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REFLECTIONS ON MYERS *V.* ELMAN, (1940) A.C. 282.

[We pointed out in these columns sometime back that a careful examination of *Myers* v. *Elman* was necessary for elucidating the possible complications which the speeches of the learned Law Lords in the case might give rise to in the matter of the distinctive relations between counsel and client on the one hand and between counsel and court on the other. We are glad to publish hereunder an exposition of that case by Rao Bahadur K. V. Krishnaswami Aiyar.]

I

The recent pronouncement of the House of Lords in *Myers* v. *Elman*[1], has important bearings on Professional Conduct and calls for studied appreciation and careful understanding.

In that case, after the successful termination of an action founded upon conspiracy and fraud of the defendant, in which the plaintiff obtained a decree for a substantial amount, the plaintiff, who could recover nothing towards his decree from the defendant, applied to the court to order and direct the solicitor for the defendant to pay him his costs of the action on the ground that the solicitor had been guilty of professional misconduct. The applicant laid two charges against the solicitor; one, that he " delivered defences which he must have known or suspected to be false " and the other, that, he prepared and permitted his client, the defendant " to make affidavits of documents which were inadequate and false." Various points were raised in support of the defence ; but the principal amongst them were (1) that while there were rules of court giving jurisdiction to make orders relating to costs as between a solicitor and his client, there was no jurisdiction under which a party could ask for an order relating to costs against the solicitor appearing for the opposite party, and (2) that in the particular case, the solicitor had left the conduct of the proceedings largely to his managing clerk, who was a solicitor's clerk of ability and experience and that he was personally innocent of the accusation.

The trial judge, Singleton J., held that the solicitor was not guilty of professional misconduct in filing defences which put in issue

1. (1940) A.C. 282.

the charges of fraud and conspiracy against his client. But the learned judge found that the solicitor and his clerk " knew a great deal about the matters in question," and " as a result of a deliberate policy " adopted in the solicitor's office " in the conduct of the defence and in relation to discovery," the solicitor " increased the plaintiff's difficulties, added to the expense and obstructed the interests of justice, " and that he was in consequence guilty of " professional misconduct as a solicitor and an officer of court " and directed that he should pay to the plaintiff a share of the costs of the original action and the entire costs of the application.

On appeal, the Court of Appeal, Greer and Slesser L.JJ., Mackinnon L.J., dissenting, reversed the order of Singleton J. They observed that, assuming that the solicitor could be held liable for professional misconduct if he had done the act complained against personally, he was not liable in this case " inasmuch as he had appointed a fully qualified clerk to do such business and the act had been done not by the solicitor himself but by his clerk."

Before the House of Lords the appeal was heard by Viscount Maugham, Lord Atkin, Lord Russell, Lord Wright and Lord Porter. All the noble and learned law lords, except Lord Russell, agreed in reversing the decision of the Court of Appeal and restoring that of Singleton J. But Lord Russell differed on the question of fact, whether the evidence tendered established the charges. On the question of the existence of the jurisdiction to make the order and the duties and obligations of solicitors in acting for parties, he agreed with Viscount Maugham.

Viscount Maugham dealt first with the nature and scope of the jurisdiction. He held that the jurisdiction of the court to order a solicitor to pay costs personally was very different from the jurisdiction to strike him off the rolls or to suspend him, a jurisdiction which was strictly personal and related to the solicitor himself and his fitness to practice, and that in the former case, the court was merely exercising its jurisdiction over an officer of court and enforcing his duty to the court. The order to pay costs had also a twofold purpose to serve. It was not merely to punish the solicitor but also " to protect the client who has suffered and to indemnify the party who had been injured," and misconduct or default or negligence in the course of the proceedings was in some cases sufficient to justify such an order. The learned Viscount went on to say that if the solicitor's negligence in the discharge of his duty as an officer of court was sufficient to invoke the jurisdiction, he could not shelter himself behind a clerk, for whose actions within the scope of his authority, he was liable. He concluded with the expression of his concurrence with Singleton J., that the solicitor was guilty of " pro-

fessional misconduct in not insisting on his client disclosing the relevant documents" and "in preparing and putting on the file affidavits of documents which he knew to be very inadequate."

Lord Atkin said that the words "professional misconduct" themselves are not necessarily confined to cases where the solicitor himself is personally guilty. After all they only mean misconduct in the exercise of the profession; and they cover cases where a duty is owed by the solicitor to the court and is not performed owing to the wrong doing of the clerk to whom that duty has been entrusted. The confusion in the Court of Appeal, had arisen from the fact, that charges of professional misconduct have been generally brought up by a special procedure. He added. "It seems to be quite incorrect to suppose that the cases in which solicitors have been ordered to pay costs where there has been no personal complicity are cases in which, the court is exercising a kind of summary jurisdiction in contract or tort by way of awarding damages for breach of warranty of authority. The court is not concerning itself with a breach of duty to the other litigant but with a breach of duty to itself." He then put to himself the question "what is the duty of the solicitor" and answered it thus: "He is at an early stage of the proceedings engaged in putting before the Court on the oath of his client information which may afford evidence at the trial. Obviously he must explain to his client what is the meaning of relevance: and equally obviously he must not necessarily be satisfied by the statement of his client that he has no documents or no more than he chooses to disclose. If he has reasonable ground for supposing that there are others, he must investigate the matter; but he need not go beyond taking reasonable steps to ascertain the truth. He is not the ultimate judge, and if he reasonably decides to believe his client, criticism cannot be directed to him. But I may add that the duty is specially incumbent on the solicitor where there is a charge of fraud; for, a wilful omission to perform his duty in such a case may well amount to conduct which is aiding and abetting a criminal in concealing his crime, and in preventing restitution."

Lord Wright said: "Alongside the jurisdiction to strike off the roll or to suspend, there existed in the Court the jurisdiction to punish a solicitor or attorney by ordering him to pay costs, sometimes the costs of his own client, sometimes those of the opposite party, sometimes, it may be, of both.....The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice..... It need not involve personal obliquity. The term, professional misconduct, has often been used to describe

the ground on which the Court acts. It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfil his duty to the Court and to realise his duty to aid in promoting in his own sphere the cause of justice..... The jurisdiction is not merely punitive but compensatory." The noble and learned Lord then proceeded: "The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit nor can he escape the responsibility of careful investigation or supervision. If the client will not give him the information he is entitled to require or if he insists on swearing an affidavit which the solicitor knows to be imperfect or which he has every reason to think is imperfect, then the solicitor's proper course is to withdraw from the case. He does not discharge his duty in such a case by requesting the client to make a proper affidavit and then filing whatever affidavit the client thinks fit to swear to."

Lord Porter said that he rejected the contention that the summary jurisdiction of the court extended to relief only in cases of personal misconduct and neglect of duty. "It is misconduct in the way in which the work entrusted to his firm is carried on, not the personal misdoing of the individual, which gives rise to the exercise of the jurisdiction..... The Court is not enforcing a civil right but exercising its authority over the conduct of its officer." The noble and learned Lord concluded: "In any case I do not consider that the solicitor or his clerk has fulfilled the obligation of supervising to the best of his ability the swearing of a full and complete affidavit of documents." Lord Russell of Killowen who disagreed with the majority on the finding of the facts said: "It is, I think, immaterial that no professional misconduct is attributable to Mr. Elman personally. He would nonetheless have failed in the discharge of the duty which he owed to the Court."

On the pronouncements above quoted, understood with reference to the facts of the case, there can be no difficulty in appreciating the rule of conduct enunciated by the House. Though the case related to a solicitor, the principles apply equally to a practitioner in this country who in addition to pleading in Courts acts for the party and therein performs the functions of a solicitor. But the decision itself enunciated no new standards of professional conduct which the legal profession did not have for their guidance earlier. The obligations of a practitioner to the Court enunciated in the pronouncements, were never understood to be in any way different and are as old as the profession itself. *Hill's case*[1], where a solicitor was punished for having put in for his client "a long insufficient demurrer to a bill

1. (1609) Cary 27 : 21 E.R. 15.

exhibited against his client in which supposed demurrer were many matters of fact and other things frivolous and vain" furnishes adequate proof.

