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DEFAULT CLAUSE IN CHIT FUND SECURITIES.

The security bond given by a prize-winner in favour of the karaswan (or stake-holder) of an auction-chit-fund is intended to secure the payment of the future subscriptions due by the prize-winner. The amount secured by the bond includes the premium charged against the prize-winner for distribution among the "non-benefited" subscribers by way of solatium to them. That distribution takes the shape of a deduction from the amount of individual subscription payable for the auctioned instalment.

An illustration of the working of an auction-chit-fund, the karaswan and the subscribers of which are content with a moderate rate of interest, may be given here. A is the karaswan, and B, C, D and E are the four other subscribers. The annual subscription payable by each member is Rs. 1,000, and he is to pay at that rate for five instalments (or years). The total subscription for the first instalment, (*viz.*, Rs. 5,000) goes to the karaswan, and that for the last instalment goes to the subscriber who has not drawn the prize at any of the intermediate instalments. The subscription at each of these intermediate instalments is available for loan to the successful bidder at the auction. The member who has the most pressing need for the loan offers the highest premium or bonus in consideration therefor, *i.e.*, he offers to accept the lowest proportion of the total subscription (*viz.*, Rs. 5,000). Accordingly, he is declared the prize-winner.

The chit-kararnama takes care to provide that the premium is to be not less than Rs. 500 so as to ensure a reasonable minimum usury or compensation for the grant of the loan. If at any particular auction, no member is willing to offer the minimum premium of Rs. 500, the kararnama prescribes that the prize is to be decided by casting lots and the prize-winner by the event of the lot has to pay the minimum premium of Rs. 500.

The security bond to be given by the prize-winner as a preliminary to his receiving the prize-money, will purport to be for the full amount of the instalments yet to come.

Let us take the case of C in the following tables. He is the prize-winner at the 3rd instalment; the premium offered by him is Rs. 600; that sum is divisible between D and E who are by then the only non-benefited subscribers. The security bond to be executed by him will purport to be for Rs. 2,000, being the amount due for the fourth and fifth instalments yet to come. The bond will recite that a sum of Rs. 2,000 was paid back to C in respect of his subscriptions for the past two instalments; and it will further recite that excluding the premium of Rs. 600, the actual cash consideration paid by the karaswan to C was Rs. 1,400.

In fact and truth, as a result of the prize, C will get Rs. 3,400 net, *i.e.*, after deducting the premium of Rs. 600 and a further sum of Rs. 1,000 due for the third instalment. Rs. 2,000 out of the Rs. 3,400 represents substantially his past subscriptions, which aggregated to Rs. 1,750, with interest thereon at a little less than 10 per cent. The bond will contain the usual default clause that if C should fail to pay any of the future instalments on the due date, the entire balance of the secured debt of Rs. 2,000 and interest thereon at a stipulated rate will be payable from the date of default.

The accompanying tables require no further elucidation.

TABLE I.

Time of Prize.	Prize-Winner.	Amount of premium, and divisible among whom.	Nominal amount of the security bond, *i.e.*, the amount of the future instalments payable by the prize-winner.	Recitals of consideration in the security bond.	Total net cash received by the prize-winner deducting his subscription for the auctioned instal-
1	2	3	4	5	6
1925 January.	A	Nil.	Rs. 4,000	Rs. 4,000 paid in cash.	Rs. 4,000.
1926 January.	B	Rs. 750 divisible among C, D & E at Rs. 250 each.	Rs. 3,000.	(i) A recital that as per a separate voucher, B received Rs. 1,000 the full amount of his past subscription, (ii) and a further recital that Rs. 750 in the way of premium, and Rs. 2,250 in the way of cash received by B, go to make up the Rs. 3,000 for which the bond is passed.	Rs. 3,250.
1927 January.	C	Rs. 600 divisible between D & E at Rs. 300 each.	Rs. 2,000.	(i) A recital that as per a separate voucher, C received Rs. 2,000, the full nominal amount of his past subscriptions, and (ii) a further recital that Rs. 600 in the way of premium, and Rs. 1,400 in the way of cash received by C, go to make up the Rs. 2,000 for which the bond is passed.	Rs. 3,400.
1928 January.	D	Rs. 550; it goes to E alone.	Rs. 1,000.	(i) A recital that as per a separate voucher, D received Rs. 3,000, the full nominal amount of his past subscriptions, and (ii) a further recital that Rs. 550 in the way of premium, and Rs. 450 in the way of cash received by D, go to make up the Rs. 1,000 for which the bond is passed.	Rs. 3,450
1929 January.	E	Nil.	Nil.	Nil.	Rs. 4,000.

TABLE II.

Prize-winners.	The full nominal amount of the prize-winner's past subscriptions (before the time of the prize).	Actual amount of past subscriptions paid by the prize-winner (before the time of the prize).	Rate of interest involved by the karaswan's repayment to the prize-winner of the full nominal amount of the past subscriptions of the prize-winner.
1	2	3	4
A	Nil.	Nil.	Nil.
B	Rs. 1,000.	Rs. 1,000.	Nil.
C	Rs. 2,000.	Rs. 1,750.	Little less than 10 p. c.
D	Rs. 3,000.	Rs. 2,450.	Little less than 11 p. c.
E	Rs. 4,000.	Rs. 2,900.	Little less than 14 p. c.

In the generality of cases coming before the Courts, the proportion of premium to the actual money received by prize-winner, is much higher; and the rate of interest involved by the karaswan's repayment of past subscriptions as per Col. 4 of the second table above would be correspondingly higher. Likewise, the rate of interest prescribed by the default clause in the chit-security bonds put into Courts is usually exorbitant and fearful. One way to check this evil is by a judicious use of section 74 of the Contract Act and section 3 of the Usurious Loans Act.

Two views are possible as to the distinctive character of the premium in chit-fund securities. One view is that it is a fee or a bonus for the very grant of the loan to the prize-winner and that the term as to the repayment by instalments is a sheer concession and a thing of grace which can be withdrawn on the borrower's default. This view sounds harsh and has not received judicial acceptance.

The other view is that the premium represents the price paid by the borrower in consideration of the term that the loan is to be repaid in instalments to be spread over a defined period. The principal loan and interest in advance, are added together, the total sum due being made repayable in equal instalments; and, upon default in payment of any instalments, the whole balance is to become due with a stipulated rate of interest. In

short, the case is covered by Ill. (*g*) to section 74 of the Contract Act; and relief may be granted in accordance therewith. That view was first enounced by the case in *Ramalinga Adaviar* v. *Meenakshisundaram Pillai*[1] and three subsequent cases have approved of it—*Tatayya* v. *Gangayya*,[2] *Subbiah Pillai* v. *Shanmugam Pillai*[3] and *Muthukumaraswamiah Pillai* v. *Subramanian Chettiar*[4] (Cf *Velchand* v. *Flagg*[5]).

Those cases proceed on the ground that the effect of the default clause is not a mere acceleration of a debt existing from the outset, but that the debt itself comes into existence piecemeal as the instalments fall due, and that the enforcement of the default clause as to the precipitation of the whole sum, coupled with the high rate of interest thereon, would be a double penalty.

The actual decision in *Ramalinga Adaviar* v *Meenakshisundaram Pillai*[1] and *Subbiah Pillai* v. *Shanmugam Pillai*[3] was that the karaswans' claim on the security bonds given by the prize-winners, could be decreed only to the extent of the instalments in default by the date of the suit, with reasonable compensation thereon; and the larger claim of the karaswan to recover the whole of the unpaid balance of the secured debt was disallowed. Here it may be observed that in the case in *Muthukumaraswamiah Pillai* v. *Subramanian Chettiar*[4] interest in respect of the 3rd, the 4th, and the 5th calls was decreed on the amount of the calls, and not on the whole of the unpaid balance of the secured debt.

The only statutory limit to the reasonable compensation for breach of contract, recoverable under section 74 of the Contract Act, is that it must not exceed the stipulated penalty or the sum named in the contract as the amount to be paid in case of such breach; and this is so, whether or not actual damage or loss is proved to have been caused by the breach. Neither the letter nor the spirit of the section would be violated, if in a proper case, on the prize-winner's default, the Court should substantially decree, the karaswan's claim for the entire balance of the secured debt payable by the prize-winner (see *Velchand* v. *Flagg*,[5] where it appears that "at the time of the suit the 39 months' period had not expired").

Apart from section 74 of the Contract Act, the borrowing prize-winner may, in a deserving case, get relief under section 3

1 (1924) 47 M.L.J. 833 2 (1927) 53 M.L.J. 562 at 564, 568.
3 (1927) M.W.N. 527 4 A.I.R. 1927 M. 1105.
5. (1911) I.L.R. 36 B 164.

of the Usurious Loans Act, provided, of course, the interest is excessive and the transaction was substantially unfair as between the parties.

Clause (2) (*b*) of the section specifically enacts that in considering whether interest is excessive under the section, the Court shall take into account any amounts charged or paid for fines, bonuses and premia; and clause (2) (*d*) of the section provides that in considering whether a transaction was substantially unfair, the Court shall take into account all circumstances tending to show that the transacion was unfair, including the necessities or supposed necessities of the debtor at the time of the loan so far as the same were known, or must be taken to have been known, to the creditor. The explanation says that interest may of itself be sufficient evidence that a transaction was substantially unfair.

In the case of chit-fund securities, the high rate of interest involved in the premium goes with the notorious fact that the loan (or prize-money) is knocked down to the person who offers the highest premium because of his greatest need; others in lesser need offer only lesser premium. Furthermore, the prize-money is handed over to the prize-winner only on his furnishing safe and ample security.

No doubt, the rate of interest must vary with the risk run; and the risks and responsibilities of a karaswan are serious, as recognized in *Vaithianatha Aiyar* v. *Govindaswami Odayar*.[6] But, in a deserving case, even that is not a sufficient ground for refusing relief under the Usurious Loans Act. Under section 3 (1) (*b*) (iii) of the Act, the Court may set aside either wholly or in part or revise or alter any security given in respect of any loan (cf. *Kering Rupchand & Co.* v. *Bayley*[7]).

K. C. G.

SUMMARY OF ENGLISH CASES.

FORSTER, *In re* SOMERVILLE *v.* OLDHAM, (1929) 1 Ch. 146: 98 L.J. Ch. 27.

Settlement—Law of Property Act, 1925—*Legal estate with the personal representatives—Trustees under settlement not calling for legal estate after* 1925—*S.* 35, *Law of Property Act,* 1925.

By a settlement, the settlor had transferred all her interest in her lands to trustees to stand possessed of the same in trust

6. (1921) 42 M.L.J. 551. 7. (1919) I.L.R. 44 B. 775.

for herself and her husband during their joint lives or during the life of the survivor or in the case of her husband until his remarriage if any and after that in trust for their children in such shares as she, the settlor, should by her will appoint. By a later will of 1915 she effectually exercised her power of appointment and consequently the settled property in equity belonged absolutely to her two daughters in different shares. Before 1925, the husband remarried and the question arose whether the property was vested in the trustees of the settlement or in the personal representatives of the settlor or in the two daughters as joint tenants.

