Court of Western Australia against the defendant for a sum found to be due by him on a partnership account, the defendant

having left the colony before the issue of the writ, but having been served here with notice of the proceedings, on the ground that he was not bound by the judgment, which was not that of a court of competent jurisdiction over him. Lord Justice Buckley in his judgment said there were five classes of cases of actions in personam in which the courts would enforce a foreign judgment: (1) where the defendant was a subject of the foreign country in which the judgment had been obtained: (2) where he was resident in the foreign country when the action began: (3) where in the character of plaintiff he had selected the *forum* in which he was afterwards sued; (4) where he had voluntarily appeared; and (5) where he had contracted to submit himself to the *forum* in which the judgment was obtained. The judgment in the case before Mr. Justice Scrutton did not come within any of these five classes, and the question for him was whether there was anything in the peculiar character of divorce procedure which provided yet another and sixth case in which a foreign judgment might be enforced. He found this in the fact that the courts of the country where the defendant resides could not do justice in such cases. The English Courts could not give damages against the co-respondent, for their jurisdiction is limited to dealing with marriages of persons domiciled in England and the consequences following from the infringement of such marriage ties. The reason for the judgment in the *Faridkote Case* (that the *forum rei* which can do justice should be resorted to) did not, therefore, apply. A new class of case arises, then, where the judgment to be enforced is in proceedings *in personam* ancillary or accessory to the dissolution of a marriage of persons domiciled or otherwise within the jurisdiction of the court pronouncing the decree, were both the Court pronouncing the judgment and the court enforcing it are courts of the same Sovereign, but where the court enforcing it cannot itself grant the relief because it has not jurisdiction over the marriage to whose dissolution the proceedings are ancillary. Stated more widely, the sixth class is a class where (the court pronouncing and the court imposing judgment being courts of the same Sovereign) the judgment is one in *rem* affecting status or a judgment *in personam* ancillary or accessory to such a judgment and regularly pronounced by the law of the courts which have given it. That is, no doubt, a salutary addition to the old jurisdiction of our courts.—*Ibid.*

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THE LATE LORD MACNAGHTEN.

Lord Mersey, in asking the Lord President to be allowed to present him with the picture on their old friend, said, Lord

Macnaghten was a great lawyer who for 25 years or more administered justice in that tribunal with such consummate ability that he secured for his decrees the admiration and confidence of the whole nation. He was more than a great Judge—he was a good man and a kind friend.

Lord Morley, in the course of his reply, said he was sure that they all accounted this gift of Lord Mersey's as due to a most liberal and happy thought, and it was his duty, and it was a very great gratification to him, in his office as Lord President, to accept that gift from his hands. Nobody would dispute the full title of Lord Macnaghten to the honour that was now paid him in memory of the great public service he rendered in the most important of all public callings, as he ventured to think the judicial office was. He had been reading some of the judgments of Lord Macnaghten, and what struck him, and used to strike him when he had the pleasure of talking to him in the House of Commons or at Lincoln's Inn or elsewhere, was this—he did not consider the judicial points in a case on an argument as being the exhaustive aspect in all its bearings of which the case was capable. Many would remember the Scottish Church case eight or nine years ago. He had read that judgment—not with any view (Heaven forbid!) of pronouncing on the legal right or wrong, but he regarded it as a literary composition, and he could not say how much he was struck by the breadth of mind and elevation of thought and the recognition of the importance of the historical interests concerned. He took in all his cases—some of them very complex—an elevated and broad view; he did not allow (if he might say so with all respect) that statute and precedent were everything. Apart from that particular point, what struck him, as a critic, was Lord Macnaghten's arrangement of his topics, and the structure of his arguments left him entirely free from what he regarded as a mortal sin of all writing and pronouncing of judgments—that of being either involved or obscure. Lord Macnaghten had, as he was told, a gift which was not bestowed on all of them—the gift of listening. He would listen all through a case—however complex—with unbroken silence, but when the silence was broken then it was found that he had grasped all the arguments of the matter, and, when that was done, he went directly to the point. Reading the Scottish judgment and others of his, what struck him was Lord Macnaghten's shrewd common sense, because law was not always entirely reconcilable (if he might say so) with shrewd common sense. Lord Macnaghten was cool without being languid. He thought his colleagues would agree that his reasoning was (as it