Nor is the jurisdiction a novel or new creation of the House of Lords. Viscount Maugham's judgment and the citations that he makes amply show that the jurisdiction to order costs against a solicitor is founded on his duty to the Court. Referring to the obligations of solicitors, Lord Hatherly said in In re *Jones*,[1] that they have not merely to "perform their duties towards their own client but also towards all those against whom they are concerned" referring thereby to their duty to the court. The jurisdiction did not depend on disgraceful or dishonourable conduct of the solicitor but on a mere negligence of a serious character the result of which was to occasion useless costs to the other party. It is obvious that occasions for the exercise of such jurisdiction will be rare and *Myers* v. *Elman* properly reminds the profession of the existence of the jurisdiction and its implications.

It would be of interest to know that in *Maharajah of Vizianagaram* v. *Lingam Krishna Bhupati*[2], counsel for the petitioner was directed to pay the costs of the opposite side thrown away by his neglect in the lower court. The foundation of the jurisdiction was not, however, explained in the judgment and it was not stated in terms that the practitioner was either guilty of professional misconduct or that he failed to discharge his obligations as an officer of court.

II

The jurisdiction of the court to deal with the solicitor as for professional misconduct and direct him to pay the costs of the opposite party, is, as has been explained, founded upon the obligations which he owes to the court as its officer and his failure to discharge those obligations properly. This necessarily leads us to consider how far those obligations reach and to what extent they impinge upon his other duties which he has to perform for and towards the client for whom he acts and whom he represents. The decision of the House of Lords itself recognises a distinction between the obligations of the solicitor in making certain forms of pleadings or raising certain issues and his obligations in making and presenting an affidavit of discovery. The solicitor in *Myers* v. *Elman* was also charged with professional misconduct in that "he had delivered defences which he must have known or suspected to be false." Singleton J., held that the solicitor was not guilty of professional misconduct in allowing the defences to be delivered. The Court of Appeal affirmed that

1. (1870) L.R. 6 Ch. App. 497.
2. (1908) 12 M.L.J. 473.

view and stated that " it was not professional misconduct in a solicitor to prepare and deliver on behalf of his client a defence which he might himself suspect contained misstatements or raised false issues and put the plaintiff to proof of his case." In the House of Lords, which upheld the view taken by the courts below, Viscount Maugham said: " I think it useful to observe here that there is this plain distinction between defences which consist—as they did here—of a denial of allegations and of untrue affidavits of documents. The defences are not on oath and they merely put the plaintiff to the proof of the allegations in the statement of claim." He added: " However guilty they (the parties) may be, an honourable solicitor is perfectly justified in acting for them and doing his very best in their interests, with, however, this important qualification, that he is not entitled to assist them in any way in dishonourable conduct in the course of the proceedings." Lord Atkin described the duty owed to the court as one " to conduct litigation before it with due propriety." Lord Wright observed : " There may indeed be circumstances in which a legal adviser has taken such action or so comported himself on behalf of a client as to go further than an honest advocate or solicitor could properly go. It is difficult and perhaps impossible to formulate any principle which would afford a general definition applicable to such cases." Singleton J., wisely said : " Nothing ought to be said which may prevent or tend to prevent solicitor or counsel from doing his best for his client so long as his duty to the court is borne in mind. A client is entitled to have legal aid in order to put the other side to proof of the case against him, and to test and probe that case and the evidence addressed. Thus the client is entitled to say that he denies the fraud or other matters charged and to have that defence placed on the record. He is entitled to have professional aid in regard to the maintenance of that defence before and at the trial." He concluded: " It is not sufficient evidence of misconduct, taken by itself, that a solicitor continued to act in the action notwithstanding that he was aware or was put on enquiry that the defendants were or might be raising false issues in it." It would seem to follow from the foregoing that where the pleadings contain affirmative allegations which the practitioner knew or must have suspected to be false, it may amount to professional misconduct on the part of the practitioner. As Dr. Johnson said, counsel are not to state what they know to be a lie.

The range of acts which a solicitor or any practitioner in this country has to do on behalf of the client in the preparation and conduct of a cause is very wide. The making of pleadings is but a very small part of it. Where is the line to be drawn to demarcate his duties for breach or for even negligent discharge of which, he would be liable as for professional misconduct, from those other

duties of his, in respect of which he has a discretion to act in the best interests of the client, untrammelled by any other consideration? For, it is obvious that the functions of a solicitor are not exhausted by ascribing to him the character of an officer of court merely. He is essentially a trusted representative and an agent for the client and his character and obligations as an officer of court arise only out of this primary character which he possesses as an accredited agent and in the course of discharge of those primary obligations. He is only secondarily and only in part an officer of court. While in the discharge of his duties in and in relation to the court his action and conduct are circumscribed by the limitations which his character as an officer of court might impose on him, he does not continue to bear that character throughout in respect of all his other actings in relation to his client, or on his behalf. In other words a solicitor acting for his client is acting in a much larger sphere than what would be connoted by his relation to the court as an officer of it and the scope of his actions and conduct as solicitor for his client, is, by no means, coterminous with the range of his duties as such officer. To hold otherwise, would cut at the very root of the position of the solicitor in the scheme of the administration of justice as a necessary middleman between the client and the court and an accredited representative of the client for whom he appears. The House of Lords recognise this distinction that the practitioner has duties towards his client which fall outside his obligations to court and are untrammelled by them. It is obvious that no practitioner is employed by a client merely to confess judgment or deliberately to expose the weakness of his case in the supposed discharge of the practitioner's obligations to court. Where then is the scope for the lawyer to present his client's case at its best, employing tactics and strategy where necessary?

The decision of the House of Lords, gives liberty of action to the practitioner in the matter of making pleadings and raising defences and issues. But there are many other varieties of acts for which a practitioner has to undertake responsibility on behalf of the client. It is not possible to enunciate them seriatim. In fact, their number is legion. But as a guidance to ourselves, we may lay down the following. Let it be a first rule that honourable conduct in all matters is to be studied and practised. There need, however, be no assumption that the duty of absolute disclosure enunciated with reference to affidavits of documents applied in respect of all acts which a practitioner has to do on behalf of his client and that as soon as a fact or a document comes to the knowledge of the practitioner which militates against his own case and lends support to that of the adversary, the maintenance of his honour requires him to hand up his client, as it were, disclose the matter to the Court in the assumed

discharge of his duties as an officer of Court and solicit a judgment in favour of the opposite side. The line may therefore be drawn by enunciating that no practitioner acting on behalf of his client shall do anything with the object of using the Court for perpetrating a fraud upon the opposite party or doing manifest injustice to him and thereby seek to make the Court an instrument of fraud or oppression. Subject to this duty which he owes to Court, the practitioner must conduct himself as an honourable man maintaining fidelity to the trust reposed in him and properly discharging his contractual obligations to the client.

In the judgment of Viscount Maugham, in referring to the nature of the application before the Court it is stated that the application was " in the light of the evidence and of the facts disclosed relating to the conduct of the solicitors "..... "to exercise the Court's jurisdiction to pay the costs *so* recovered from their respective clients." (The italics are mine.) It is also mentioned in the report that the applicant was not able to recover anything from the opposite party. These facts may suggest that the applicant sought, that the solicitor should disgorge that which he had absorbed to such an extent as to leave his client flaccid, and by way of a tracing order. But it is obvious that any such suggestion is not warranted by the grounds of the decision. The order would have been made against the solicitor, even if he had not enriched himself at the expense of his client and even if that client were in a position to meet the original decretal obligation.

SUMMARY OF ENGLISH CASES.

NAAS (LADY) *v.* WESTMINSTER BANK, LTD., (1940) A.C. 366 (H.L.).

Deed—Settlement executed by one party—Failure of other party to execute or give release deed—Effect—Settlement—If revocable.

Where there is an absolute and unconditional settlement it takes effect at once by the act of the settlor's executing it. This is complete when he delivers it as his deed. Consideration is not necessary and the settlor cannot revoke it. In the present case the Court of Appeal held that the settlor executed the settlement on the faith that the settlor's wife would execute it and give a release for which he stipulated and since she had not in fact executed the deed and eventually returned it unexecuted, the deed does not bind in equity. The House of Lords found,

Held [reversing the decision of the Court of Appeal (1938) 3 All. E.R. 652 and restoring the decision of Morton, J.], the settlement was binding on the settlor although not executed by his wife. Statement in *Luke* v. *South Kensington Hotel Co.*, (1879) 11 Ch.D. 121, (125) held to be too wide.

LISSENDEN *v.* BOSCH, Ltd., 1940 A.C. 412 (H.L.).

Election—Receipt of amount allowed under award by workman—If 'election' barring right of appeal as to portion disallowed.