Held, before the Property Act of 1925, the trustees of the settlement were entitled to call upon the settlor's personal representatives, in whom the legal estate was outstanding, to execute a conveyance of the property to them. But they never exercised that right. Now the land being held by the personal representatives in trust for persons entitled in undivided shares, the personal representatives became trustees for sale under S. 35 of the Act and may sell the property, if the two ladies do not elect to call for a conveyance of the property to themselves as joint tenants upon the statutory trusts.

WINDSOR STEAM COAL CO., LTD., *In re*, (1929) 1 Ch. 151.

Company—Liquidator—Bona fide *settling a claim made against the company—Claim found invalid—Liquidator not consulting shareholder or obtaining Court's sanction for the settlement—If liable to repay the amount to the company—Liquidator if a trustee—Trustee Act of* 1925, *Ss.* 30 *and* 61—*Companies Act*, 1908, *S.* 215.

The liquidator of a company—a professional chartered accountant—without taking the sanction of the Court or referring the matter to a general meeting of the shareholders, settled a claim made against the company by another firm and paid it. The courts in this action found the claim to be baseless and invalid. No charge was made against the liquidator's *bona fides* or his professional or personal honour. An originating summons was taken out against him to recover the amount on the ground that by having acted on his own responsibility at a time when he need not have done so, he has in fact misapplied moneys of the company. Mr. Maugham held that the liquidator was not a trustee within the meaning of the Trustee Act, 1925, and that, therefore, S. 30 of the Act did not apply.

On appeal, the Court of Appeal, without deciding whether the liquidator was a trustee, *held* that even if he were, he was

not entitled to the indemnity given by S. 30, as that section does not apply when there is no loss within the meaning of that section but only a misapplication of funds coming to the liquidator's hands; nor could the breach be excused by the Court under S. 61 as the liquidator could not be said to have acted *reasonably*. The liquidator by having applied money without caution to the liquidation of a claim not sustainable by the firm is liable under S. 215, Companies Act, 1908, as for misapplication of moneys coming to his hands.

Even treating him as an agent, he is liable as he was negligent in respect of his principal's business.

Per Lawrence, L. J.—Even if S. 215, Companies Act, had not existed and an action had been brought against the liquidator as a trustee, an ordinary account would have been directed of his receipts and payments, and every payment which could not be vouched as having been properly made under the trust would be disallowed and he would be treated as still having in his hands the balance found to be due from him.

A DEBTOR, *In re*, (1929) 1 Ch. 170: 98 L. J. Ch. 35.

Bankruptcy—Landlord and tenant—Judgment for rent—Tenant's default in payment—Bankruptcy notice by landlord—Landlord's notice to under-tenants to pay direct to him—Receipt of a portion of arrears from under-tenants—If precludes landlord's continuance of the bankruptcy proceedings

A landlord obtained judgment against his tenant for arrears of rent due and later served a bankruptcy notice based on that judgment. The notice not having been complied with he filed a petition in bankruptcy against the debtor. Before the petition came on for hearing, the landlord acting under S. 6, Law of Distress Amendment Act of 1908, received some arrears directly from the under-tenants and there still remained due to him a debt sufficient to sustain the petition.

Held, that notwithstanding the fact that the landlord had exercised the power given to him under the Law of Distress Amendment Act, 1908, to recover from the under-tenants directly, he was not precluded from proceeding under the bankruptcy notice if he still has a debt of over £50 due to him.

Per Lord Hanworth, M. R.—The remedy under S. 6 of the Law of Distress Amendment Act, 1908, is simply to prevent loss being suffered; it is a remedy which may save assets which might otherwise go to the debtor.

A. AND C. BLACK, LIMITED *v.* CLAUDE STACEY, LIMITED, (1929) 1 Ch. 177.

Copyright—Infringement of—"Who's Who," a compilation of biographies—Copyright in the sketches of lives—If in compiler or the person who supplies the particulars of his life.

The defendants copied several passages from the plaintiffs' work "Who's Who"—a compilation of biographies. In its compilation, a questionnaire is sent out to the person whose life is to be put in and he gives a short sketch of his life for publication In an action for infringement of the copyright, it was contended that the copyright in the order and arrangement of the compilation was in the plaintiffs but that the copyright if any in the several entries were in the persons to whom it refers and who supplied the sketches, as they are the authors of the passages.

Held, the information given by the authors is not given otherwise than as material available for use by the compiler and by incorporating it in his book the compiler acquires a copyright in it. The author of it has no copyright in it.

In re F. AND E. STANTON, LIMITED, (1929) 1 Ch. 180.

Company—Winding up—Actual issue of debentures within three months of winding up—Cash paid before and in consideration of debentures—Fraudulent preference—Validity of charge—Time of creation of charge.

The respondents, to whom already a sum was owing by the company on advances and account, made a substantial advance to the company to help the company to tide over its temporary shortage of cash and put it on its legs again. The advance was made relying on a promise by the director to execute and issue debentures covering that amount. The actual issue of the debentures was delayed for more than 50 days though the respondents repeatedly requested the director to promptly execute them. Within three months of the actual issue of debentures but more than 3 months after the payment of cash, the company went into liquidation and the question arose if the charge created by the debentures was not void under S. 212 or a fraudulent preference under S. 210 of the Companies Consolidation Act, 1908.

Held, (*i*) that moneys having been advanced on an actual obligation by the company to give security, the giving of the security on the verge of bankruptcy did not constitute a fraudulent preference, and (*ii*) payments made on account of the considera-

tion and in anticipation of the creation of and in reliance on a promise to execute debentures must be deemed to have been made *"at the time of"* its creation within the meaning of S. 212 unless the delay in the issue of the debenture is one which the creditor has himself procured or suggested, or if the delay is one in which he has in any sense acquiesced and the respondents who were repeatedly requesting the directors to issue the debentures could not be said to have voluntarily acquiesced in the delay or procured it.

ACKLOM, *In re.* OAKESHOTT *v.* HAWKINS, (1929) 1 Ch. 195.

Will—Bequest of house to sister for life or so long as she wished to reside there—Absence abroad with intention to return —Subsequent staying out long but letting the house—If ceased to reside.

By his will, a testator bequeathed his house, etc., to his trustees upon trust to permit his sister to reside there after his death if she should wish to do so and to have the use and enjoyment thereof during her life or till she should not wish to reside or continue to reside in the said house. The sister entered into possession and resided there for some years but on grounds of health went abroad intending to return soon, but as she was prevented from illness from returning, she let the house from time to time and continued to pay the tax thereon.

Held, that in the absence of evidence that at any particular date she had finally and irrevocably decided not only not to continue to reside but not to let the house under her powers as tenant for life, she had not ceased to reside in the house.

In re PINTO LEITE AND NEPHEWS. *Ex parte* VISCONDE DES OLIVAES, (1929) 1 Ch. 221

Bankruptcy—Proof—Right of trustee to set off as against the assignee of a debt due by the bankrupt, debts due from the assignor to the bankrupt—Debt payable at date of assignment—Obligations out of which the debt arose existed prior to assignment but debt itself matured after—Assigned debt payable in future.

In 1918, *A* agreed with *B* to leave a debt of 100,000*l.* in deposit with him until 1932 on certain terms. In 1920 the debt was at the direction of *A* transferred to *C* in *B's* books and *C* likewise agreed to leave it in deposit as before. In 1926 *C* trans-

ferred the debt in equity to *D* and on March 2, 1926, gave notice of the transfer to *B*. A page was opened in *D's* name in *B's* books and the sum of 100,000*l*. credited to him. On 15th March *B* was adjudicated bankrupt Before the 2nd March, there was a sum of 10,000*l* due to *B* from *C* and between the 2nd and 15th another sum of 15,000*l*. became due to *B* as for amounts expended by *B* in taking up acceptances, for which as between *B* and *C*, *C* had become bound to provide funds before the 2nd. The question arose if these two sums can be set off against *D's* claim for 100,000*l*.

Held, (1) As for 10,000*l*—Though in certain circumstances the fact that *B* entered 100,000*l*. in *D's* name in his books may be taken as evidence that the firm recognised the transfer to be one which was to be free from cross-claims as between *B* and *C* thus waiving their right to set off, in this case there is nothing to show that it was intended to waive the set off. It was so made only to record the fact of transfer of *C's* rights to *D* and not to waive.

(2) As for 15,000*l*.—Though *C's* liability for this sum arose out of a liability which existed before 2nd March, the date of notice, yet as the money became a debt due and payable by *C* to *B* only after *B* paid it, it was not *debitum in presenti* and therefore it cannot be set off against *D*. The fact that the assigned debt to *D* is payable in future does not matter as even then a set off can be had only if the debt so to be set off was *debitum in presenti* at the date of notice of transfer.

Jeffryes v. *Agra and Masterman's Bank*, (1866) L.R. 2 Eq. 674 discussed and explained

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In re FRANKLIN AND SWATHLING'S ARBITRATION, (1929) 1 Ch. 238: 98 L.J. Ch. 44.

Partnership—Deed of partnership authorising nomination of successor by a partner—Admission of nominee subject to the consent of general partners—Consent, not to be unreasonably withheld—Partners and the nominee entitled to refer to arbitration if consent unreasonably withheld—Death of partner—If nominee can refer to arbitration—Nominee, if a party to the submission within the meaning of Arbitration Act, S. 5.

Under a deed of partnership, a general partner had a right to nominate his successor by will and the admission of the nominee was to be subject to the consent, not to be unreasonably withheld of the general partners voting at a meeting of the partners. If consent were unreasonably withheld the general

partner or the qualified nominee could refer the matter to arbitration. An otherwise proper nominee was refused admission at a meeting of the partners and the applicant had a right under the deed to have the question whether consent was unreasonably withheld referred to arbitration

Held, as the applicant was not a party to the original deed and he cannot be treated as a representative of the partner as he has not yet become a partner, the consent having been withheld, he was not a party to the submission.

In re VILLAR. PUBLIC TRUSTEE *v.* VILLAR, (1929) 1 Ch. 243.

Will—Residuary gift in favour of issue living at the end of 20 years of the death of the last of Queen Victoria's lineal descendants living at testator's death—Impracticability of ascertaining date of such survivor's death—Gift if valid.

By his will, a testator bequeathed his property in favour of trustees to deal with the income and capital as per the directions in the will and to convey the residue to his issue (including in issue, his lineal descendants also) living at the expiration of 20 years from the day of the death of the last survivor of all the lineal descendants of Her Late Majesty Queen Victoria who shall be living at his death

Held, that though the ascertainment of the end of the period may be difficult in time to come, the vesting was not suspended beyond legal limitations and did not transgress any rule of law at the present time. Also the persons to take under the gift being clearly defined and the event on which they are to take also equally clearly defined, there is no uncertainty either, rendering the gift void.

PROFITS AND INCOME INSURANCE CO., *In re,* (1929) 1 Ch. 262.

An actuary and secretary of an insurance company resigned and the directors granted him a pension. Subsequently the company was ordered to be wound up compulsorily and the late actuary and secretary lodged a claim in respect of his pension after that date, but before the liquidator could assess it, he died. The question arose if the pension was to be valued as an annuity within the meaning of the Assurance Companies Act, 1909, in which case the widow would be entitled to a capitalised value of the annuity as per mortality table or if she was entitled only

to the actual pension earned up to the date of his death under the Companies Act of 1908.