was in the House of Commons) luminous and weighty, and though he had none of the subtle humour that Lord Bowen and others possessed, nevertheless there was in him—it was quite evident—whether in politics or in law, a real fund of genial humour—very often ironical. But ironical humour was part of the salt of literature, of human nature, and of human life. His language was always excellent. He liked terse, short sentences and simple and homely words in which he went directly to the point. He never went in for overdrawn emphasis, which was the ruin of true force. Someone had said that a man's profession, is gifts, even his opinions, were not all. Besides all these there was the man himself, and they would all agree—both those who knew him well and those who knew him little—that if ever there was a man who deserved this language it was Lord Macnaghten. They all felt the loss caused by his departure from their midst—and especially had the Judicial Committee suffered a great loss—and, that being so, he thought Lord Mersey had done very well in enabling them to put on record as it were in that Court so good a token of the regard in which he was held by his colleagues and the Bar.—*Ibid.*

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THE ETIQUETTE OF THE BAR.

An interesting correspondence has been proceeding in the *Times* on the question of professional etiquettee raised in connection with the appearance of Sir Edward Carson and Mr. F. E. Smith in the *Matin* and *Chesterton* cases. The *Times*, in a leading article on June 13, said: The etiquette of the Bar, we are told by some of its members, left these counsel [Sir Edward Carson and Mr. F. E. Smith] no choice: they could not refuse briefs delivered to them; they acted in accordance with a laudable practice and tradition, which give all comers the services of eminent advocates.'

Sir Harry Poland, K.C., referring to the statement of the *Times*, writes: There can be no doubt that this is not the etiquette of the Bar. These eminent advocates were absolutely free to refuse briefs in the *Matin* case, and in the prosecution of Mr. Chesterton by Mr Godfrey Isaacs, if they thought that appearance in such cases would interfere with their duty in Parliament to their constituents. . . . It seems to me that the conduct of these counsel is a matter between themselves and their constituents, and that the public has nothing whatever to do with it. The leaders, of course, of the Unionist Party may regret that they are deprived of the assistance of these two advocates in the forthcoming debate, but with that again the public has nothing to do. There are, of course, some cases in which

counsel is bound in honour to appear for a client. Let me give an instance. Tom Paine was in 1792 prosecuted for a seditious libel—the first part of the "Rights of Man"—and Erskine was retained for the defence. He was then Attorney-General to the Prince of Wales. Every effort was made to induce Erskine not to appear for the defendant. In his speech for the defence he referred to 'the calumnious clamour that by every art has been raised and kept up against me.' Then he went on to say:—'Little indeed did they know me who thought that such calumnies would influence my conduct. I will for ever, at all hazards, assert the dignity, independence, and integrity of the English Bar; without which impartial justice, the most valuable part of the English Constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the Court where he daily sits to practice, from the moment the liberties of England are at an end. If the advocates refuses to defend from what he may think of the charge or of the defence, he assumes the character of the Judge; nay he assumes it before the hour of judgment, and in proportion to his rank and reputation puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favour the benevolent principle of the English law makes all presumptions, and which commands the very Judge to be his counsel, (State Trials, vol. 22, p. 411) Erskine for his brave and honest defence was removed from his office of Attorney-General to the Prince of Wales. Clients often like to have as their counsel men opposed to them in politics. Frost the Chartist, for instance, when indicted for high treason, retained two Tories to defend him, Sir Frederick Pollock and Mr. Kelly. A counsel who practises at the Central Criminal Court, in the Crown Court on circuit, or at the sessions is bound for one guinea to defend any prisoner if he has no previous engagement and to attend to the case throughout, even if it lasts a week. I am sure that most counsel would act as Sir Edward Carson and Mr. F. E. Smith did, because they feel bound to give their services to any client who requires them. No one could possibly have foreseen that the Marconi affair would stir both political parties as it has done. The oath of the King's Serjeants bound them faithfully to serve the King 'and his people.'