The doctrine of 'election' is applicable only to cases arising under wills and deeds and other instruments *inter vivos*. It cannot apply to judgments or awards. Payment by a defendant of what has been found to be due from him does not operate without more to prevent the plaintiff from appealing for some further relief. It may be true that an award under Workmen's Compensation Act, 1925, is "indivisible" if not appealed from, but it is not an accurate statement of the position pending appeal. Appellant can appeal against a part of the award. Receipt of the amount awarded did not amount to election to bar the right of appeal. *Johnson* v. *Newton Fire Extinguisher Co., Ltd.*, (1913) 2 K.B. 111, overr.

FIFE COAL CO., LTD., *v.* YOUNG, (1940) A.C. 479 (H.L.).

Workmen's Compensation Act (1925), *S.* 1—"*Injury by accident*"—*Meaning—Disease before date of incapacity—Effect.*

The pressure on the peroneal nerve (caused by the crouching position in which he had to work) during a spell of work brought about the paralysis of the claimant's muscles which is described as dropped foot. In a claim for compensation,

Held, the claimant sustained a definite physiological injury in the reasonable performance of his duties and as the result of the work he was engaged in at the time of the injury. The employee is entitled to compensation. Gradual and steady extension of the meaning of "injury by accident" traced. Authorities fully considered.

MELLOR *v.* AUSTRALIAN BROADCASTING COMMISSION, (1940) A.C. 491 (P.C.).

Copyright—Music—Performing rights—Consent or licence conferring —If includes right to broadcast.

Appellants' pamphlet stated: "We have paid for the performing rights of every piece." "All our music is free for public performance." "We make one price cover both the music and the performing rights thereof." Bands having bought the music published by the appellants played the musical works in public and some performances were broadcast by the respondent, a corporation. In an action for alleged infringement,

Held, broadcasting was included in "performing rights" and respondent was not liable.

LETHBRIDGE *v.* INDEPENDENT ORDER OF FORESTERS AND ATTORNEY-GENERAL FOR CANADA, (1940) A.C. 513 (P.C.).

Constitutional Law—British North America Act, 1867, *Ss.* 91 *and* 92—*Acts of Provincial Legislature reducing interest on securities—Acts in "pith and substance" relating to "interest" under S.* 91 *and only indirectly relating to subjects under S.* 92—*Conflict with Dominion Act as to interest—Constitutional validity of the provincial Acts.*

The legislative assembly of the province of Alberta passed three Acts :—(1) Alberta Provincial Guaranteed Securities Interest Act, 1937, reducing the interest on securities guaranteed by the province ; (2) Alberta Provincially Guaranteed Securities Proceedings Act, 1937, providing that no proceedings should be brought in respect of such interest or in any way to enforce such security without the consent of the Lieutenant-Governor in Council ; and (3) The Provincial Securities Interest Act Alberta (1937) reducing interest on securities issued by the province.

Held, the Acts relate in substance not to borrowing but to payment of interest in respect of existing debentures and other securities at less than the contract rates. In pith and substance it relates to 'interest' a subject under S. 91 (19) of the British North America Act, 1867. Also they conflict with a Dominion Act (Interest Act, 1927). All three Acts are *ultra vires* the Provincial Legislature.

CAMERON *v.* PRENDERGAST, (1940) A.C. 549 (H.L.).

Income-tax—Amount received by an assessee (a director from his company as consideration for not resigning his directorship)—Liability to income-tax as profit arising from the office of director.

A director of a company agreed to continue as director of the company in an advisory capacity in consideration of the payment of £45,000. On a question whether the appellant was liable to income-tax in respect of the sums,

Held, the payment was one arising from the assessee's office and liable to tax under Schedule E of the Income-tax Act.

Hunter v. *Dewhurst*, (1932) 16 Tax Cases 605, distinguished.

(JAMES) & MILLWARD CO., LTD., *In re*, (1940) 1 Ch. 333.

Companies Act (1929), *S.* 225—*Voluntary liquidation—Judgment-creditor, if entitled to apply for compulsory winding up—Practice—Affidavit evidence founded on information and belief—Probative value.*

Where a company is in voluntary liquidation a judgment-creditor is entitled *ex debito justitiae* to an order for compulsory winding up and he need not show prejudice if winding up upon voluntary lines was allowed to continue.

Clauson, L.J.—" Where the onus is on the person opposing the winding up I would place but little reliance upon the affidavit of a liquidator founded on information and belief where the directors conversant with the whole matter do not put in any affidavit and are shielded from cross-examination."

A. LEWIS & CO., (WESTMINSTER) *v.* BELL PROPERTY TRUST, LTD., (1940) 1 Ch. 345.

Landlord and Tenant—Covenant not to use adjoining premises for business of sale of tobacco, cigars and cigarettes—Premises let for use as tea shop where cigarettes were supplied to customers on the premises—If breach of covenant.

There was a covenant not to use adjoining premises for 'business of sale of tobacco, cigars and cigarettes.' The landlords let the adjoining premises to an A. B. C. Tea Shop who supplied customers cigarettes at the premises. In an action for damages for breach of covenant against the landlord,

Held, one cannot fairly predicate of the tea shop that they are carrying on upon the premises the business of selling tobacco, cigars and cigarettes and the action must fail.

CAMDEN NOMINEES, LTD. *v.* FORCEY, (1940) 1 Ch. 352.

Tort—Contract between landlord and tenant—Tenant's Association advocating the withholding of rent to redress grievances against landlord—Liability for inducing breach of contract.

If *A* without justification knowingly interferes with a contract between *B* and *C* he commits an actionable wrong. The plaintiffs were the owners of a block of flats let upon tenancy agreements which were in standard form, each agreement containing *inter alia* (*a*) an obligation on the tenant to pay his rent, and (*b*) certain obligations on the landlord including that of lighting the staircase and landings and keeping them properly cleaned and swept and of maintaining constant hot water and central heating. There were 62 tenants in the block. Certain tenants complained that landlords were not satisfactorily carrying out their obligations. Some of the tenants formed into an association. The two members who were active in forming the association were sued for endeavouring to persuade their fellow tenants to break their agreements by withholding rent. The defendants contended that they were justified on two grounds namely (1) that they and those whom they would persuade to break their contracts have a common interest in making the landlords perform their obligations, and (2) that because the tenants on one side were weak and the landlords on the other are strong and take advantage of their strength, it is justifiable to use the weapon which would otherwise be wrongful.

Held, the defendants had no justification and must be restrained by injunction and are also liable for damages.

BLAIBERG. *In re* : BLAIBERG AND PUBLIC TRUSTEE *v.* DE ANDIA YRARRAZAVAL AND BLAIBERG (1940) 1 Ch. 385.

Will—Clause for forfeiture on legatee "marrying any person not of the Jewish faith"—If void for uncertainty.

A codicil contained, *inter alia*, the following clause : " ..... should any child or grandchild of mine at any time whether before or after my decease marry any person not of the Jewish faith such child or grandchild shall forfeit and be deprived of any interest or share under my said will or codicil and my said will or codicil thereto shall be construed as if such child or grandchild had been dead at the time of his or her contracting any such marriage." A granddaughter having married a person other than of Jewish faith, which marriage was later dissolved.

Held, the question whether or not a person is of the " Jewish faith " is something which lies in his or her own conscience and is a matter of belief. The condition is one far too uncertain for the Courts to give effect to and is void.

WILSON *v.* LONDON MIDLAND AND SCOTTISH RAILWAY CO. (1940) 1 Ch. 393.

Companies—Stamped proxies sent only to holders of stock of over £2,500 following the practice of the company—Object to ensure quorum—Smaller holders if legally entitled to claim equality of treatment and enforce it through Court—Proper remedy.

There were holders of stock to the amount of £1,000,000. What the directors did in practice was to send a stamped proxy to all holders who hold stock to the value of £ 2,500 and upwards. The object was to ensure the necessary quorum which was very large. It will take a good many stockholders of stock valued at less than £ 2,500 to make the necessary quorum. In a claim by smaller stockholders claiming similar rights,

Held, the question as to whether or not the practice is to be followed is a pure question of the policy of the company and the directors are entitled to take the course they did. If the stockholders think that the practice has to be changed they have to resort to ordinary constitutional methods in the company itself. They have no right to call for assistance from the Courts.

WELLS' WILL TRUSTS, *In re* : PUBLIC TRUSTEE *v.* WELLS, (1940) 1 Ch. 411.