Held—The minute recording the resolution of the Board to pay him a pension was an instrument evidencing a contract to pay an annuity and is, therefore, a policy within the meaning of the Assurance Act. Also the consideration for an annuity on human life need not be cash or its equivalent.

In re SANDWELL PARK COLLIERY CO. FIELD *v.* THE COMPANY, (1929) 1 Ch. 277.

Vendor and purchaser—Vendor, receiver in a debenture-holders' action—Conditional contract—Sale subject to approval and sanction by Court—Date fixed for completion of contract but none for obtaining sanction—No sanction obtained before date for completion—Repudiation of contract by purchasers—Return of deposit with interest.

In a debenture-holders' action in the usual form, the receiver entered into a conditional contract whereby the defendants agreed to purchase certain lands, and deposited a portion of the price with the receiver, the sale to be completed by a fixed date. The contract was made subject to the approval and sanction of the Court but no time was fixed for obtaining the sanction. The said sanction was not obtained within the time fixed for the completion of the sale and the purchaser thereon repudiated the contract and demanded return of the deposit with interest.

Held—Where no time is fixed for obtaining the approval of the Court to the sale, the approval must be obtained within a reasonable time. A condition precedent to the validity of a contract for sale of land must *prima facie,* in the absence of express provision, be fulfilled before the date fixed for completion of the contract, and further the receivers having delayed long were not entitled to claim specific performance either and as such the purchasers were entitled to a return of their deposit with interest earned by such deposit since it was paid to the vendor.

In re HOBSON, HOUGHTON AND CO., LTD., (1929) 1 Ch. 300.

Company—Articles of Association—Restriction on transfer of shares—Liberal construction of—Transfer by executors and trustees as trustees—If can be read as by executors.

A testator appointed his wife, a son and two other persons executors and trustees of his will and after giving certain

other pecuniary and specific legacies bequeathed the residue to trustees on trust to sell and hold the proceeds in trust for a portion of it for one son and the rest for the other children living at his death. The residue included 1,850 shares in a company. The wife and the son who alone proved the will, caused the said shares to be registered in their individual names. Later they appointed another trustee of the will and executed a transfer deed vesting the shares in all the three but the company refused to register it on the ground that the transfer was only a transfer by trustees of the will to themselves and another trustee and not a transfer by *"executors of a deceased member to trustees for sons or daughters"* or a transfer by *"members to trustees for sons or daughters of themselves or one of them"* within the meaning of those words in the Articles.

Held, that Articles of Association should be so construed as not unreasonably to prevent shareholders in a company from enjoying a fair and reasonable exercise of their powers as members of the company. Though the widow and son executed the transfer as *trustees,* the transfer may be justified as being by them as *"executors."*

In re WILTS AND SOMERSET FARMERS, LIMITED, (1929) 1 Ch. 321: 98 L. J. Ch. 17.

Company—Alteration of rules—Alteration under which members were to take additional shares—If intra vires—*Liability to contribute in voluntary liquidation.*

By a society's original rules and amendments, an individual member was to hold at least one share for every 20 acres farmed by him but by a later resolution each individual member was required to hold at least five shares for every twenty. By the rules, the society had the power to alter rules by a resolution of three-fourths majority at a special general meeting. Subsequent to this amendment the society went into voluntary liquidation and the question was raised whether members who joined the society prior to the amendment were liable to be placed on the list of contributories for the number of shares required to be taken by each member according to the amendment, and if so the amendment was not *ultra vires* the society as infringing the principle of limited liability.

Held, affirming the judgment of Romer, J., that the point was governed by *Biddulph's case,* (1927) A.C. 76 and that the rule as altered was binding upon the contributories apart from the contract between them and the society.

In re KNAPP. SPRECKLEY *v.* ATTORNEY-GENERAL, (1929) 1 Ch. 341: 98 L.J. Ch. 95.

Will—Gift in favour of a charity—Direction to allow interest on investment to accumulate—If binding on trustees.

After bequests of annuities, etc., a will provided that the residue was bequeathed in favour of a charity but that it was the testator's wish that the interest on his investments may be allowed to accumulate for 21 years, that the interest may be utilised for the purchase of lands and building for the poor of the village and that the total amount at the end of the said 21 years should remain in tact for all time.

Held, the trustees of the charity were not bound by the direction to accumulate, it being a mere wish. But the trustees will bear it in mind in the performance of the trusts.

BALDWIN *v.* ELLIS, (1929) 1 K.B. 273: 98 L.J.K.B. 71.

Election—Nomination paper—Omission of the name of parish for which the candidate was qualified as a Local Government Elector as required by statute—If can be cured.

As under the column "How qualified" in a nomination form, it was only stated "Local Government Elector" and no further details were given as to the parish for which the nominee was a Local Government Elector as required by Rule 4 of the Rural District Councillors Election Order, 1898, the returning officer rejected the nomination paper as invalid. Upon an election petition filed against it,

Held, the omission of a "description" required by a statute or statutory order is not merely an inaccurate description of the person or place, but a failure to comply with the requirements of the particular order in question and as such the defect cannot be cured. It is not a mere technicality.

KNEESHAW *v.* CLAY AND HORSFALL, (1929) 1 K.B. 285.

Income-tax—Change in partnership by one partner walking out—Falling short of profits and gains of trade since the change—Specific cause, meaning of—Calculation of tax.

There occurred a change in a partnership by one partner retiring therefrom and in the first year after the change, there was no fall in profits but in the second and third years (years of assessment) the profits had considerably fallen due to a depression in the market. The Commissioners assessed the firm as usual on the average of the profits for the three years prior to

the assessment year and not on the profits of the year of assessment contending that the question whether there was a fall or not in profits must be decided by a comparison of the profits of the firm before the change in the partnership and those made afterwards and that the comparison must be of the aggregate profits since the change with the aggregate profits of a corresponding period before the change.

Held, by the Court of Appeal.—To fall under R. 11, Sch. D of the Income-tax Act, 1918, it is enough to establish that there has been a falling short of the profits or gains in the year in respect of which relief is being claimed from specific cause and not that the aggregate profits or gains since the change have so fallen short.

BURTON *v.* BOARD, (1929) 1 K.B. 301 : 98 L.J.K.B. 165.

Defamation—Libel—Plea of fair comment—If facts on which the comments are based can be proved, when in themselves they are defamatory.

In an action for defamation, the defendant pleaded that the words complained of were comments made in good faith and without malice upon a matter of public interest and sought to give particulars of the facts upon which he was commenting, those facts being in themselves defamatory of the plaintiff. The plaintiff objected to them as being a colourable attempt to set up justification without putting on record a plea of justification in the ordinary sense.

Held, that the defendant is entitled to show and indeed, he must show, what the facts were upon which he commented, that they are facts, that the matter is one of public interest, that the comment is fair and that the comment was made in good faith and without malice. The defendant is entitled to plead that the inferences and comments are fair in the sense that they were made without malice and were such as might reasonably be made on the facts.

WEDDLE, BECK & Co. *v.* HACKETT, (1929) 1 K.B. 321.

Stock Exchange—Purchase and sale of shares and payment of differences—Illegal contract between plaintiffs' clerk and defendant—Stock jobbers ignorant of the same—If disentitled to recover balance due on account.

The defendant entered into a speculative gambling agreement with the plaintiffs' clerk individually by which the clerk

was to buy and sell shares on behalf of the defendant and the defendant was to receive the profit or pay the loss upon the transaction The plaintiffs entered into contracts with the firm of stock jobbers for purchase of shares on behalf of the defendant and subsequently for the sale of the same. The stock jobbers had no intimation that these transactions on behalf of the defendants were not genuine and that the shares would not in due course be taken up on behalf of the defendant. The plaintiffs debited the defendant with the amount paid for the purchase of shares and credited him with the amounts received by them from their sales and brought the action for recovering the balance due from the defendant on account.

Held, that the plaintiffs were acting as brokers on defendant's behalf; that as between the plaintiffs' clerk and the defendant these were gambling transactions, their object being speculation in differences. But as the third parties (stock jobbers) entered into the contracts with the defendants through the plaintiffs as genuine transactions for the sale and purchase of shares, the plaintiffs were entitled to recover.

Swift, J.—"There is no law in this country against betting or wagering generally, and it is not illegal for two people to agree together that they would carry out transactions with an innocent third party which they intend shall really amount to no more than speculative transactions, but which from the point of view of the third party are genuine."

SEABROOK AND SONS, LIMITED *v.* JONES, (1929) 1 K.B. 335: 98 L.J.K.B. 169.

Employer and workman—Labourer—Agricultural Wages (Regulation) Act, 1924—"Employment," meaning of—It means actual working.

An information was preferred by the respondent, an officer under the Agricultural Wages (Regulation) Act, 1924, to the effect that the appellant failed to pay wages at no less than the minimum rate fixed by the Board to his employee. For a week of 50 hours' employment, the employee was to have 30*s.* minimum, but as in a particular week Good Friday happened to be a holiday, the work turned out by the labourer was only 41 hours and wages were paid to him proportionately.

Held—"Employment does not mean actual working at the moment" and the employee must be deemed to have worked even on Good Friday for the purpose of the rule.

LENG (SIR W.C.) & Co. ("SHEFFIELD TELEGRAPH"), LTD. *v.* SILLITOE, (1929) 1 K.B. 366.

Betting—Ready Money Football Betting Act, 1920—*Publication of coupon of ready money football betting business—Offer of prizes for forecasting winning teams—Paper purchased by some solely and some partly to obtain the coupon and compete—If an offence under the Act.*

During the football season of 1926-27, the appellant company owners and publishers of three leading Dailies, conducted a competition by which the person who most nearly gave the correct results of certain specified football matches was offered a prize. To each newspaper a coupon was attached which had to be filled up and sent to the company. The respondent preferred an information under the Ready Money Football Betting Act, 1920, against the appellant company for unlawfully *publishing* a coupon of a ready money football betting business. It was found as a fact that on the date specified in the charge some persons bought the newspaper solely to obtain the coupons and that some other persons bought it partly to obtain coupons.

Held, that for a conviction under the Act it is enough if the defendant is shown to be carrying on a *ready money football betting* business within the definition of that Act and he is liable even if he should annex it to an existing business. It is not necessary to prove that the substantial object of the newspaper is to sell the coupons either.

ALDRIDGE *v.* WRIGHT, (1929) 1 K.B. 381.

Easement—Right of way—Right not amounting to an easement of necessity—Assignment of servient tenement—If impliedly reserves the easement.

The common owner of two adjacent houses assigned his interests in the houses to *A* and *B*, to *A* in 1901 and to *B* in 1904. *B* got the assignment of the house with all rights, easements, etc., belonging or appertaining to the said premises. *B's* house enjoyed during the common ownership and for some time after *B* got it a right of way through a garden in *A's* house but it did not amount to an easement of necessity. It was contended for *B* that *A* took the assignment impliedly subject to the right of way enjoyed before.

Held, the reservation by the grantor of any easement, other than an easement of necessity over the tenement, must be in express language and cannot be implied. Further such use of

way as has been permitted to *B* has been as a courtesy accorded to a neighbour.

Wheeldon v. *Burrows*, (1879) 12 Ch. D. 31 followed.
Thomas v. *Owen*, (1887) 20 Q.B.D. 225 distinguished.