Mr. Justice Neville writes: To my mind the question raised is no mere question of etiquette, but one which affects the existence of the Bar, holding, as it does, the exclusive right of audience before the Superior Courts in the country. In the past loss of favour at

Court, in the present unpopularity with public or party, may mar the realisation of a barrister's ambition. If they allow themselves to pick and choose between their clients it will not be long before the unpopular cause has to put up with inferior advocacy. As it once was put to me, always remember that you are in a position of a cabman on the rank, bound to answer to the first hail. I regret to differ from my senior at the Bar, but surely the noble eloquence of Lord Erskine in the quotation referred to by Sir H. B. Poland himself might have led him to another conclusion than that which leads him to tell us that advocates are absolutely free to refuse briefs if they think that appearance in the case would interfere with their duty in Parliament to their constituents. No man is forced to become or to remain a member of the Bar or of the House of Commons, but so long as he exercises the privileges of a barrister he is bound to give his services without fear or favour to those in a position to require them. Judges are precluded from sitting in the House of Commons; barristers are not, but only on the condition that they recognise no claim that may interfere with their duty to their clients while they continue to practise their profession. It is, I think, because this duty is so often misunderstood that there are heartburnings over the etiquette of the Bar. It should always be remembered that a barrister in the conduct of a case not only does not, but may not express any opinion of his own upon the guilt or innocence of a prisoner, the justice or injustice of his client's cause. Every case has something to be said for it, something to be said against it. It is the duty of the barrister simply (it is not a simple duty) to put the points of his client's case as forcibly as he can, to reduce the points against him to their proper proportions to the best of his ability. So long as the advocate recognises that this is the limit both of his right and his responsibility perplexity as to his duty will seldom arise. The politician not infrequently girds at the advocate for what he supposes to be the insincerity of his profession. For my part, as a member of the House of Commons. I found the question of when and how far personal opinion on minor matters ought to be subordinated to party welfare far more perplexing than any question of duty which ever arose in the course of my practice at the Bar. But the services of counsel are open to every member of the public alike, and that it must be first come first serve is the rule as I understand it, handed down to us by long generations of men who have left the reputation of the Bar of England for integrity, fearlessness, and impartiality unrivalled in the world. That members of the public should come as they do

over and over again to commit their most vital interests to the hands of men whose political interests are directly opposed to their own seems to me the highest compliment ever paid in any country to any body of professional men. Judges, we all know, should avoid controversy, and it is with no desire to break this rule that I seek the publicity of your columns. But when I remember the injunctions laid upon me when the sacred torch was handed on by abler and better hands, I feel that if I kept silence now I should fall short of the duty which I owe to that profession to which it has been the pride of my life to belong.

Mr. F. E, Smith, K.C., M. P., whose letter, he explains, was written without his having any opportunity of consultation with Sir Edward Carson, writes: I agree with Sir Harry Poland, who writes, of course, with great authority, that we could not have been compelled to accept briefs in either the *Matin* or the Chesterton case. We were never under any delusion upon this point. The relevant considerations in a difficult decision were two:—1. Was it or was it not our duty under the Rules of the Bar to accept the retainers which were offered to us, or were there in the material words 'special circumstances' entitling or obliging us to refuse those retainers? 2. Whatever the Rules of the Bar may have been, was it or was it not our duty in relation to the general public and the profession to accept the retainers which were offered to us? The considerations involved in these two questions overlap and may without inconvenience be considered together. It is proper to remember that our conduct under circumstances so singular may easily become a precedent. Bearing this in mind, it is necessary to ask whether at the commencement of the *Matin* action we should have been justified in lending such weight as our names afford to the view that the circumstances were so 'special' as to relieve us of the duty which is the correlative of the monopoly which we are permitted to enjoy. The Postmaster-General and the Attorney-General of England were accused in a reputable French paper circulating widely upon the Continent of corruption in their high public offices. The Attorney-General is the head of the profession to which we both belong. He has been intimately known to us both in many capacities for many years. Under these circumstances we were offered retainers on behalf of the plaintiffs. I invite our critics to indicate with precision the grounds upon which it is suggested that it was our duty to refuse these retainers. Were we to say, 'We cannot accept them because the plaintiffs are Liberals and we are Conservatives, and therefore, the issue being political, the circumstances are "special"?