Will—Annuity free of all deductions—If to be free of income-tax.

A gift was given by will in this form :—"I bequeath the following annuities free of duties to commence from the date of my

death of my said wife : an annuity of £ 350 during her life or widowhood to be paid free of all deductions by equal quarterly payments the first shall be paid three months after my death....."

Held, the annuity was not given " free of income-tax." 1939 Ch. 654, Not Foll.

REDDITCH BENEFIT BUILDING SOCIETY *v.* ROBERTS, (1940) 1 Ch. 415.

Practice—Defendant who had not entered appearance in time appearing at time of signing judgment and attempting to enter appearance—Judgment by default—If can be passed.

In an action on a mortgage the defendant had not entered appearance within time but received notice of application for leave to enter judgment in default of appearance. On the day fixed he wanted to enter appearance.

Held, a judgment ought never to go in default of appearance when the defendant is before the Court and whether he has technically appeared or not, is there and anxious to put himself in a position to defend.

BIRCHALL, *In re* : KENNEDY *v.* BIRCHALL, (1940) 1 Ch. 424.

Will—Bequest to children alive at testator's death and if any child shall die in testator's lifetime leaving child or children living at testator's death—Children of child dead at time of will—Rights of.

The testatrix provided that the residue of the trust moneys was to be held in trust for her children " living at my death.....provided that if any child of mine.....shall die in my lifetime leaving a child or children living at my death who being male attain the age of 21 years or being a female attain that age or marry, such child or children shall take the share which his or her or their parent would have taken if such parent had survived me."

Held, the children of a child already dead at the date of the will were entitled to share.

BOND *v.* NOTTINGHAM CORPORATION, (1940) 1 Ch. 429.

Easements—Support to adjoining premises—Removal by local authority without providing equivalent support after default by owner in carrying out clearance order—Liability to provide equivalent support.

The owner of a tenement is not entitled by his acts to remove the support to adjoining premises without providing an equivalent. Where the owner of the servient tenement fails to carry out a clearance order to demolish the premises and the local authority wants to demolish the premises, the local authority also is equally under an obligation to adopt that method of demolition which will not interfere

with the right of the owner of the adjoining premises to support from the building to be demolished. (1939) Ch. 847, affirmed.

CAPON, *In re* : THE TRUSTEE IN BANKRUPTCY *v.* KNIGHT & SONS, (1940) 1 Ch. 442.

Sale of Goods—Auctioneer providing funds for purchase of pigs—Purchaser removing pigs after signing note acknowledging receipt of the pigs (that pigs were auctioneers' property and could be removed and sold by them) —Bankruptcy of purchaser—Right to the pig.

Auctioneers had provided funds for purchase of pigs by a farmer who before removing them signed a note acknowledging receipt of the pigs and stating that pigs were auctioneers' property and could be removed and sold by them. On the bankruptcy of the farmer the auctioneers seized and sold the pigs and claimed to retain the sale proceeds against the trustees in bankruptcy. The auctioneers claimed that the farmer was their agent in the purchase of the pigs and the arrangement was to give them a security.

Held [affirming (1939) 4 All.E.R. 554], the farmer was not an agent of the auctioneers and the property in the pigs passed to him and the trustee in bankruptcy was entitled to the sale proceeds of the pigs.

A DEBTOR, *In re* : THE JUDGMENT CREDITOR *v.* THE JUDGMENT-DEBTOR, (1940) 1 Ch. 470.

Practice—Stay of execution "provided that 10 l. *be paid on the* 1*st February,* 1940 *and* 10 l. *per month thereafter"—Construction.*

An order contained the following provision :—

"And it is further ordered that execution be suspended provided that 10*l.* be paid on the 1st February, 1940, and 10*l.* per month "thereafter." The first payment was made on 1st February, and the next payment was not paid till 5th March. On 2nd March a bankruptcy notice was issued and the debtor applied to set aside the notice contending that he had the whole of the month of March in which to pay the second instalment and so there was no default.

Held, the word "thereafter" refers to the date on which the first payment is to be made namely 1st February and accordingly the last day for payment would be the 1st of every succeeding month and the application to set aside the bankruptcy notice must be dismissed.

TAYLOR, *In re* : MIDLAND BANK EXECUTOR AND TRUSTEE CO. LTD., *v.* SMITH, (1940) 1 Ch. 481.

Wills—Trust for voluntary associations—Validity.

A testator bequeathed his residuary estate in trust for the Bank staff association (a voluntary association) whose object was to give financial assistance to the past and present members of the staff or their dependants. The gift was directed to be held upon the trusts, set out in the constitution and rules of the association. It was contended that the gift was not charitable and was a gift to no named persons and the objects of the trust as found in the constitution and rules of the association were so vague and uncertain that the Courts cannot give effect to them and that therefore the residuary estate must be treated as undisposed.

Held, (1) the gift was not for charitable purposes alone; (2) the gift was to the association, that the hand to receive it being the trustee of that association; (3) where there is a gift to an unincorporated body of persons and nothing in the rules or the constitution of that body which prevents them from using the fund so given to them in any way they please, either by applying the capital or the income to any of the purposes therein set out or by putting an end to the fund altogether and distributing it among themselves the fact that there may be some difficulty in construing the exact meaning of the rules or the constitution is not a matter which can affect the validity of the gift itself.

SYKES, *In re*: YOUNGHOUSE *v.* SYKES, (1940) 1 Ch. 490.

Will—Option to purchase conferred by will—If can be exercised by executors of donee after his death.

Prima facie an option to purchase given by will to a named person is personal to him and does not pass to his executors or confer a transmissible interest. If the contrary is to be held there must be found, in the will giving the option, some indication that it is exercisable by the executors of the person to whom it is given.

In re *Cousins*, 30 Ch.D. 203, does support the proposition stated in Jarman on Wills, 7th Edition, Vol. I, at p. 731.

GILT EDGE SAFETY GLASS, LTD., *In re*, (1940) 1 Ch. 495.

Companies—Directors acting without requisite number of qualification shares—Liability for statutory penalties—Relief against future proceedings—Discretion of Chancery Courts to grant.

In consequence of reduction of capital of the companies the directors ceased to hold the requisite number of qualification shares but continued to act as directors. Proceedings were commenced against the directors by the respondents under Companies Act, 1929, S. 141 (5). The directors applied for relief from liability in respect of fines or penalties under S. 141 (5) and also in respect of future liability for acts done as directors.

Held, as the directors had acted honestly and reasonably they were entitled to relief against future liability. But their liability under the pending proceeding must be decided by those Courts.

GAUMONT-BRITISH PICTURE CORPORATION, LTD., *In re*, (1940) 1 Ch. 506.

Companies Act (1929), *S.* 135—*Inquiry into companies affairs by inspector appointed by Board of Trade—Examination of managing director —Presence of shorthand writer—If necessary—Refusal to answer question in his presence—Contempt of Court.*

A managing director, summoned by the inspector appointed by the Board of Trade to investigate the affairs of the company under Companies Act (1929), S. 135 refused to answer questions so long as any person (here a shorthand writer) other than the inspector was in the room.

Held, if it is a fact, that a shorthand writer to take down the proceedings as a record for the inspector's use in preparing his report is necessary then there is no question but that the inspector is entitled to have the shorthand writer present. The managing director is in effect guilty of contempt of Court. *Heart of Oak Assurance, Ltd.* v. *Attorney-General*, (1932) A.C. 392, Applied.

ROYCE, *In re* : TURNER *v.* WORMALD, (1940) 1 Ch. 514.

Wills—Legacy "for benefit of choir"—Construction—General charitable intention—Surplus to be applied cypres.

A legacy and a share of the residue was bequeathed "for the benefit of the choir."

Held, the gift is an impersonal gift for the advancement and improvement of the musical services of the church by means of a choir. There is a general charitable intention and the surplus funds must be applied *cypres*.

KING FEATURES SYNDICATE *v.* KLEEMAN, LTD., (1940) 1 Ch. 523.

Copyright—Drawing in two dimensions—Whether can be infringed by a toyfigure in three dimensions—Reproduction from a copy of plaintiff's work —Whether infringement of copyright in original work.

Where the artistic work in which copyright is claimed is a drawing in two dimensions (cartoons) it can be infringed by a figure in three dimensions such as (brooches or charms, plaster dolls and mechanical toys). It must be immaterial whether the infringing article is derived directly or indirectly from the original work. The standard is objective and the test is whether or not the original work or a substantial part thereof has been reproduced. If it has been, it is no answer to

say that it has been copied from a work which was itself, whether licensed or unlicensed, a copy of the original.