FAREY *v.* WELCH, (1929) 1 K.B. 388.

Criminal Law—Taking a pigeon under honest belief of ownership—S. 23, Larceny Act, 1861.

Where a person in the honest belief that it was his property takes a pigeon, it does not amount to larceny, nor is it an offence falling under S. 23 of the Larceny Act, as there is no guilty mind necessary to constitute such an offence.

[S. 23, Larceny Act.—"Whosoever shall unlawfully and wilfully....take any house dove or pigeon under such circumstances as shall not amount to larceny at common law, shall, on conviction....pay, over and above the value.....any sum not exceeding two pounds."]

FITZGERALD *v* NATIONAL BANK, LIMITED, (1929) 1 K.B. 394.

Will—Legacy—Legatee a creditor of testator of an equal amount—Legacy if in satisfaction of debt.

A testator by his will directed the payment of a legacy of 100*l.* to a creditor to whom he owed 100*l.* bearing interest. There was no provision in the will for the payment of this debt. The interest remained unpaid and was due on the date of the testator's death. The executors under the will paid the legacy and the interest due to the creditor on the debt up to the date of payment. In a suit to recover the debt *qua* debt.

Held, there is a well-settled presumption of law that where a debtor leaves by will to his creditor a legacy of an equal or greater amount than the debt, the legacy when paid must be taken to have been given in satisfaction of the debt and this presumption is not rebutted by the fact that the debt carries interest from day to day.

JAMES FINLAY & Co., LTD. *v.* N. V. KWIK HOO TONG H. M., (1929) 1 K.B. 400.

Sale of goods—C. I. F. Contract—Shipment specified in bill of lading as in September—Date of actual shipment later—No fraud but mere inaccuracy in date—Right of buyer to recover damages—Measure of—Sub-contracts by buyer—If to be considered in mitigation.

By a C. I. F. contract, the respondents agreed to buy and the appellants to sell Java sugar to be shipped in September from Java to Bombay as per the bill of lading given to the buyers. No fraud or blame was imputed to the sellers in the matter of the date but it was agreed to be a mere inaccuracy. The purchasers in their turn entered into sub-contracts in India, the sub-contracts containing a clause that "the bill or bills of lading shall be conclusive evidence of the date of shipment". The sugar was in fact shipped only in October and as the market had then fallen the sub-contractees resiled from the contract and the appellants did not seek to enforce acceptance through Court. The appellants received the goods shipped to Bombay and brought this action for damages claiming the difference between the market price and the price under their contract.

Held, in a C.I.F. contract, there is an implied obligation to date the bill of lading correctly and a mistake in that constitutes a distinct breach of contract. The claim in these cases is not merely for breach of contract to deliver on the specified date but also for breach of the undertaking to give a true bill of lading. Therefore the two things to be compared in assessing the damages is not the position of the buyer, so far as money is concerned, if the whole agreement had been performed on the one hand, and the position he would have been in if the whole agreement was not performed. What has to be considered is the buyer's position as regards money if the particular term of the contract had been performed, and he is to be put, so far as money is concerned, in that same position by damages for breach of that term of the contract.

As for the contention that the buyers should have minimised the damages by enforcing their sub-contracts, *held,* if the breach of contract by the original sellers was in doubt, the position might be different. But a seller who has committed a breach of contract cannot compel his buyer who has not broken his contract to minimise the damage by taking an action which may be right in a strict court of conscience but which might injure his commercial reputation by getting a bad name in the trade. The question if *Hall* v. *Pim (Junior) & Co.,* (1928) 33 Com. Cas. 324 can be reconciled with *Williams Bros* v. *Agius,* (1914) A.C. 510 left open, as in this case the plaintiffs did not claim the difference between the market price and the sub-contract price.

JOTTINGS AND CUTTINGS.

Solicitor's Privilege.—In the case of *Minter* v. *Priest,* the Court of Appeal last week, allowed the appeal from the verdict and judgment at trial before Mr Justice Horridge and a special jury, and entered judgment for the defendant. The plaintiff, a property dealer who wished to sell a house in Mayfair, appointed one, Taylor, to find a purchaser. Taylor found a Mr. Simpson willing to purchase for re-sale, but Simpson could not find the deposit, and his own solicitors would not lend him the money. Simpson's solicitors, however, suggested that the defendant, a solicitor, might assist, and said that if he did they would willingly stand aside and allow the defendant to act as solicitor to carry the matter through. Taylor and Simpson had an interview with the defendant at his office, but he declined to lend the money, and then spoke the words about the plaintiff which were complained of. The case of *More* v. *Weaver* (1928, 140 L.T. Rep. 15) was cited as establishing the general rule that relevant communications between a solicitor actually retained, and the client retaining him, are absolutely privileged. In that case Lord Justice Scrutton referred to the few cases where untrue communications, even though made maliciously, are treated as absolutely privileged, and gave as the reason the fact that "there are certain relations in which it is so important that persons engaged in them should be able to speak freely that the law takes the risk of their abusing the occasion and speaking maliciously as well as untruly." Thus a judge, as was said by Justice Channell in *Bottomley* v *Brougham* (90 L.T. Rep. 111), is not privileged to be malicious, but he is privileged from inquiry whether he is malicious. The same rule was held to apply to communications from a client to a solicitor and from solicitor to client The case of *Browne* v. *Dunn* (6 Rep 71) was also cited, in which Lord Bowen suggested a further privilege, namely, that all that passed between a solicitor and a presumptive client with a view to a retainer was protected if the client in fact retained the solicitor; and *Cromack* v. *Heathcote* (2 Brod. & B. 4) was referred to as showing that the qualification made by Lord Bowen was not needed. In the latter case it was held that privilege attaches, although the solicitor ultimately declines the employment. Two cases (which had not been referred to in the court below), namely, *Jones* v. *Pugh* (1 Phillips 97) and *Carpmael* v. *Powis* (1 Phillips 687), were held to have established that the business on which Simpson and Taylor called on the defendant was properly characterised

as "solicitor's business," and as the only evidence given affirmed that the slanders were uttered at a time when professional privilege had by the nature of the business been established, and before it was determined, the whole of the interview was protected, and evidence of what the defendant said could not be admitted.—*L.T.*, 1929, p. 279.

Present Day Tendencies.—How large a part money penalties play in the modern punishment of minor offences is shown by the fact that over half a million persons were mulcted in fines in 1927, and that less than 3 per cent. of those fined went to prison, an ample justification for the practice of allowing time for payment. The view of the authorities on this matter as embodied in the report is as follows: "It increases respect for the law, by securing the real object of imposing a fine, namely, payment; it avoids inflicting upon many petty offenders the unwarranted hardship and degradation of imprisonment; and it not only saves society the cost of their maintenance in prison, but brings in a small contribution towards the expense of coping with minor offences." Another sign of modern conditions is the further increase of 20,000 in motoring offences, which, in the year under review, totalled 183,448, as against 163,301 in 1926 and 150,733 in 1925. Without accurate knowledge of the increase in motor licences it is difficult to pass any criticism on this figure, but there is some likelihood that the rate of increase in offences would on investigation be found to be balanced, if not outweighed by the rate of increase in the cars on the road. It is probable, however, that in the increased use of motor vehicles is to be found some part of the explanation of the increase of nearly 2,000 in the cases of burglary, house and shop breaking, and attempts at the two last, known to the police. The practical difficulty of tracing and punishing the perpetrators of these offences is shown by the fact that in only 38 per cent., or not much more than one-third, of the cases is the perpetrator either charged or detected. A significant commentary on modern tendencies is to be found in the coroners' verdicts of suicide, which total 4,863 as against 3,844 five years ago, and in the increase from 1,461 in 1922 to 2,724 in the cases of attempted suicide. Another indication of the more humanitarian outlook characteristic of these days is found in the very small proportion of cases in which proceedings were taken—754. While cases of drunkenness continue to decline, indecent assault, offences against young girls, and other sexual offences continue, unfortunately, to

increase, the figures for 1927 showing an increase of 153 over 1926 and of 310 over 1925. Cases of bigamy, on the other hand, are fewer.—*L.T.*, 1929, p. 300.

Short Sentences.—The Home Secretary, Sir William Joynson-Hicks, at the annual meeting of the Holloway Discharged Prisoners' Aid Society held on the 16th April, made some interesting remarks on reforms in prison administration, especially with regard to the modern remedial work in prisons and the consequent inadvisability of short sentences of imprisonment. He was convinced that it was impossible to do anything really remedial in building up the character of men in any period of less than three months, and he was certain that the work being carried on at Wakefield where they were collecting prisoners, none of whom had sentences of less than three months, was the right kind of work for young men selected as capable of undergoing it. Hard work in some prisons was now the real thing—not the old treadmill and oakum-picking, but the kind of work the prisoners would do when they left prison. In addition there was physical drill, mental education, and an effort towards moral improvement. He and his advisers felt certain that if they went forward with the remedial side of imprisonment, prisoners must be sent to prison, if sent there at all, for periods long enough to give remedial methods a chance of success.—*L.T.*, 1929, p. 322.

Lord Phillimore.—Apropos the fact that the late Lord Phillimore was the last member of the Bar to be the holder of a patent of precedence, thus entitling him to all the advantages of being a Queen's Counsel without any of the disqualifications which that dignity carried with it at that time, it has been recalled that the only other holder of a patent of precedence in recent times was Judah Philip Benjamin, the great lawyer whose classic treatise on the Sale of Goods would perpetuate his name among members of the Profession if his earlier and somewhat adventurous career were forgotten. Curiously enough Benjamin was a King's Counsel at Lancaster. Was he the last to receive this dignity? Alderson, afterwards Baron Alderson of the Court of Exchequer, tells us in one of his letters that he was offered by Mr. Justice Bayley a silk gown at Lancaster. "I have declined the honour," he wrote, "for the present circuit, but I mean to accept it next time, if offered, and so I told him." Bayley laughed and said, "Well, you are on the road to promotion." Bayley was right, for very shortly afterwards Alderson, while still wearing a stuff gown, was made a judge of the Court of King's Bench, being

transferred some years later to the Exchequer.—*L.T.*, 1929, p. 351.

Statutory Orders.—Just before the House of Commons adjourned last week, Sir John Marriott recurred to the question of Legislation by Departmental Order, and drew a statement from the Attorney-General on the subject. Two methods of control have been suggested: that a Sessional Joint Committee should be set up to scrutinise Statutory Rules and Orders; and that Orders laid on the table of the House should require positive approval before they become operative. But while these methods would result in a more careful examination of the Orders which are issued, the enormous growth of Statutory Orders in recent years is the result of the skeleton legislation to which Parliament has lent itself Sir Thomas Inskip distinguishes between Orders which take from the Courts powers of decision and entrust them to Administrative Tribunals, and those which deal with an infinity of detailed and technical matters which Parliament cannot be expected to wade through. Lawyers are familiar with Orders of the latter sort in Rules of Court and Rules under the Land Registration Act Numerous matters in connection with the Law of Property Act are also dealt with by Rules. These Rules, however, in general come not from a Government Department, but from a Rule Committee representative of the various interests affected, and perhaps a similar check might be placed on industrial and other regulations.—*L.J.*, 1929, p. 247.