I would recommend those who take this view to examine with some care the certain consequence of such an action. Political issues constantly present themselves for decision in the Law Courts. In the overwhelming majority of cases juries have done their duty indifferently between the parties, treating their own views upon politics as immaterial. How long do you think this state of things will endure if every Conservative case is to be presented by Conservative advocates and resisted by Liberal advocates, and every Liberal case conversely resisted by Conservative advocates? How long do you think it would be before our Law Courts reproduced the grotesque travesty of judicial procedure which has disfigured the record of the Marconi Committee? . . . Your leader writer observes in this connection that 'there are not two Sir Edward Carsons.' In the only sense in which this is true this statement is a meaningless common place recording the accepted fact that human personality is not physically duplicated. In the only sense in which it is relevant it is notoriously untrue. Was the author of the four Philippics the 'same man' who delivered the speech. Was Cicero the same man when he declaimed against Catiline and when he argued Pro Muliere Arretina? In their public utterances Cicero, Demosthenes, Erskine, and Sir Edward Carson are judged by the same standards as any public man who is not by profession an advocate, and are expected when they speak to express their own opinions with the candour required from other public men. But when they speak as advocates every cultivated person in the world knows that, discharging a function vital to the very existence of civilized society, they give trained but strictly representative expression to the contentions of their clients. . . . . It is suggested that our professional commitments have put it out of our power to take part in the debate upon the Report of the Marconi Committee, thereby depriving the Opposition of such assistance as it might otherwise have been in our power to give. I agree with Sir Harry Poland that this is in the main a question for our constituencies. But I am not unwilling to analyse elsewhere the nature of the complaint. Let us consider first what it involves explicitly and impliciitly. It means that no barrister who is a member of Parliament can properly accept professional employment in a matter which may possibly or perhaps one should say probably, become the subject of Parliamentary discussion. Is this the standard proposed? Was Sir Edward Carson wrong in accepting the Archer-Shee case? Was Mr. Duke wrong in appearing for Sir Stuart Samuel? Was Sir Charles Russell wrong in appearing

before the Parnell Commission? And finally—a still more pregnant question—would Sir Edward Carson and myself have been wrong, in the opinion of our critics, if we had appeared against Ministers in the *Matin* case and for Mr. Chesterton in the Chesterton case? Or to put the same question in another way, was Mr. Rigby Swift wrong in appearing for Mr. Chesterton? If not, why not? We could not in either case have taken part in the debate. Is our offence not that we acted as advocates in these cases, but that we acted as advocates upon the wrong side? If this indeed be the meaning no grosser affront was ever put upon an honourable profession. It means that we may with propriety appear in a particular case upon the conservative side, but that we cannot without impropriety appear in that case upon the Liberal side. . . . . On the general question Sir Harry Poland quotes Erskine's noble vindication of the position of the Bar. He cites this well-known case as one in which an advocate was bound in honour to appear. But here, with respect I am unable to understand his position. Why was Erskine specially bound to appear in Paine's case? Why was this obligation of higher quality than that of any other advocate? Himself a Whig and an intimate friend of the Prince of Wales, he defended Paine for scandalous attacks upon the Royal Family. Surely it is altogether wrong for an advocate ever to base his duty upon the facts of a particular case. If he does so he breaks Erskine's own rule and becomes a judge. But if such considerations are relevant how did Erskine's position differ from ours? We appeared for a private citizen who having regard to the record and the submissions of Mr. Chesterton's counsel, was as clearly upon his trial for grave criminal offences as if he had stood in the dock.—*Ibid.*

CONTEMPORARY LEGAL LITERATURE.