CLAYTON, *In re*: COLLINS *v.* CLAYTON AND READE, (1940) 1 Ch. 539.

Costs—Solicitor's lien—Charge limited to costs incurred in recovery of property.

Where solicitors had acted on behalf of the administrators of the estate (defendants in a summons for administration of the estate of an intestate) and in the course of the action some property was sold and proceeds were brought into Court, the solicitors asked for a charging order for all the costs of the action.

Held, the charging order should be limited to the costs properly incurred in recovering and preserving the money in Court.

TREBANOG WORKING MEN'S CLUB AND INSTITUTE, LTD. *v.* MACDONALD; (1940) 1 K.B. 576.

Clubs—Serving of intoxicating liquor to members—If sale of liquor—If requires justices licence.

In a prosecution of an incorporated member's club for selling intoxicating liquor without holding a licence,

Held, that the transaction which takes place in a member's club, when a member orders and pays for intoxicating liquor is not a sale but is rather deemed the transfer of a special property in the goods from all the other members of the club to the consumer in consideration of the price paid. The club does not require a justices licence to cover the serving of intoxicants to members.

REX *v.* CARMICHAEL, (1940) 1 K.B. 630.

Crimes—Indictment of father for incest—Evidence by father that subject of the charge was not his daughter though born in wedlock—Admissibility—Rule in Russell *v.* Russell, *if precludes such evidence.*

On 2nd September, 1912, the accused married *P* and there were two children of the marriage—*Elsie* born on 11th April, 1913 and *Sonia* born on 18th May, 1915. Throughout 1914 *P* lived at Cambridge and the accused in London. Accused used to visit the wife during week ends. There was evidence that about August, 1914, 9 months before the birth of *Sonia*, *P* was associating with a stranger *H* but there was no evidence of misconduct. In January, 1915, accused enlisted in the army and while he was away his wife committed adultery with *H* and on 17th November, 1916, accused presented a divorce petition and a decree for divorce was duly passed. On

10th July, 1918, accused married *G* and the daughters *Elsie* and *Sonia* lived with accused's mother till 1926 when they came to live with the accused and his second wife. In 1932 accused separated from *G* who became suspicious about accused's feelings towards *Sonia*. After that accused lived with *Sonia*, who since then gave birth to three children. In the divorce petition against his first wife and on other occasions the accused had acknowledged that he was the father of *Sonia*. The accused was charged with incest. The second wife *G* was cited as a prosecution witness. Accused wanted to ask her in cross-examination whether it was not the fact that the accused had informed her that he was not the father of *Sonia*. The Judge held *Russell* v. *Russell*, made the question inadmissible. Then accused in giving evidence for himself sought to prove that at the time of the offence charged he knew he was not the father of *Sonia* and that his first wife told him so. The evidence was disallowed on the ground that it would infringe the rule in *Russell* v. *Russell*, and the accused was convicted. On appeal,

Held, the ingredient of the offence is that accused should have had carnal knowledge with one "who is to his knowledge his..... daughter." Knowledge is vital to the commission of the offence. *Russell* v. *Russell* did not preclude the accused from giving any relevant evidence in support of his plea that he did not believe that *Sonia* was his daughter, including an admission or confession by her mother.

DIGBY *v.* GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD., (1940) 1 K.B. 643.

Insurance—Motor insurance—Indemnity against third party risks of policyholder and similar indemnity to authorised driver—Claim of policyholder against his driver—Rights under policy—Arbitration clause—If binding on driver.

An Insurance Company undertook to indemnify the policyholder in respect of any claim by any person including passengers in the car against all risks through or in respect of his car. The indemnity was to extend to any person driving the car with the owner's order or permission. The owner having been injured in a collision and failing in his claim against the owner of the other car, sued his own chauffeur who in turn claimed indemnity under the policy of insurance. It was contended that the policyholder could not be a claimant.

Held, the driver was entitled to be indemnified in respect of damages awarded to the policyholder against him. The chauffeur was bound by the arbitration clause in the policy.

RUBIE *v.* FAULKNER, (1940) 1 K.B. 571.

Motor driving—Offences—Learner driving under supervision of competent driver—Driving on wrong side leading to collision—Competent driver remaining passive—If can be convicted of aiding and abetting offence.

A person with a learner's licence drove the motor car in a bend of the road on the offside and as a result of the engine stopping there was a collision. The appellant, a competent driver, accompanying the learner, in conformity with the Motor Vehicles Regulations remained passive without warning the learner not to go to the offside of the white line on the road which the appellant occupying the back seat was able to see.

Held, the appellant by his passive conduct in circumstances in which something was needed to be done in order to fulfil the duties of a supervisor, aided and abetted the learner driver to commit the offence.

UNSWORTH *v.* ELDEN DEMPSTER LINES, LTD., (1940) 1 K.B. 658.

Workmen's compensation—Receipt of compensation by workman—Circumstances precluding common law remedies.

On 8th March, 1938, plaintiff while working on a certain ship to load the vessel was injured by a beam which fell on him. He received half wages during disablement. He did not know his right to damages and right to compensation under the Act.

Held, the workman was not receiving the money with knowledge that it was compensation under the Act. He was not precluded from enforcing his common law remedies. (1939) 3 All.E.R. 339 reversed.

MCQUACKER *v.* GODDARD, (1940) 1 K.B. 687.

Tort—Animal causing injury—Liability of owners—Camel—Whether domestic or wild animal—Question whether animal wild or domestic—If for Judge or jury.

A camel in a Zoo having bit the plaintiff while visiting the Zoo, the owners were sued for damages. The evidence was overwhelming that in fact camels are the oldest domesticated animals in the world. There was no evidence that the defendant knew that this particular animal was likely to do mischief.

Held, the defendant is not liable. The question whether an animal is wild or domestic is for the Judge to decide and not for the jury. The Judge takes judicial notice of the ordinary course of nature—in this particular case of the ordinary course of nature in regard to the position of camels, among other animals. The evidence was given merely to assist the Judge in forming his view as to what the ordinary course of nature in this regard, in fact is, a matter of which he is supposed to have complete knowledge.

EVANS *v.* OAKDALE NAVIGATION COLLIERIES, LTD., (1940) 1 K.B. 702.

Workmen's compensation—Certification of silicosis—Workmen receiving compensation on that day for previous accident—Extent of compensation for silicosis.

A collier met with an accident on 12-8-1935 while working for the appellant company. Several ribs were broken and he was paid compensation on the basis of total incapacity at the rate of 30*s.* per week, until 9-12-1936 and then reduced to 19*s.* per week. On 22-2-1937 the medical board certified the workman to be suffering from silicosis as a result of his employment and dated the disability back to 18-11-1936.

Held, the workman must notionally be regarded on 18th November 1936, as having then a full earning capacity which has been totally destroyed by the silicosis and the payment in respect of the first accident ought not to be taken into account.

SUNLEY (B) AND CO., LTD. *v.* CUNARD WHITE STAR, LTD., (1940) 1 K.B. 740.

Contract—Damages for breach—Failure of defendant to transport certain machine in due time—Machine idle for a week—Proper measure of damages.

The plaintiffs were contractors and the defendants undertook to transport one of plaintiff's " tractor and scraper " from one workspot to another. There was a delay of one week in carrying out the contract and plaintiff claimed damages. The evidence did not show that the work for which the machine was transported would have been finished earlier or that there was any loss of profits.

Held, plaintiffs were entitled to recover only nominal damages for depreciation, interest, maintenance of machine and wages. (1939) 3 All.E.R. 641, varied.

ONLO OSAKAYETIO *v.* ARNOLD LEVER AND CO., LTD., (1940) 1 K.B. 750.

Contract—C.I.F. contract for purchase of timber—Insurance—Increase of premium for covering war risks to be for buyer's accounts—Shipping cargo in belligerent ship—Buyer if liable for increase of premium.

In a C.I.F. contract for purchase of timber there was an insurance clause providing that any increase in premium payable for covering war risks (according to institute war and strike clauses in force at the time of attachment of the insurance) in excess of prevailing rates to be for buyer's accounts. The shippers chartered a Spanish (then belligerent state's) ship covering the cargos with insurance at a

rate in the discretion of the underwriters. In a claim against buyers for the excess in the premium rate,

Held, the claim failed. There was no ruling rate for Spanish ships and buyers were liable only for scheduled rates of premium: (1939) 4 All.E.R. 88, affirmed.