Administrative Tribunals—There is more serious objection to the transfer to Government Departments of the judicial powers which properly belong to the Courts. The Attorney-General says that this is not a departure for which the present Government is responsible. No doubt he is right, but in suggesting that it dates from the time of the Coalition Government he hardly goes far enough back. England does not love Coalitions, but this political maxim was born long before the Executive had begun to encroach on judicial functions. It was just before the war that Lord Haldane laid down, in *Arlidge's Case* (1915, A. C. 120), the principle which must guide an Administrative Tribunal. "In modern times," he said, "it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary Court, to authorities whose functions are

administrative and not in the ordinary sense judicial." And in the exercise of those semi-judicial duties, the Department is bound to act in good faith and to listen fairly to both sides; but it is not bound to follow ordinary judicial procedure. That judgment is the charter of administrative tribunals, but it is for Parliamentary vigilance to see that only matters really appropriate shall go to such tribunals. The Attorney-General, without committing the Government, suggests that it is time for some inquiry to see how far the mischief—"if it be a mischief" —has extended, and to see what steps can be taken to check it. But the check, if it comes, will be due to independent members like Sir John Marriott, and not to the halting admissions of Law Officers.—*L.J.*, 1929, p. 248.

Women Police.—The employment of Women Police is held to have justified itself and a substantial increase in their numbers is recommended, particularly in cities for patrol work in uniform. It is suggested, and there will, we think, be general agreement with the recommendation, that a sufficient number of qualified and specially trained women should be made available to take statements from all young girls and children in sexual cases The practice by which such statements are taken by a male officer in the presence of a "chaperon" is wholeheartedly lemned.

> rom the point of view of the person making the statement, a mixed ce would seem to be the worst possible arrangement and the most rassing which could be devised for the narration of the details of sexual offence.
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> —*L.J.*, 1929, p 269.

Women Barristers and Publicity.—The newspaper maxim that "Women are news," has of late been exemplified in the case of women barristers, whose every brief, every movement, and every forensic article of apparel irresistibly attracts the attention of the journalist. It is not only to the "first woman" series that their observations apply. Everyone knew that the first woman called to the Bar, the first woman to hold a brief, the first woman briefed in a criminal case, a civil case, a murder trial, a breach of promise action—these would inevitably receive a good press and their names be written among the immortals. But now the journalist have passed on to make notes concerning the pretty ones; how they "trip into court" and out again; whether they appear shy or imperturbable; and the male barrister, however worthy of notice, becomes interesting only by reason of his proximity to one of them.

The latest topic is the difficult and highly controversial subject of women's forensic neckwear. It is one which was much debated and discussed by the profession when women barristers began. And now the first woman to wear the high-peaked collar of the male has been noted with appropriate comment by an eager press. If it is generally adopted, sex in wig and gown would, as in the Forensic Fable, be entirely unidentifiable.—*L.J.*, 1929, p. 275.

Sunday and the Law.—The fact that the Sunday Observance Acts are generally disregarded does not, of course, mean that they can be treated as having been repealed. As a matter of fact, there are a substantial number of prosecutions for breaches of these Acts every year—according to the Criminal Statistics there were 29,623 cases in 1927. These figures are startling, especially when it is noted that the average from 1900-1904 was only 5,208, and that from 1915-1919, 9,061; but the explanation appears to be that the Acts are enforced with extreme rigour in a very few places. Of the 1927 total of 29,623 charges of Sunday trading, no less than 19,720 were brought in the County Borough of Kingston-upon-Hull! The County Borough of Grimsby comes next with 3,684 cases, Wales accounts for 3,580, the West Riding for 1,246, and Lincoln (Parts of Lindsey) for 620. So that these five loca[illegible] account for more than 28,700 of the total of 29,623. Th[illegible] that a particular law is enforced so unequally is obviously satisfactory, and it is high time that these statutes were reconsidered by Parliament. So long as they remain on the Statute Book, the Courts must take judicial notice of them as occasion arises, and two such occasions have recently arisen. In *Jones* v. *Smith* (*Times*, March 16), Mr. Justice Clauson refused a motion for an injunction to restrain a landlord from refusing to permit boxing contests on Sundays in a hall which had been let for that express purpose, the learned Judge said that since a charge was made for admittance the provisions of the Act of 1771 would be infringed, and that the Courts could not grant an injunction which would have the effect of enabling an illegal act to be done. In the other case, a magistrate at Bow Street held that the refusal of a licence to trade in the street on Sundays was justified under the Act of 1679.—*L.J.*, 1929, p. 283.

The Lord Chancellor's Religion.—That is the common belief which has hitherto been accepted and acted upon when Lord

Chancellors are made. But it is difficult to find in the existing law any reason for the discrimination. He who wrote the note on page 56 of the seventh volume of *Halsbury's Laws of England,* after summarising the effect of the Statutes, observes that, whatever the effect of those provisions may be, it would clearly be held unconstitutional by Parliament for any person other than a Protestant to be appointed.

Lord Coleridge, when Attorney-General, was of a different opinion; and in reply to a question by Sir Colman O'Loghlen in the House of Commons on May 6, 1872, delivered a reasoned opinion that the effect of 34 and 35 Vict., c. 48 (the Promissory Oaths Act of 1871) was, when taken in conjunction with the earlier Acts, to remove every restriction against Roman Catholics. "The 21 and 22 Vict.," said he, "substituted one oath for the three oaths of objuration, allegiance and supremacy, which up to that time had existed. The substituted oath was just as exclusive as regarded the Roman Catholics as any of its predecessors. The 31 and 32 Vict., substituted a further oath, but that the Roman Catholics could take, and by the ninth section the Lord Chancellor was specially referred to as a person who could take the oath....if a Roman Catholic could take the new oath he could become the Lord Chancellor."—*L.J.,* 1929, p. 292.

The Uneasy Statutes.—Apparently, the real difficulty, whensoever a great lawyer, qualified by every merit save his religion for the Lord Chancellorship, comes to the point where he must be deliberately rejected or accepted, will be the constitutional feeling of the House of Commons. It is amazing how a question of this kind will suddenly and unexpectedly set the Parliamentary spirit in a flame.

But enough of this Popery. Yet I must mention the manner in which Sir John Coleridge, the Attorney-General, prefaced his famous reply to Sir Colman O'Loghlen in the House.

He recalled the story of Lord Coke, who, on being asked by James I a question of law, enquired: "Is it Common Law or Statute Law? Because," said he, "if it's Common Law I can answer it in bed; but if it is Statute Law I must get up and examine the Statutes." There is not a practitioner amongst us who has not, at times, experienced that feeling of unrest at the mention of a Statute.—*L.J.,* 1929, p. 292.

An Expression of Regret.—I heard the other day in Hall a story, probably old and possibly not authentic, touching the

rule that a legal text-book may not be cited in Court until the embargo is removed by the author's death. Counsel was quoting a passage from Scrutton on Charterparties, in a case which was being heard by the learned author.

Scrutton L.J.: You are aware that the author of that book is still alive?

Counsel: I'm sorry, my lord.—*L.J.*, 1929, p. 292.

When the King Makes His Will.—A King can make a last will and testament disposing of his real and personal estate; but his wills are not as our wills. In the Parliament Rolls of the sixteenth year of Richard II it is recorded that "the Bishops, Lords and Commons asserted in full Parliament that the King, his heirs and successors might lawfully make their testaments". The estate of Henry IV was in such dubious plight that, although he had made a will and appointed executors, they refused to act because they were afraid the assets would be insufficient; and Henry V had to step in to save the face of sovereignty and to avoid the indignity of a sale.

Henry VIII made a will disposing of no less an asset than his Crown; and for this he had the express sanction of 28 Hen. VIII, c. 7, which declared that he might limit the Crown by his last will made in writing and signed under his hand, lest the realm might be "encumbered with such a person that would covet to aspire to the same, whom the subjects of this realm shall not find in their hearts to love, dread and obediently serve as their Sovereign lord." The will was duly made and deposited in the registry of the Prerogative Court of Canterbury.—*L.J.*, 1929, p. 292.

The Age of Marriage Bill.—Lord Buckmaster's Bill to make void marriages between persons either of whom is under the age of sixteen has emerged from the Select Committee of the House of Lords to which it was referred, unimpaired as to its essential point, but with certain additions which, in our view, remove the doubts which led several eminent lawyers to demand, when the Bill was first introduced, that it should receive further consideration before being passed into law. It will be remembered that as originally framed, the Bill provided simply that a marriage between persons either of whom was under the age of sixteen should be void. The Bill received a unanimous second reading in the House of Lords, but when the Committee stage was reached, a number of Peers, including Lord Hanworth, Arch-

bishop Davidson, and Lord Darling, expressed grave fears as to the effect of the proposed change, and carried a motion for the reference of the Bill to a Select Committee. The Committee has been commendably prompt in dealing with the matter—a Select Committee of the House of Lords is an ideal body for considering such a question as this—and has now put forward a remodelled Bill which will, no doubt, pass without difficulty or delay into law. The controversy in the House was chiefly as to whether such marriages should be void or voidable; and after hearing evidence from those best qualified to give it, the Committee take the view—which we said at the time (*ante* p. 194) was our own view, that they should be not merely voidable, but void So that Lord Buckmaster's wish on this point prevails, a result which we are inclined to think would not have been attained had the House of Lords dealt with the Bill in Committee in March.—*L J.*, 1929, p. 300.

The Safeguards.—The additions made to the Bill by the Select Committee aim at safeguarding parties to marriages which it renders void from consequences which it would not be just should follow. Marriages contracted before the Act are not affected; and it is to be a difference to a charge under S. 5 (1) of the Criminal Law Amendment Act of 1885, or for an indecent assault, that the person charged had gone through a form of marriage with the girl, and had reasonable cause to believe that she was over sixteen. Clause 2 is important in the interests of the "wife"; it provides that where parties to a marriage which is rendered void by the Bill have lived together and have afterwards separated, she may make appliaction for an affiliation order in respect of any child born of the intercourse at any time within twelve months after the separation, without proof that the father has paid money for the maintenance of the child or children. It will be seen that there is nothing in these additions which in any way weaken the Bill; and we imagine that Lord Buckmaster will agree that its chances of passing through both Houses of Parliament during the few weeks which remain of the present session have been immeasurably increased by the fact that it has been calmly and dispassionately considered by a Committee which has heard evidence and has come to a reasoned conclusion upon its merits.—*L.J.*, 1929, p. 300.

The Retirement of Lord Shaw.—Lord Shaw has himself in *The Other Bundle*, summarised his public career: "In 1892 entered Parliament; in 1894-1895 was Solicitor-General for

Scotland; then ten years of Opposition; then 1905-1909 Lord Advocate; then, with infinite regret, I left the House of Commons, being created a Lord of Appeal. Then in the House of Lords for eighteen years. That is to say, on duty in the Palace of Westminster for thirty-five swiftly flowing years." Now the eighteen years has been increased to twenty—a length of service, we believe, rarely equalled in the House of Lords—and Lord Shaw retires at the age of eighty-two.