"*Is the doctrine of consideration senseless and illogical?*" as some writers for instance Dean Ashley in the Harvard Law Review for March seem to think or is it a useful principle to be retained in our system of law is the question which Mr. Ballantine considers in the *Michigan Law Review* for April. He thinks that the doctrine of consideration is not irrational but that the old definitions and tests are not wide enough to cover all cases where a promise should be justly enforced. There should be recognised he says, three distinct forms of consideration, meaning thereby three different grounds why it is unjust to break a promise and why a promise should be enforced (i) the usual one, the reciprocity of bargain or exchange (ii) justifiable reliance on gratuitous promise

(this is a sort of Estoppel) (iii) existing obligation legal, equitable, even moral if based on value received. Instances of these last are payment of another's debt, improvement on another's land, &c. He has much to find fault in the usual "legal detriment" view of consideration. On this theory, he argues that the validity of a promise for promise and the recognition of contracts binding at the option of one party cannot be justified. He would substitute instead a conception of consideration as a test of the intrinsic nature of the transaction, based on an exchange present or future. This would rationalise according to him the doctrine of consideration and furnish a key to the maze of conflicting views as to the element of consideration in bilateral contracts.

In the March number of the *Candian Law Times*, Mr Lemnel Foster gives much useful advice to young men, for "*building up a law practice.*"

In the April number of the same journal there is a summary of the law in America as to the liability of owners of irrigation ditches. The rule laid down in *Rylands* v. *Fletcher* is not law there; the owner of the ditch is liable only if he does not take due care and caution to prevent injury. There is also a note as to whether a past debt is a valuable consideration for a security. The result of the decisions in *Fullerton* v. *Provincial Bank of Ireland*[1], *Wigan* v. *English and Scottish Law Life Assurance Association & Co.*[2] and *Clegg* v. *Brow*[3], is stated to be that past debt is not consideration unless there is an agreement to give time or on the faith of the security time is given. The forbearance to sue need not be for any definite time; some forbearance is all that is necessary.

In the May number of the same journal, a writer summarises the contributions of Chief Justice Holt to the development of English Law. In *Coggs* v. *Bernard* Holt gave a final shape to the law of bailments. By his judgment in Ashby v. White, he laid down the principle *ubi jis ibi remediem*. He was the first to lay down that the status of slavery could not exist in England. (*Smith* v. *Brown*) He put an end to trials for witchcraft by directing the prosecution of complainants and seeing them convicted. He put a stop to the practice of trying prisoners in fetters. It was during his regime that evidence of former crimes became inadmissible.

In the Harvard Law Review for June, Mr. Charles P. Hine subjects the doctrine of *Election of* remedies to vigorous criticism.

1. (1903) A. C. 309. 2. (1909) 1 K. B.
3. (1912) 3 K. B. 474.

The rule is thus stated in an American case. "An election once made with knowledge of facts between co-existing remedial rights which are inconsistent is irrevocable and conclusive irrespective of intent" "The commencement of an action upon one theory constitutes an election". In the first place, courts differ as to the principle on which the rule depends. According to some courts, it is only another name for estoppel; in that view, the rule is a mere surplusage. The ratio of the majority of the decisions, however is that a party ought not to be permitted to experiment with the remedies the law affords. Again, if it is a growth from the equity doctrine of election, the original purpose of the rule has been long forgotten and is applied most harshly to the prejudice of innocent parties. By the operation of this rule, the mere bringing an action precludes a party from bringing an action on an inconsistent theoryt hough nobody has acted on the faith of such election and though he does not prosecute it to the end. And yet the law allows a party to dismiss an action and recommence another for the same remedy. The courts are not all agreed whether mere commencement or only prosecution to the end that constitutes the bar. A difference may reasonably be made between actions to rescind contracts and actions based on the affirmance of contracts. In the latter case, commencement of an action may well be viewed as a binding election. The rule is cumbersome in that it puts the court to the necessity of trying in one action the question whether the plaintiff would have succeeded in another. The old common law rule on which this doctrine is supposed to be based only precluded a person who had a choice between a real and a personal action after choosing one form of action from resorting to the other. The rule did not apply where the choice was only between different kinds of personal actions. Most of the recent decisions upon the authority of which the rule is supposed to rest, are merely obiter (See *Morris* v. *Robinson*[1], *Valpy* v. *Saunders*[2], *Brewer* v. *Sparrow*[3], *Lythgoe* v. *Vernon*[4], *Smith* v. *Baker*[5], and *Scarf* v. *Jardine*[6]) and are traceable to a misconception as to the common law rule stated above.