IMPERIAL SMELTING CORPORATION, LTD. *v.* JOSEPH CONSTANTINE STEAMSHIP LINE, LTD., (1940) 1 K.B. 812.

Contract—Charterparty—Frustration by accident to ship—Onus of proving that frustration was or was not self-induced.

The claimants (the charterers) claimed damages for failure to load. The respondents (shipowners) pleaded the destruction of the ship as a navigable unit (by reason of the bursting of a boiler) and claimed that the contract was thereby frustrated, without liability on their part. The claimants in reply stated that the frustration arose from the default of the respondents, who are not entitled, therefore, to rely upon it.

Held, as a general rule a party seeking to recover compensation for damage must prove that the party against whom he complains was in the wrong. When respondents have proved the accident causing the destruction of the ship, the onus of ultimately satisfying the tribunal that the ship was at fault rests on the claimants. Whether such onus has been discharged must be judged by applying the following principles—namely (*i*) if the accident was such as to raise a presumption of negligence the onus is on the owner to destroy that presumption; (*ii*) if the accident was such as to afford no proof of negligence the onus is on the charterers to prove negligence in fact; and (*iii*) if the onus is upon the owner under the first principle, that onus is discharged by proving facts from which the inference that the accident was not caused by negligence is as strong—that is, equally consistent with the facts—as is the inference that it was caused by negligence. (On the facts the claimants failed to discharge the onus and the claim was dismissed.)

ETTENFIELD *v.* ETTENFIELD, (1940) P. 96.

Husband and wife—Separation deed—Birth of child—Evidence of spouses as to non-access—Admissibility.

It was found that the husband left his wife about August 6, 1935. Parties orally agreed to live apart, the husband making a weekly payment to his wife. The wife gave birth to a child on May 26, 1937. The question arose whether the husband could give evidence of non-access.

Held, (1) The rule in *Russell* v. *Russell* that evidence tending to bastardise or legitimise a child conceived and born during wedlock

cannot be given by either spouse is absolute, and applies, not only when the parties are living together, but also when they are separated either by a decree of a Court of competent jurisdiction or by their own volition. (2) Where the only evidence of adultery in support of a husband's petition is the birth of a child to the wife (*a*) if the parties have been separated by the decree or order of a Court, the husband need prove no more than the date of the decree or order and the date of birth of the child. If it must have been conceived after the date of the decree or order, there is a *presumptio juris* that it is a bastard. The wife may rebut that presumption if she can, but she must do it by evidence other than her own; (*b*) where the parties have voluntarily separated, whether by deed, writing under hand, oral agreement, or agreement implied from conduct, the husband cannot give evidence of non-access, but he can prove that fact by any means open to him other than his own evidence. The presumption is that the child is legitimate. If the husband leads evidence to rebut that presumption, the wife can call, but cannot herself give evidence in support of the child's legitimacy. Case-law discussed. Decision of *Langton, J.*, in (1929) 2 All.E.R. 743, reversed. Leave to appeal to House of Lords given.

JOTTINGS AND CUTTINGS.

Mr. R. Satyamurthi Aiyar.—Mr. R. Satyamurthi Aiyar, Master of our High Court, has been selected by the Central Government to serve as a Judicial Member of the Appellate Tribunal, Income-tax, constituted under S. 5-A of the Indian Income-Tax Act, 1922. Mr. Satyamurthi Aiyar has been a member of the Provincial Judicial service since 1919. Starting as a District Munsiff, he became Assistant Registrar, High Court, in 1926 and thereafter has held in succession the posts of Official Referee, Deputy Registrar and Master. He also acted as Registrar for a short spell during this year. He is the author of a number of books:—The Court-Fees Act, The Civil Procedure Code, etc. It may be remembered that some time back the Government of Madras entrusted him with the task of bringing to light the loopholes as well as the difficulties experienced in the working of the Court-Fees Act, with a view to the framing of suitable amendments thereto. The Appellate Tribunal, Income-tax is vested with important functions, being as it were a sort of second appellate authority in income-tax matters. We wish Mr. Satyamurthi Aiyar a career of usefulness and success in his new sphere of service.

Vagaries of Draftsmanship.—If anywhere absolute precision of language is eminently essential it surely is in the sphere of legislative

enactments. In these, however, as in other products of the human mind, the desiderated precision is sometimes conspicuous by its absence, with the consequence, not altogether displeasing to members of the legal profession, of providing ample room and verge enough for debate in the Courts as to the purview of the statutes, so lacking, which come up for consideration. The late Lord Thring, who for many years held the important office of Parliamentary Counsel, compiled an admirable work treating of this subject, and incidentally gave various examples of how not to achieve the desired clarity; in short, a number of what nowadays are called, although why is not very obvious, "howlers." Among these which he cites is that of the Queen's Counsel, also a member of the House of Commons, who in 1865 drafted an amendment to a Bill then before the House, which ran thus: "Every dog found trespassing on inclosed land unaccompanied by the registered owner of such dog or other person who shall on being asked give his true name and address, may be then and there destroyed by such occupier or by his orders." This piece of draftsmanship, oddly enough, was not accepted by the sponsors of the Bill or by the House!—*L. T.*, *1940*, *p. 148*.

Some Amusing Slips.—A story has come down to us from the days when Ireland was represented in the House of Commons and when that country sent not a few who enlivened the oftentimes dull proceedings by some exceedingly witty interjection, or occasionally by what Calverley called in the delightful way a "paronomasia, play upo' words," or, in simple language, a bull. On one occasion an Irish member drafted a Bill wherein it was provided that such and such proceedings should take place annually on 1st August, "unless that day fell upon a Sunday, Good Friday, or Christmas Day." It need hardly be said that the Bill, at any rate in this form, did not get into the statute book. But one quite as bad, or nearly so, was perpetrated by the draftsman of the Bill which eventually reached the statute book as the Darlington Improvement Act, 1872, in which the term "new building" was defined thus: "Any building pulled or burnt down to or within 10 feet from the surface of the adjoining ground." But slips are also to be found not infrequently in our older Acts; thus in the Registration Act, 52, Geo. 3, c. 146, the fruit of penalties is to be divided between the informer, who gets one-half, and certain charitable purposes, to which the other is devoted, while the only penalty set forth is transportation for fourteen years!—*L. T.*, *1940*, *p. 148*.

Criminal Statistics.—The Criminal Statistics for England and Wales for 1938, which were recently issued by the Home Office, show

that the total number of persons found guilty of indictable offences during the year was 78,463. There were 84 cases of murder of persons over one year of age known to the police (compared with 78 for the previous year); and in 30 cases the murderer or suspect committed suicide. Nine persons were hanged, in nine cases sentence of death was commuted to penal servitude for life, and in one case the convicted person was ordered to be detained during His Majesty's pleasure. During 1938, 5,263 persons committed suicide and 3,303 cases of attempted suicide were reported to the police. The number of persons found guilty of violence against the person (indictable cases) was 1,583 or 0.2 per cent. of the total number of offences recorded. Non-indictable assaults numbered 10,699 or 1.4 per cent. As to larceny, there were 78,463 offenders, of whom 68,679 were males and 9,784 females. Of those found guilty of larceny, 10,814 or 13.7 per cent., were charged with breaking and entering. Less than a quarter of these were adults and 37 per cent. were under the age of fourteen. It appears that in general the worst age groups for boy offenders is from fourteen to sixteen, and for girl offenders from fifteen to nineteen. The incidence of crime is nearly eight times greater among males than among females. The total number of persons found guilty of drunkenness in 1938 was 52,661, or 236 more than in 1937. The increase in this class of offence which has been recorded since 1932, when the figure was 33,100, thus continuous. Once again wide local variations throughout the country are recorded in the proportion of adult offenders placed by courts of summary jurisdiction under the supervision of a probation officer. An analysis of records of the Criminal Record Office at Scotland Yard of persons found guilty of criminal offences in 1932 discloses the fact that the great majority do not offend again. Of the older persons 90 per cent., of the younger over 70 per cent., were clear of any further charges during the ensuing period of five years; while these statistics show that the proportion of offenders convicted of further offences is higher among the young than the older people and decreases progressively with the increase of age. In all age groups the re-conviction rate was lower for the period from 1933 to 1938 than for the previous five years.—*S.J., 1940, p. 157.*