We have just referred to one of Lord Shaw's books, and there is another, the *Letters to Isabel*. Between them we get a revelation such as is not often afforded during a man's life, and the whole is of great interest. We are told of the early drudgery, in a slicitor's office; the abandonment of the office for Edinburgh University, with hardships of another kind—"I rejoice that the life of the poor student is now infinitely happier, infinitely more human. I love the poor student. He is of the earth's best"; the Hamilton Fellowship of 300*l*. which came his way and might have diverted him to philosophy, with literature as a strong rival. But it was to be the law, after all, though this time at the Bar, and in 1875 Thomas Shaw "entered the Edinburgh Parliament House," which we take it, is the same as being called to the Bar here.

Next there was the work of the rising advocate with the difficulty when Parliamentary life began of combining law in Scotland with politics in London. "To fit in these two ends of existence, the life and the living, when between them there ran a railway track of 400 miles, needed some engineering and not a little loss of sleep." In the session before he became Lord Advocate, Lord Shaw says he travelled on that track, mostly by night, a distance equal to the circumference of the earth. It was a heavy price to pay for the double success of the Bar and the House of Commons. And success in the House started in a curious way. In these days we are still trying to get Crown procedure put on a right basis, and it was just this matter that first brought Lord Shaw to the front. There was a Home Rule Bill, and in some way a question arose about the necessity of a petition of right before you could sue the Crown. Gladstone wanted the point explained, but there was difficulty because Rigby tried and was too heavy—probably he would be. Then Shaw, under a sudden inspiration, caught the Speaker's eye, and told the House of the simple Scottish plan of doing without a petition of right altogether, and just suing the Government

That did not do much for Crown procedure, but it appears to have started Shaw on the public career which placed him at length in the House of Lords.

And to that House he attained twenty years ago. We are not going to trace the judicial course of those years. They included the war years when, rightly or wrongly, liberty was curtailed. We always remember with gratitude Lord Shaw's great judgment in *Halliday's Case* (1917, A.C 260) in favour of the inviolability of Magna Carta. He was in a minority of one—"Among the faithless, faithful only he"—and if we must assume it was not law—for Parliament since John Austin's day has been omnipotent and can override even our fundamental statute with Emergency Laws—it was a noble gesture. But Lord Shaw has been effective enough on the Judicial Committee, which, he has said, "wields a jurisdiction over one quarter of the population of the globe." And the story of the Reign of Law he carried over the sea when he visited the American and Canadian Bar Associations and delivered the Addresses which are preserved in *The Law of the Kinsmen*.

Lord Shaw has had a distinguished career; it has been a career marked by high ideals—his advocacy of the League of Nations is one instance of this, his advocacy of pure literature is another; and he carries into his retirement the good wishes of the profession.—*L.J.*, 1929, p. 307.

The Abstinence of Eve.—There is a treat in store for someone who would show the sights of London to a fresh and intelligent person who has never seen them before. Eve, J., with unblushing and even boastful candour, has confessed that he does not like London, and has never been to the Waxworks. Not only so. At the dinner of the London Society he produced a list of Things He Had Not Seen; a list so long that his breathless listeners, aware from former confessions that he had no ear for music, wondered if he had an eye for any of the marvels of his native city. The interior of the National Gallery, of the Tate, of the Portrait Gallery he has never seen; not yet, despite seventy years of opportunity, has he beheld the mummies and other exciting contents of the British Museum; never has he crossed the threshold of the Mint, or the Bank of England, Woolworth's, Selfridge's or Harrod's; man and boy, he has never pressed his eager face against the bars which protect the Crown Jewels; and he has not, up to date, been inside the Bloody Tower or any other of the Towers of London.

I think he has been to the Zoo; I have seen him in the Law Courts; and he has never, so far as I am aware, pleaded judicial ignorance of the nature and locality of any of the Sights of London.—*L.J.*, 1929, p. 310.

Lord Haldane as Labour Chancellor.—In the present condition of political parties a Labour Government has not the same variety of legal talent of which to avail itself as a Conservative or Liberal Government, but, no doubt, Mr. Ramsay MacDonald will surmount that difficulty. In his former Premiership, he was able to obtain the co-operation of Lord Haldane as Lord Chancellor, and it is unfortunate that death has intervened to prevent a recurrence of this arrangement. But Lord Haldane has told us in his Autobiography that he joined the Labour Government on special terms, both as to remuneration and work. Of the 10,000*l.* a year to which he was entitled as Lord Chancellor, he returned 4,000*l.* to the Treasury, retaining 6,000*l.* a year to meet the unavoidable expenses of the position and his own requirements. Needless to say, he had not indulged in the pleasure of an expensive family, and family or no, this self-denial is, we imagine, not likely to be repeated. Then he thought it incumbent on himself to make a change which he had advocated in the Machinery of Government Report. He dropped the daily judicial sittings, and allotted time instead to the superintendence of Justice and the reorganisation of the magistracy. In addition, of course, he had to attend to Government Bills, act as Constitutional Adviser to the Cabinet, and preside in the House of Lords, while he was also Chairman of the Committee of Imperial Defence. It was a sufficiently large programme, even without the judicial sittings. But the brief duration of Mr. MacDonald's first Government hardly allowed a new precedent to be established for the Lord Chancellorship. It will be interesting to see if the experiment is repeated, though the withdrawal of the Lord Chancellor from judicial duties would be an unwelcome break with tradition.—*L.J.*, 1929, p. 409.

Prof. Holdsworth's Knighthood.—No one who is acquainted with Prof. Holdsworth's "History of English Law" will be surprised that he appears in the list of Birthday Honours as the recipient of a Knighthood; the surprise will be that it is inserted in the list of Honours for India. The explanation is that Prof. Holdsworth was a member of the Committee—the others being Sir Harcourt Butler, chairman, and the Hon. Sid-

ney Peel—which recently inquired into and reported on the relationship between the Paramount Power and the Indian States. Appointed in 1927, the Committee visited India, and on its return last autumn had the advantage of hearing Sir Leslie Scott on behalf of a large group of States, and of receiving the opinion of other eminent counsel on the legal and constitutional aspects of the subject of inquiry. The Report, which was issued in April, will doubtless have an important effect in renewing the confidence of the Indian Princes in Great Britain as the Paramount Power, and from the official point of view, it is intelligible that this has been taken as the occasion for bestowing a well-merited honour on Prof. Holdsworth. But while we do not grudge his name to the India List, we more willingly see in the honour a recognition of the great services he has rendered to the study of English Law.—*L.J.*, 1929, p. 410.

Wives and Income-tax.—The question of the treatment of the incomes of husband and wife as a single income for the purposes of income-tax is being again ventilated in the Press. It is not a matter of separate assessment, for that method has been available ever since 1914 for those who elect to avail themselves of it. But separate assessment does not meet the real objections. These are mainly, that husband and wife do not get each a personal allowance of 135*l.*, but a joint allowance of only 225*l.*; and that only one sum of 225*l.* is taxable at half the standard rate, whereas each income, if treated separately, would have the benefit. The Income-tax Commission of 1919 heard a great deal of evidence on the subject, and came to the conclusion that the system of aggregation of the incomes of wife and husband should continue to be the rule. They regarded the objections to it as more vocal than real, and there was the very solid argument that a change in the system would, according to the Inland Revenue figures, involve a loss of 20 millions, increasing possibly to 45 millions in consequence of the avoidance of tax by the transfer of income from the husband to wife. The married state has certain mitigations in the children allowances, but these do not wholly meet the objections to the present system, nor is the loss of revenue a final argument, if the system is essentially unjust.—*L.J.*, 1929, p. 411.

Mr. MacDonald's Legal Appointments.—Last week, in referring to the filling of the legal offices in the new Government, we abstained from prophecy, and were content to suggest that the Prime Minister would be able to surmount the difficulty caused by the failure of the Labour Party so far to attract within its fold any considerable number of prominent lawyers. Of the three posts in which the profession is specially interested, two have been filled in the manner generally anticipated. Lord Justice Sankey becomes Lord Chancellor, and Mr. J. B. Melville, K. C., becomes Solicitor-General. But the Attorney-Generalship has proved a surprise. The attraction of the Labour fold, which was not strong enough before the election to prevent Mr. W. A. Jowitt, K. C., from contesting Preston as a Liberal, has proved strong enough after the election to win him from Liberal to Labour. This has enabled Mr. MacDonald to offer him the post without going back on the statement, said to have been made to the Executive of his Party, that he did not intend to make any appointments from outside its ranks. Sir Henry Slesser, who was Solicitor-General in the last Labour Government, succeeds Sir John Sankey as a Lord Justice in lieu of becoming a Law Officer again.—*L.J.*, 1929, p. 427.

The New Lord Chancellor.—Of these appointments, the promotion of Sir John Sankey to the Woolsack is, in interest as well as in rank, the most important, and the Labour Party are to be congratulated on gaining such a recruit. That it can be treated as a political appointment in the ordinary sense we are not sure. Lord Haldane, the first Labour Chancellor, had already been turning to Labour, mainly because he found in Liberalism small encouragement for his ideals in education, and he was ready for the overtures Mr. MacDonald made him at the end of 1923. That was the significant but intelligible conversion of a strong politician. Of Sir John Sankey it would be inappropriate to speak in terms of party politics. If he has had political leanings, they have not been made public, and they are hardly to be found in his Report as Chairman of the Coal Commission in 1919, and his recommendation of the acquisition of mining royalties by the State. It is known that he sympathised with Lord Haldane's views on education, and the lecture which he gave at King's College in March of last year on "The Principles and Practice of the Law To-day" (reported in the *Solicitors' Journal*, March 17 and 24, 1928) shows that he has interested himself in recent developments of Administra-

tive Law "It would be strange," he said, "if we had escaped the frying-pan of the Prerogative to fall into the fire of a Minister's Regulations" It will probably be found that Sir John Sankey has very definite views on this matter, and it may be anticipated that he will attempt to regularise administrative justice in the interests of the subject. The chances, too, of proceeding with the reform of Crown procedure may be improved. But politically, Sir John Sankey has a clean slate, and he may be expected to take up impartially the important duties of his office. His appointment adds distinction to the Labour Government, and his occupation of the Chancellorship will be watched with interest.—*L.J.*, 1929, p 427.

Slesser, L.J.—Sir Henry Slesser, who takes Lord Justice Sankey's place in the Court of Appeal, is personally popular with the profession, but has been regarded rather as an intellectual with interests in religion and philosophy than as an outstanding figure at the Bar When Mr. Ramsay MacDonald first took office in 1924, Sir Henry Slesser was a junior and received silk *ad hoc* on appointment as Solicitor-General. His promotion to be Attorney-General this time would not have been unexpected, but we doubt if his best friend would claim that [redacted]osition entitled him to expect promotion direct to the Court [redacted]ppeal. That is a very high honour, implying as it does the [redacted]ng over of the existing High Court Bench, and the appoint[redacted]t at once challenges comparison with that of so great a lawyer as the late Lord Moulton Outside the rather restricted sphere of Trade Union cases, Sir Henry Slesser has never enjoyed a practice comparable with those of many other front rank leaders, and his promotion has, frankly, caused some surprise. It must not be forgotten that Lord Justiceships are in the gift of the Prime Minister, not of the Lord Chancellor, and this may account for the vacancy not being filled from the High Court Bench, with the subsequent offer of a puisne judgeship to Sir Henry Slesser. It is conceivable that the new Lord Chancellor might have been unwilling to make his first appointment to the Bench so plainly a political one. We trust that the Prime Minister will remember that neither the public nor the Bar likes the high judicial offices to be merely places to be filled according to political convenience. There were, it is thought, difficulties also in promoting a High Court Judge, in that a resolution of the two Houses would have been necessary before a vacancy in the King's Bench Division could be filled, and that

might not have been easily obtained in the present state of the lists. It may be admitted that many judicial appointments which have been criticised at the time have proved to be justified by the ability and judicial qualities of the holder, and we hope that this will be one of them.—*L J.*, 1929, p. 428.