In the same issue of the Harward there is a learned controversy between Professor Gray and Professor Kale as to the application of the rule against perpetuities to the exercise of general testamentary powers *i.e.* whether a person holding a general power of appointment by will can appoint only to such persons and in such ways as

1. (1824) 3 B. and C. 196.
2. (1827) 7 B. and C. 310.
3. (1848) 5 C. B. 686.
4. (1860) 5 H. and N. 180.
5. (1873) L. R. & C. P. 350.
6. (1882) 7 App. Cases 345, 360, 361.

consistently with the rule against perpetuities the original donor could have made dispositions of the property or whether the donee can appoint as if he is making the disposition himself. Professor Gray is of the first opinion. Professor Kale holds the other view. The argument on one side is that the donee of a general testamentary power cannot, unlike a donee of a power of appointment by deed, appoint to himself and therefore you cannot regard him as the owner of the property. The answer to this by Professor Kale is that when you do not make a difference between the case where a man owns property during his lifetime and where he acquires it just before his death, why should you make a difference between the two kinds of powers?

The same issue contains a learned note on the maxim "*In pari delicto melior est conditio possidentis*. The writer of the note thinks that this maxim which is merely of method one expressing a consideration of policy is so much broader than the legitimate scope of the policy that it ought to be discarded altogether. The reluctance of courts to adjust the right of criminals is hardly a sufficient reason for allowing clever scoundrels to defraud their victims whenever they can involve them in a crime. These remarks were made with reference to a case in one of the American courts where the court refused to a participant in a felonious marriage the recovery of property conveyed to the supposed wife who had induced the crime in order to defraud him of his property.

BOOK REVIEWS.

Indian Decisions (New Series): Calcutta Vol. I by Messrs. T. A. Venkasawmy Rao and T. S. Krishnasawmy Rao.

The promptness with which the first volume of the Calcutta Reports (I. L. R.) has been brought out, may be taken we hope as an earnest of the Editors' desire to carry out the publication expeditiously. While expeditious, we are glad to note it bears no signs of hasty preparation. So far as we have examined, the book is free from typographical errors.

Lawyer's Reference (Bengal Law Reports Vol. Calcutta Law Reports (Vols. 1 to 14) by the Lawyer's Companion Office.

Books of this sort have a justification for their existence only in the absence of a good digest; otherwise one should regard it as a sheer waste of time to go over the same ground in bits, now Bengal

Law Reports, now Indian Law Reports now Weekly Reports and so forth. Granting a justification for its existence, the work is well done. The index is full and accurate.

Transfer of Property Act by Mr. A. K. Ray (1913) Published by Messrs. R. Cambray and Co., Calcutta.

Though we cannot say that there is any distinction about this work, it is certainly a useful publication. The notes are brief and to the point. The headnotes in bold type enable one to take in the whole matter at a glance. References to English statutes and an account of the Hindu and Mahomedan Law of gifts and mortgages are special features of this work. The extracts which the author gives from leading English text-books and decisions are apt and sure to be found useful. The references seem to be up-to-date and fairly (we would have said quite, but for the omission of a few Madras cases which we were able to detect) exhaustive. The treatment given to the doctrine of subrogation is not quite as adequate as one would have desired. In one place, the author is positively misleading *i.e.* where he deals with the admissibility of evidence of conduct to determine whether a transaction is a sale or a mortgage. He does not refer at all to the Madras cases after 13 Madras. One should have very much liked the author to give the I. L. R. references wherever possible and not merely the references to non-official reports. But these are minor defects and do not detract from the usefulness of the volume as a whole. As a handy book of reference, we have no hesitation in recommending the book to the profession.