Enthusiasm in the Law.—Long ago Lord Bacon laid it down that every man is a debtor to his profession, meaning thereby, we may assume, that in the legal sphere the lawyer is under obligation to give of his best on behalf of the client by whom he is instructed—an injunction which most members of the profession fulfil to the letter. In one of the letters in Scott's Redgauntlet, Alan Fairford, writing to his friend Darsie Latimer, says, "You know my father considers every moment taken from the law as a step downhill; and I owe

much to his anxiety on my account, although its effects are sometimes troublesome," and one can well imagine that Scott was stating his own experience, his father being one of the old school who thought law was everything and must on no account be neglected if his son was to make any headway in the legal world. Some, no doubt, exhibit an enthusiasm in the practice of the law which puts the less excitable practitioners to shame. Most of us are familiar with the story, certainly ben trovato if not literally accurate, of Baron Parke, who in his enthusiasm took what he called "a beautiful demurrer", to the beside of a sick friend to cheer him into convalescence—a result which it is to be hoped had the desired effect. In other ways, too, the Baron showed his enthusiasm for legal correctitude by insisting that the record should be above suspicion in the matter of form, nothing giving him more pain than to find it lacking in precision and clarity; these he regarded as essential. Great lawyer he certainly was, but he had at least one predecessor on the Bench who was equally enthusiastic for law and its practice. This was Mr. Justice Buller of whom, in another connection, it was said that, while he was considered by the male sex as the most learned of lawyers he was stigmatised by the ladies as the most cruel of judges because to him was attributed the ungentlemanly dictum that a husband was entitled to beat his wife, provided that the stick with which the castigation was administered was no thicker than his thumb! Like many other pungent remark attributed to men in a prominent position the accuracy of this dictum has been gravely doubted, and surely he is entitled to the benefit of the doubt. More germane to our present purpose was his dictum that his idea of heaven "was to sit at Nisi Prius all day, and to play at whist all night"!—*L.T., 1940, p. 210.*

No Certain Bliss.—"Was your marriage happy at the start?" Counsel recently asked a witness in the Divorce Court, and Mr. Justice Bucknill said: "We cannot assume that marriage is a state to which the word "happy" can properly be applied. It is enough if a spouse can say of it that it was even normal. 'Was your marriage normal?' is a much more sensible question." Constant dealing with matrimonial causes seems to make judges chary of talking too lightly of happiness. One recalls the case of an eloquent advocate who wound up a speech before Mr. Justice Cresswell with the words: "I hope your lordship will decree a separation between these parties and let this lady pass the rest of her days in peace and happiness." But the judge said: "This Court has no power to decree that the lady shall pass the rest of her days in peace and happiness, but what it has power to decree is that these persons shall be judicially separated." On the whole, both in marriage and separation, it is

probably wise to leave out "lived happily ever after." *S.J., 1940, p. 181.*

Judges' Mannerisms.—Of late the glamour value of Bench and Bar has caused more traders than usual to drag them into advertisements for the stimulation of sales. One of these, designed to sell a species of chocolate bean, said to be good for the nerves, told (with comic illustrations) the story of a barrister who was put off his speech by an eminent judge's habit of tapping absent-mindedly on his desk, but who cured his lordship with a timely gift of a packet of the wonderful beans. Well, that, at any rate, was a better way of dealing with the situation than the one adopted by an Irish Barrister who, irritated by the mannerisms of Crampton, J., interrupted his argument before the full Court, saying: "I really can't proceed while Judge Crampton is nodding his head at me and the smack of his lips every five minutes is like the uncorking of a bottle." The old judge, who was a most polished gentleman, did not fly into a rage at this rudeness, but said: "I am really not aware of these peculiarities and I am grateful for the rebuke. No man is conscious of his own peculiarities."—*S.J., 1940, p. 181.*

Dr. Johnson on Law and Lawyers.—To praise Boswell's Life of Johnson is in these days a work of supererogation; it is a classic in the domain of biography, but like many another classic it is apt to be taken as read and to be left on the shelf along with many another volume which has achieved distinction in the world of literature.

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It is certainly a very pleasant occupation for a leisure hour to turn to some of the many references to the legal world and its work as viewed by the virile mind of Johnson. In 1768, Boswell, who loved to draw his mentor out on questions of casuistry, asked Johnson whether as a moralist he did not think that the practice of the law did not in some degree hurt the nice feeling of honesty. To this, it will be remembered, the doctor replied that he did not think so, provided that one acted properly, meaning, thereby, that the lawyer must not deceive his clients with false representations and must not "tell lies to a judge." The pertinacious Boswell, not content with this, continued his cross-examination by the question, "But what do you think of supporting a cause which you know to be bad?" "Sir," answered Johnson, you do not know it to be good or bad till the judge determines it.....You are not to be confident in your own opinion that a cause is bad, but to say all that you can for your client, and then hear the judge's opinion." Even this failed to satisfy the curiosity—for it was only this—of Boswell, who, we may be sure, cared not a jot whether the case he chanced to be supporting

in court was really good or bad. But it is worth being reminded of Johnson's practical view of the moral aspect of the question which "Bozzy" affected to be so much worried about.—*L. T., 1940, p. 239.*

What's in a Trade?—Those witnesses who attach so much importance to the elegant description of their callings would do well to remember the story of a particularly self-confident young barrister who began rather badly with the examination of his first witness in his first case. "You are a butchah, arn't you?" he began. "No, sir," came the sullen reply. "Then you are a bakah, arn't you?" "No sir." There was a titter in court, but the young man rose magnificently above it. "Really", he said, "it doesn't matter a damn what you are!" Still, sometimes the question of occupation can be made to tell. In the course of the great Baccarat Case, Sir Charles Gill rose to cross-examine a fashionably dressed "swell" who stood in the box flourishing a tasselled cane. "Put that stick down and attend to me," he began. "What are you?" "What am I?" repeated the witness, taken aback "Yes, what are you?" said Gill in his nastiest tone. "What do you do for a living? What good are you to the world?" After that the witness could only murmur very pitifully: "I'm a master of foxhounds."—*S.J., 1940, p. 269.*

Outstanding Judges.—In each generation there is usually at least one member of the Bench possessing a personality which finds expression in some notable dicta, not always, it may be, strictly germane to the matter being forensically debated, and not even on purely legal topics which excite the attention of those who follow the proceedings of the Courts, but dicta, it may be, of a humorous character, or sometimes in the form of a scathing comment on men and things. In recent years the most conspicuous instance of a judge having such characteristics was, of course, Mr. Justice Darling, whose good things, if perhaps scattered with a too profuse hand, were usually of excellent quality giving great delight to those in his court, unless it may be those who were victims of his criticisms, and to them these could scarcely make a potent appeal. In an old notebook upon which the present writer lighted the other day he found preserved one or two of Mr. Justice Darling's dicta which seemed to be too good to lose, several of which may be of interest to readers. The earliest of these scattered memoranda takes us back to the days before that learned judge had reached the Bench, and recalls an early effort by Mr. Darling, as he then was, in an action which was tried by Baron Huddlestone. Darling was for the plaintiff, his opponent being A. G. C. Liddell, who later filled the office of ecclesiastical secretary under the Lord Chancellor, and who left us a singularly attractive

volume of reminiscences bearing the modest title "Notes from the Life of an Ordinary Mortal," which is full of good things. There he told us that, when still practising at the Bar, he appeared for the defendant in an action which was tried by Baron Huddlestone, the plaintiff being represented by Mr. Darling. The defendant was a blackman and a Parsee, and when he went into the witness-box to give evidence some discussion took place as to how he should be sworn. Eventually it was settled that he should unbutton his waistcoat and take the oath with his hand thrust inside a coloured thread which encircled his waist. Observing this quaint ceremony with no little interest, Mr. Darling quietly remarked, "The thread of the Parcae," thus giving promise of his future distinction as a master of shrewd and witty comment. Then there was his explanation that the maxim *Ne sutor ultra crepidam* has no application to anyone exercising judicial functions; it applies only to "suitors." Many will also remember his remark when it was sought to justify the cross-examination of a prisoner as to character on the ground that he had called the prosecutor a liar. Mr. Justice Darling thought that the proposed cross-examination was surely inadmissible seeing that the prisoner, under the stress of cross-examination, merely said of one man what the Psalmist said of all men!—*L.T., 1940, p. 287.*

BOOK REVIEWS.