Sacrifice.—Even from the point of view of finance, however, it is very doubtful whether any member of the Bar with a High Court practice would lose by accepting the office of Attorney-General. The highest income earned by the most fashionable silk during the past year did not greatly exceed 20,000*l.*; and the statement that 40,000*l.* was earned has no foundation in fact.

Apart from the income-tax officials, who disclose no secrets, the clerks are the best-informed people on the subject of a barrister's income; and when a thousand guinea brief is delivered in the Temple or in Lincoln's Inn, everyone knows about it next day. Four "thousand-guinea" briefs per term in the whole Temple is a high average for the past four years; and briefs of higher denomination are still more rare.

In any event, the theory of self-sacrifice, in the absence of sufficient motive, by barristers or laymen, is unacceptable.—*L.J.*, p. 438.

Sovereignty and the Privy Council.—My reference to Barra O'Briain's opinion of the Judicial Committee of the P[redacted] Council, as expressed in his interesting book "The Irish Constitution," contained a misquotation; and I am very greatly obliged to him for calling my attention to it. He wrote, with regard to Australia, not that all questions, but that all constitutional questions, had been withdrawn from the Judicial Committee.

That the Judicial Committee is open to grave criticisms is an assertion which will not generally be disputed. But I think that its defects are such as could be remedied by a reform in its constitution and by limiting its jurisdiction so far as the self-governing Dominions are concerned, to questions affecting two or more of them. The idea that the appeal to the Privy Council diminishes the sovereignty of the Dominions is largely fanciful. Every member of the League of Nations is pledged to a similar restraint; and the Judicial Committee, as a court of appeal from the British Commonwealth of Nations, has provided a notable precedent for world courts and international

tribunals. The rigid Austinian theory of sovereignty is in practice as dead as mutton in the modern world.—*L.J.*, 1929, p. 438.

Judicial Precedence: The President of the Probate Division.—My thanks are due to the reader who reminded me, with reference to my observations on the order of legal precedence in 1885 and 1929, that I had omitted to give his proper place to the President of the P. D. and A. Division. His position, dubious before, was clearly established by the Supreme Court of Judicature (Consolidation) Act, 1925, sec 16 (2).

The order of judicial precedence in the Supreme Court contained in S 16, which supersedes the order as laid down in the Judicature Acts of 1873 and 1875, is now as follows: The Lord Chief Justice and the Master of the Rolls shall, when sitting and acting in the Court of Appeal, rank in that order. A person who has held the office of Lord Chancellor or a Lord of Appeal in Ordinary shall, when so sitting and acting, rank according to his precedence as a peer. The President of the Probate Division shall have rank and precedence next after the Master of the Rolls. The Lords Justices of Appeal, if not entitled to precedence as peers or privy councillors, shall rank after the *ex-officio* judges and according to the priority of the dates of their appointment to the Court of Appeal. The judges of the High Court who are not also judges of the Court of Appeal shall rank next after the judges of the Court of Appeal according to the order of their judicial seniority.—*L.J.*, 1929, p. 438.

The M.R's Memoirs—In Lord Hanworth's memoir of Chief Baron Pollock (John Murray) there is a wealth of interesting fact and anecdote relating not only to the chief ornament of the Pollock family, but his illustrious political and legal contemporaries of the eighteenth century.

The Master of the Rolls repeats from Lord Alverstone's Recollections of Bar and Bench one very human story of the Lord Chief Baron. When on circuit at York he was called at 5 a.m. to read a voluminous brief; but he picked up the "Heart of Midlothian" and became so absorbed in it that he never touched the papers until breakfast time. The Court sat at nine, and Pollock went into court in total ignorance of the contents of the brief and of the two or three hundred letters in the correspondence.

He was equal to the occasion. Said he to the jury: "I could not better present the facts of the case to you than by

using the language of the parties themselves, and I shall therefore read to you the correspondence in chronological order. And he did.

Abbott, C.J., growing weary, asked if it was necessary to read all the correspondence? "Absolutely, my lord," replied Pollock, "for I never read it before."—*L.J.*, 1929, p. 438.

Thackeray and Chief Baron Pollock.—The Master of the Rolls sets out Thackeray's acceptance of an invitation to dine with the Lord Chief Baron on "ye last day of May":—

> By Fate's benevolent award, should I attain the day
> I'll drink a bumper with my Lord before the last of May
> That I may reach that happy time most fervently I pray,
> For ducks and peas are in their prime upon the last of May
> At thirty boards 'twixt this and then my knife and fork will play,
> But better wine and better men I shall not meet in May
> And though, good host who bid me dine, your honest beard is grey,
> And, like this powdered head of mine, has seen its last of May,
> Yet, with a heart that's frank and kind, a boyish spirit gay,
> You've spring perennial in your mind and round you make a May

Compare the spirit of this acceptance with that of Bowen, L.J., when he asked for a lift to Lord Selborne's melancholy spree, as set out in our last week's issue.—*L.J.*, 1929, p. 438.

Our Three Prime Ministers.—It is curious, having regard to the number and the high political gifts of barrister M.P.s, that so few of them have become Prime Ministers. The probable cause is that the best of them preferred the stately permanence of the higher judicial posts or the greater temporary advantages of the Lord Chancellorship. Many there are who consider that Lord Hailsham might have become Prime Minister if he had followed his star in the House of Commons; and there is a distinct possibility that Sir William Jowitt may in time, if he pursues that object with undeviating ambition, become Prime Minister in a Socialist administration.

At present, however, the Bar can boast of only three Prime Ministers. The Hon. William Pitt, junior barrister of Lincoln's Inn and the Western Circuit, was the first; the Hon. Spencer Perceval, Solicitor-General to the Queen, Solicitor-General, Attorney-General and Chancellor of the Exchequer, was the second; and Mr. Asquith, K.C., of the North-Eastern Circuit, Home Secretary and Chancellor of the Exchequer, afterwards Lord Oxford, was the third and the last.—*L.J.*, 1929, p. 454.

The Life of a Law Officer.—Law Officers, as such, do not last long, and their average span of life does not amount to more than two or three years.

The shortest on record was that of Sir John Jervis, who was Solicitor-General for three days. When Lord John Russell formed his first administration, in 1846, Sir Thomas Wilde resumed his old position as Attorney-General with Sir John Jervis as his colleague. His appointment was dated July 4. Two days later Tindal, C.J., died; Wilde succeeded him, and Jervis became A.G.

Mr. Theobald Mathew, in commenting on this appointment, drew attention to the effect of luck on legal destinies. "Had Tindal, C.J., died three days earlier, or Sir Robert Peel's Government lasted three days longer, the Chief Justiceship would have fallen to Sir Frederick Thesiger. As it was, that learned lawyer had to linger at the Bar for nearly twelve years before he became Lord Chancellor in the Government of Lord Derby. His first Chancellorship, in 1858, lasted for a few months only, and his second (1866-1868) was abruptly terminated before it was two years old by his dismissal at the hands of the new Premier, Mr. Disraeli, and the promotion of a younger rival, Lord Cairns . . . . if he had succeeded Tindal, C J., in 1846, he might have been a Chief Justice for thirty years and more."—*L J.*, 1929, p. 454.

CONTEMPORARY LEGAL LITERATURE

Once dreaded as unsafe, the aeroplane has now been improved and popularised and before long if, as Mr. Eubank suggests, an airplane and landplane should be combined in one, it may wholly displace the motor of to-day and it is therefore necessary that the question of the right of the aeronaut to fly in the airspace over another's land should be definitely decided. The difficulty arises from the maxim *"Cujus est solum ejust est usque ad colum"* and if, as some would have it, it is only a nice theory passed down from mediæval times when there was no occasion to apply it to its full extent, the problem may be easy of solution. But seeing the varying circumstances to which the maxim has been applied, it may be difficult to deny to the owner of land his proprietary right to the airspace above and in that event the difficulty will face the aeronaut how he can trespass on another's property. In two articles in the *American Law Review* by Professor Hiran L. Jome of Denison University and Mr. John Eubank of the New York Bar, attempts are made

to solve this difficulty. The solution of this problem has to be arrived at by a delicate balancing of the rights of the individual and of society. The individual must be protected, but his bundle of rights ought not to be so enlarged as to jeopardise the development of the industry. Broadly speaking, there are two views on the question. (*i*) that a landowner has exclusive proprietary right in all the airspace over his head, and (*ii*) that the landowner has no property whatever in the airspace. The exponents of the first view rely on the maxim The advancers of the second argue variously—(*i*) Balloonists, smoke, sounds, carrier pigeons, etc., have for a long time passed and repassed over private property and no owner has ever recovered damages for it without proof of damage. (*ii*) It is an obsolete maxim which can be disregarded in the interests of industry. (*iii*) If the maxim is at all to be applied, it must be limited to the zone of effective possession, that is only so far upward as the necessities and the protection of the landowner require. (*iv*) The ownership in the airspace has been lost by failure to use the airspace. (*v*) This is analogous to the easement or right of the public to pass over water of a river, the bed of which is the private property of another. (*vi*) After all it is a *"damnum absque injuria"* (damage without injury) and *"di minimis non curat lex"* (a triviality which the law will not take note of). (*vii*) The superincumbent airspace is a newly discovered territory and therefore common to all. But this school does not say at what height this territory begins. Mr. Eubank points out that the opposing advocates in effect admit the owner ship of the landowner but would limit it to those uses which are appurtenant to the land and necessary to the full enjoyment thereof. Professor Jome points out that *Coelum* in the maxim was understood by the Latin writers, as also Blackstone and Coke only as referring to the space which began a short distance above the surface of the earth. In that view the landowner could never have possessed any right over the space traversed by the airplane. Mr. Eubank also refers to passages from Justinian's Institutes and Queen Elizabeth's which say that the air like the sea is *ex jurae naturae* common to all. During the world war national governments asserted their sovereignty in the airspace over their territory and the first International Air Navigation Convention held in Europe in October, 1919, accorded to all Governments such sovereignty with a right of innocent passage to subjects of other Sovereign States. Such right of passage is only temporary and can be revoked when occasion demands. Both the writers refer to several Acts of the

legislatures in America, Great Britain, etc., which have recognised the proprietary right of the landowner but made it subject to the right of reasonable flight of aeroplanes. Professor Jome says that "these laws regardless of the real meaning of the common law maxim have quite unnecessarily created a property right in the airspace, the justification for the limitation of which must be proved". But Mr. Eubank questions their legality in so far as they legalise flights and deprive the owner of the land of his right to compensation for the loss of his proprietary right in the airspace.

Referring to the decision of the Court of Appeal in *Weld* v. *Petre*,[1] *The Law Quarterly Review* (April, 1929) says that it emphasises the survival of the old doctrine "Once a mortgage always a mortgage" In *London and Midland Bank* v. *Mitchell*[2] and *In re Stucley*[3] it was held that the statutes of limitation did not apply to proceedings to foreclose mortgages of pure personalty and in the case under review, that was applied to proceedings for redemption. In the case under review the mortgagor was permitted to redeem eighteen years after the last acknowledgment. The note points out that although redemption was allowed after 18 years, the majority of the Court (Lawrence, L J , and Master of the Rolls) was not prepared to hold that mere delay without more was insufficient to constitute a bar to redemption, but as the note later points out, Lawrence, L.J., quotes verbatim from *Lindsay Petroleum Co.* v. *Hurd*[4] and *Erlanger* v. *New Sombrero Phosphate Co.*[5] and both these passages refer to acts or changes occurring during the interval which might prejudicially affect either party. Sankey, L.J., applies to the case under review the test of change in the position of the parties so as to make it impossible to restore them to their original position, but earlier lays it down that "unreasonable delay may bar the mortgagor's right to redeem."

At the present day it has become a practical question to ascertain the nature and incidents of a marriage of a Hindu or Muhammadan with an English girl in England. In a contribution to the *Journal of Comparative Legislation and International Law,* Mr. Les De Gruyther, K.C., has dealt with the question in three aspects: (*i*) The validity of the marriage, (*ii*) the dissolution of the marriage, and (*iii*) the rights of inheritance consequent on the marriage.

1. (1929) 1 Ch. 33 2 (1899) 2 Ch. 161. 3. (1906) 1 Ch. 67.
4. (1874) L.R. 5 P.C. 221 at 239. 5. (1878) 3 A.C. 1218 at 1279.

To constitute a valid marriage, two conditions are to be satisfied: (*i*) The parties must have the capacity to marry each other, and (*ii*) the requisite ceremonies should be gone through, the nature of the ceremonies being governed by the law of the place of the marriage. The Hindu marriage being a sacrament, the Hindu Law will not permit such a marriage and therefore the marriage of a Hindu with an Englishwoman will be invalid. A Hindu can renounce his religion and then marry an Englishwoman validly but then the precise matrimonial relations resulting from such a marriage and also the mode in which his estate will be distributed on his death intestate would be left in doubt The marriage under Muhammadan Law being a civil contract, the marriage of a Muhammadan with an English girl will be valid. There is a prohibition in that law against marrying an idolatrous woman but not an English girl who belongs to the "scriptural sects".

The matrimonial status is governed by the law of the domicil of the parties. The wife on marriage enters the domicil of the husband, and the principles governing dissolution will be determined by the law of India. Among Hindus there can be no divorce but the Muhammadan can divorce at will subject only to the payment of the dower to the wife.

In the case of a Hindu, the marriage itself being invalid, neither the wife nor the children, if any, of such a marriage could have any rights of inheritance. On the death of the Muhammadan husband, the distribution of his estate would be in accordance with the mode of distribution directed by the Muhammadan Law. If the question should arise in England with regard to the property in England, the personal property of the intestate will devolve on those entitled to take by the law of the actual domicil of the intestate at the time of his death. Mr. De Gruyther leaves open the question of succession to realty.

The next question is, if the wife can be granted any relief in England under the Matrimonial Causes Act. In *Chetty* v. *Chetty*[8] a judicial separation was granted. Mr. De Gruyther doubts the correctness of the decision. In *Chetty's case*[8] the Court based its conclusion on two grounds: (*i*) that the disability under Hindu Law being based on religious grounds, the Courts of England would not recognise it, and (*ii*) that England is not bound to recognise the foreign law when it works injustice to its own subjects, and therefore can personally estop

8. L.R. 1909 P.D. 67.

the husband from relying on Hindu Law. The first ground overlooks the fact that the matrimonial jurisdiction has been transferred to the Divorce Court from the Ecclesiastical Courts which would not have countenanced marriage with a polygamist. Mr. De Gruyther further argues that divorce must also be granted on the ground of adultery if *Chetty's case*[8] should be right. But the House of Lords has definitely ruled that divorce cannot be decreed under similar circumstances as in *Salvesen's case*.[9] The second ground of *Chetty's case*,[8] *viz*, that of personal estoppel is not also sound because if that were correct, the wife should be able to succeed to personalty in England.

To get over these legal difficulties and doubts, Mr. De Gruyther suggests that the legislature should validate such marriages insisting on monogamy as a condition precedent to a marriage under that legislation.

Mr. V. E. Phillips of the Kansas City (Missouri) Bar has contributed to *The American Law Review* an article on the Liability of Abstractors to the Customers who go to them for abstracts of title to real property. The difficulty of securing personal knowledge regarding the titles to real property and the complexities of the real property law have brought to the front the profession of abstractors and in the United States it has become one of the highly specialised undertakings of experts. Like the other members of the legal profession, the abstractor stands in a fiduciary relation to the customer. From the nature of the work it is an undertaking involving skill and naturally the Courts have imposed on him a duty to exercise care and skill in his undertaking, with liability to damages for any errors in the abstract. But as in other contracts, only damages actually sustained by the customer by relying on the abstract will be granted to him. It is subject to the proviso that the customer must try to mitigate the damages if possible. The majority of the Courts in United States insist on privity of contract between the damaged party and the abstractor but in some States it appears to have been abrogated by statute where it appeared that the abstractor knew that the third party was relying on it. The learned author predicts that some additional rules will eventually become settled in the law of abstracts modifying the privity of contract rule. (1) If the abstractor's certificate should recite that it is for the benefit of third parties also, then on the theory of a contract made

8. L.R. 1909 P.D. 67 9. 43 Times L.R. 609.

for the benefit of third persons, relief will be given to them. (2) Courts will take judicial notice of the custom in the United States that the abstract is really prepared for the benefit of some third person and not for the owner.

The *North Carolina Review* for February has reproduced the address delivered before the Round Table section on "Wrongs" at the meeting of the Association of the American Law Schools in Chicago on December 28, 1928 by Professor Albert Coates. The learned Professor puts forth a strong plea for the fusion of pertinent criminological materials with the traditional legal materials in the courses in College on criminal law and procedure. Whereas the present system of criminal law merely gives the student what the law is as found in decisions and legislative enactments, it does not give him a knowledge of the practical situations arising in each case. "The clients do not bring him neat questions solely of property, torts, contracts, or any other one compartment of the law. As often as not they bring him problems calling for a focus of the light from half a dozen different subjects of the law. And thus he is eternally having to make new fusions, new synthesis, new integrations of law and equity, of property, torts, procedure, and the rest." In 'rest' may be included practical knowledge as well. It is not that the technical study of the law should be ignored. That is absolutely necessary but alongside with it the student must know about the workings of the legal principles he learns, and about the functioning of the legal machinery through which these principles operate. Mr. Pound says that "the strength of the common law is in its treatment of concrete controversies—in the application to *the cause in hand* of the judicial experience of the past." The learned Professor in his address points out that the proper functioning of the common law requires a knowledge of both and that the traditional law study gives only a knowledge of *the judicial experience of the past* and neglects to give a knowledge of the *cause in hand*. The materials and methods of criminology contribute to this end and should therefore be incorporated into the courses of criminal law and procedure in order to enable a lawyer the better to do a lawyer's duty. Further it is necessary that both criminology and criminal law should be fused in the brain of one teacher, for it is only then that he can bring to himself and to his teaching a new and powerful stimulus. For different teachers to teach them will be to establish an artificial dividing line between criminal law and criminology and emphasise the very gap to be filled up.

BOOK REVIEWS.

ANSON'S LAW OF CONTRACT. Edited by Sir John Miles and J. L. Brierly. Seventh edition, 1929. Clarendon Press, Oxford. Price 15*s*.

There have been several treatises written on the law of contracts and on special branches of the same. But so far as we are aware, there is none to excel Anson's Law of Contract in stating the principles underlying this branch of law in a manner suited to and interesting the student of law or a beginner. It is for this reason that it has been prescribed as a text-book for the students of law by the Madras University and we believe, by other Universities as well. It would have been a matter for regret if this standard book on this branch of law which is ever growing, were allowed to go out of date; and the editors of the present edition which is the jubilee edition of Anson's Law of Contract have earned the gratitude of lawyers and students in bringing out this work. Having regard to the rapid development of law in various parts of the law of contract, we have every reason to be thankful to the editor for having taken greater liberties with the text of the previous editions and re-written portions of the work and omitting some portions of the original matter in the present edition. The editors have referred to the alterations made by them in their preface to the work and they need not therefore be repeated here. We feel sure that this work will be continued to be studied with profit by all students of law trying to acquaint themselves with the principles of the English Law of Contracts.

THE HINDU CODE, by Sir H. S. Gour, 3rd edition, 1929. Published by Messrs Butterworth & Co. (India), Ltd. Price Rs. 30.

Dr. Gour's work on Hindu Law does not require any introduction to the lawyer. We had occasion to review the first edition of this work in some detail in the pages of this Journal (37 M.L.J. 119). We are glad to find that some of our suggestions have been accepted by the learned author in his subsequent editions, though he has not given effect to others. With reference to section 96 of the present edition, which was section 82 of the first edition, we observed that it was far from settled that possession of sridhanam property was by itself a reason for negativing a woman's right to maintenance and we referred to *Lingayya* v. *Kamakamma*, (1913) 28 M.L.J. 260: 38 Mad. 153 in support of our observations. It may be that

the learned author does not agree with the view of the learned Judges in the case which however has been arrived at after noticing the decisions referred to by the learned author in support of the contrary view in paragraph 1118 of his commentary. It may also be mentioned that the decision in *Lingayya* v. *Kanakamma*, (1913) 28 M.L.J. 260: 38 Mad. 153 referred to by us has been followed in *Kalliani* v. *Utharankat Parakkal Eashvan Raman*, 30 I.C. 897. Under these circumstances we venture to think that it would have been more appropriate if the learned author had noticed these decisions in the present edition and given his reasons for taking the contrary view. Again with reference to section 320, we referred to *Navaneetha Krishna Thevar* v. *Ramaswami Pandia Thalavar*, (1916) 40 Mad. 871: 33 M.L.J. 277 where it was held that the Court of Wards in possession of a woman's estate is not subject to the same restrictions with regard to the powers of alienation as the woman herself. This is contrary to section 320 in the author's work and it is curious that the author has not noticed it even in the present edition. Sir H. S. Gour's work has acquired a leading place among the treatises on Hindu Law and is looked upon as a book of reference. The above observations are therefore only made with the view that in subsequent editions any omissions or inaccuracies in the previous editions may be rectified, and not with any idea of finding any faults in it.

As for the idea of codifying the entire field of Hindu Law administered by the Courts, we venture to think that it is impracticable and inadvisable; and we are reminded in this connection, of the attempt in the later half of the last century made by eminent jurists and lawyers in England to codify the entirety of English Law which was, of course, not productive of any results. We are of course in favour of legislation clearing up doubts and removing hardship in those parts of the Hindu Law where they exist; but it is doubtful whether the entire personal law of the Hindus can and should be codified. As observed by Sir Courtney Ilbert, "a good text-book has often been the foundation of a Code and in the meantime is not a bad substitute." Sir H. S. Gour's present work fully satisfies Sir Courtney Ilbert's observations.