THE CODE OF CIVIL PROCEDURE by Messrs. V. V. Chitaley, B.A., LL.B., Nagpur and K. N. Annaji Rao, B.A., B.L., Advocate, Madras, Volume III (3rd Edition). Published by The All India Reporter, Ltd., Nagpur. Price Rs. 36 per set.

This is the third and last volume of the third edition of the commentaries to the Civil Procedure Code by V. V. Chitaley and K. N. Annaji Rao and D. V. Chitaley. This work has taken a leading place among the books of reference on the Civil Procedure Code, the other commentaries having gone out of date without any recent editions being brought out. Its leading place is also due to the fact that it gives all the learning in the other works as well. Effort has been taken not to omit the reference to any case whether important or otherwise. The only matter for regret is that of the cases reported in the non-official journals, references are given to the All India Reporter alone even as regards the years prior to its publication thus causing inconvenience to those who have only the non-official journals published in such years. The scheme of the work is well known and has been followed in the authors' commentaries on the Criminal Procedure Code and the Indian Limitation Act. In common with these works, there is no index of cases referred to in

the body of the work. The volume under review deals with the first schedule of the Civil Procedure Code after Order 30 and the later schedules and the appendices. This edition fully maintains the level of its predecessors and will be used widely by the members of the Bench and the Bar.

THE LAW OF PARTNERSHIP IN BRITISH INDIA by S. T. Desai, B.A., LL.B., Barrister-at-law, 514 pages. Published by the author at Hughes Road, Bombay. Price Rs. 8.

It is with great pleasure that we welcome the publication of this treatise on the Law of Partnership. With the progressive industrial growth of India fresh and novel problems bearing on the rights and liabilities of partners *inter se* and towards the outside world are bound to occur increasingly. A book dealing exhaustively and in a dependable manner with the substantive as well as the procedural law on the subject had been a longfelt want and the present publication goes a considerable way in meeting that requirement.

The Book is laid in four parts. Part I deals with the Indian Partnership Act, 1932 and provides an adequate commentary on the various sections. Part II is devoted to Practice and Procedure with special reference to the various questions that arise in suits by, against, or between partners. Part III sets out the law of insolvency affecting partners and partnerships and Part IV contains a discussion of illegal partnerships. The English Partnership Act, 1890 and the superseded provisions of the Indian Contract Act regarding partnerships are set out in Appendices. An inclusion of the rules framed by the various Provincial Governments would have added to the utility of the work and made it complete in all respects.

On some matters it may be possible to take a different view from that presented by the author. For instance on page 37 the author has expressed the opinion that there can be a joint family business among converts from Hinduism to Christianity to which the Hindu joint family law can apply and reliance is placed on *Ghosal* v. *Ghosal*, 31 Bom. 26, in preference to *Tellis* v. *Saldanha*, 10 Mad. 69. It is doubtful whether the Bombay view could now be followed in view of the decision of the Privy Council in *Kamawati* v. *Digbijai*, 43 All. 525. Again, in stating the effect of non-registration of firms the author has remarked on p. 280 that S. 69 (2) "absolutely debars a Court from entertaining a suit instituted without compliance with the provisions relating to registration." It is certainly arguable whether the section postulates a total lack of jurisdiction in Courts or merely makes the exercise of jurisdiction contingent, so as to permit of a waiver or the curing of the irregularity arising from non-compliance with its provisions.

On the whole the book contains an accurate statement of the principles of partnership law in a lucid and attractive form. The get up and printing are excellent. We can heartily commend the book as a very useful contribution to the literature on the subject.

THE LAW OF EASEMENTS, by B. K. Amin, B.A., B.SC., Barrister-at-law and C. G. Sastri, B.SC., LL.B., 544 pages. Published by Messrs. N. M. Tripathi & Co., Bombay. Price Rs. 8.

This is a handy volume in which the authors have endeavoured to expound the law relating to easements in India. The statement of law takes the form of commentaries to the sections of the Indian Easements Act. In addition to easements allied topics like Party Walls, Fisheries, Ferries, Irrigation Rights, Public Rights, etc., have also been dealt with. The citation of cases, English and Indian, is both adequate and satisfactory. Critical examination of such points, as for instance, the capacity of a trespasser in occupation to acquire an easement right under S. 12, the meaning of the expression " as of right " in S. 15, the applicability in this country of the principles in *Colls' case* in relation to easements of light, etc., has not been avoided.

The discussion relating to the Madras Irrigation Cess Act and the legal consequences of cultivation with the help of water accidentally overflowing from a Government source, as found on pp. 343-344 of the book in particular, will have to be entirely recast in view of the Madras Irrigation Cess (Amendment) Act, 1940 (Madras Act VI of 1940). The latter enactment has been in force since April last but seems to have escaped the attention of the learned authors.

The differences between the English and Indian Law—wherever they exist—have been carefully brought out. The treatment of the subject is throughout lucid and we are sure that the book will prove highly useful to students and lawyers alike.

LAW OF ADVERSE POSSESSION by M. Krishnaswami, M.A., LLM., Advocate, Dharwar, Professor, Law College, Poona. Published by M. Krishnaswami, M.A., LL.M. at his residence, Gibb Town, Dharwar.

Adverse Possession is a subject very familiar to the lawyer in India, as very often it is raised as a plea for perfecting the title of wrongful possession of a piece of property. No doubt the law on the subject has been evolved mainly due to the numerous decisions of the various High Courts and the Judicial Committee of the Privy Council.

The background for a proper perspective of the theme has been prepared for us in the first four chapters by the author of this useful volume when he dilates upon the theoretical aspect of the subject, referring to its early concept in Roman Law as well as British Jurisprudence. The next few chapters deal with the nature of adverse possession and the variety of instances where it is recognized as such. Abundant case-law references are throughout furnished to the reader and the attempt to reconcile the conflicting decisions upon the subject in the various Courts is really commendable.

We cannot however conclude without a little disagreement with the author in his deliberate intention to omit a general index to this volume, because, we believe, the usefulness of a general index can never be overrated in any law book, apart from a special index of cases required to aid an easy reference.

THE INDIAN COMPANIES ACT by Menezes and Shah. Published by Messrs. Vora & Co., Ltd., 3, Round Building, Kalbadevi Road, Bombay, 1940 Edn.

The recent amendment of 1936 to the Indian Companies Act has introduced nearly a hundred new sections in addition to the repealing of certain old provisions. The complex nature of modern enterprises in commercial, industrial and banking concerns necessitated the substantial change in the Act to meet the growing demand for fresh legislation pertaining to the management of Joint Stock Companies as well as their amalgamation and winding up. We have further a few sections in the Act devoted to companies outside India and those mainly carrying on a banking business. We cannot but agree with the authors in their opinion in the preface that instead of a separate chapter in the Companies Act, a separate Act for reforming Indian Banking just on the same lines as the recent Insurance Act would have served the interests of this country better.

The scheme of this book discloses no doubt a meticulous care in commenting and criticising the Act with timely references to both English and Indian authorities. Apart from its usefulness to the practising lawyer, the book bids fair to be of great help to the business world in general. The table of contents and the index of cases add to the usefulness of an otherwise handy volume upon Company Law.

THE LAW OF FATAL ACCIDENTS IN INDIA by M. M. Aslam Khan. Published by the Sufi Publishing House, Pindi Bahauddin, Punjab. Price 2-8-0.

This small treatise upon the law relating to fatal accidents evokes our appreciation, even at the outset, for the author's selection

of such an untraversed, though quite an important, piece of legislation on the Statute Book. Had the law remained in the form in which it was before the Act of 1855 was brought into force, no person's relatives, surviving him after his death due to the fatal accident arising from any of the causes mentioned in section I of the Act, could maintain an action against the persons responsible for the fatal injuries. But the Act of 1855 brought about a salutary change in the existing law in that an exception to the rule '*actio personalis moritur cum persona*' made it easy to the executor and administrator of a deceased person to sue the person who was responsible for the fatal accident. The later amendments of 1871 and 1914 to the Act improved the scope of the Act and met the need as then was felt for fresh legislation.

The Act itself is a very brief one of about four sections and the author deserves the thanks of the legal profession for having made a good research of the Case-law upon the subject, both English and Indian, and bringing it up to date.

This commentary is a very necessary, though a long neglected, attempt, and is rendered more so owing to the number of fatal accidents that has been on the increase with the growing volume of road traffic in our cities. The discussion of the amount of damages recoverable under particular circumstances is what makes this little volume of 55 pages compel the immediate notice of the legal profession.