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## LAW REPORTS.*

The beginning of modern law so far as Madras is concerned dates from the Madras High Court Reports. One rarely goes beyond those reports though as I said in my last lecture there are both Supreme Court Reports and Sudder Dewany Adawlut Reports for Madras as for Bengal. The Sudder Dewany Reports are all after the same pattern. But the Supreme Court Reports from Calcutta are much fuller than those of Madras. For Madras we have only Strange's Notes of Cases, which are very scrappy somewhat in the style of ancient reports in England. Sir Thomas Strange is the best known of the Supreme Court Judges of Madras. He is known as the author of a highly-valued work on Hindu Law. There is another junior Strange who is also the author of a Manual of Hindu and Malabar Law. He was a Judge of the High Court and he is well known as the Commissioner deputed to inquire into the conditions of Malabar. The Madras High Court Reports contain some of the best written judgments of the Madras High Court. Some of the Judges are very distinguished men, Sir Colley Scotland, Sir Adam Bittleston, Mr. Holloway and Mr. Justice Innes. It used to be said when Sir Colley Scotland was appointed as the Chief Justice of Madras that Lord Westbury wanted to appoint a Scotchman but as no Scotchman was available he appointed Colley Scotland as Chief Justice of Madras but it was recognised on all hands that the appointment was a good one. He was apparently a Chief Justice with a personality and many well-written judgments stand to his credit. Mr. Justice Holloway

*The eighteenth of a series of lectures arranged by the University of Madras delivered by Mr. B. Sitarama Rao, Advocate, Madras High Court.

apparently believed in strong language but unlike the great run of judges who use strong language he had marvellous erudition. He was a Civilian and had large experience of Malabar. He had considerable acquaintance with the German jurists who make prominent appearance in his judgments. He is, in fact, a translator of one of the works of Savigny. So far as Malabar and Hindu Law are concerned, his lead was not always in the right direction. He was largely conservative and for consistency's sake, he put down the fairly well-established practice of partition both under the Marumakkathayam and Aliyasantana Laws and he is responsible for the simile of the full leech and empty leech, the strict rule as to maintenance of junior members and the doctrine of lapse to the family to which much of the discontent of Malabar with its system of law is traceable. He applied the doctrine of lapse also to the Hindu Law but the Privy Council knocked it on the head in the well-known *Sivaganga case*.[1] He was, as all his contemporaries were, under the influence of Colebrooke and other Bengal writers and he does not seem to have to the end fully realised the characteristic features of the Mitakshara though he never failed to point to the Mitakshara as being the highest authority for the South. So far as the general law is concerned, his attitude was correct and his judgments are sound and have largely stood the test of time. In *Narayanan Chetty* v. *Mrs. Jensen*,[2] he, sitting with Innes, J., said: "Undoubtedly, it is most desirable that, for the purpose of discovering the rule of equity and good conscience, the tribunals should always be encouraged to enquire how systems of positive law have in analogous cases understood and applied the rule. Safely to apply this process, however, a Court must have a very thorough knowledge of the system from which the principle is to be eliminated, and must take pains to reject principles of accidental and mere arbitrary growth, and distinguish them from such as really flow from the nature of the subject-matter." The qualification laid down properly applied, no doubt, to the two Judges who decided the case and the pupil of one of them, Mr. Justice Muthuswami Aiyar, who came after this series In *The Madras Railway Co.* v. *Zamindar of Karvetinaggur*[3] again he said: "A rule of English Law is not a rule for us, unless it is a correct rule, and it is quite possible that a rule excellent there may be wholly inapplicable here."

1. (1863) 9 M.I A. 544. 2 (1865) 2 M H.C.R. 383 at 384.
3. (1871) 6 M.H.C.R 180 at 183.

Acting on this principle, he refused to apply the rule in *Fletcher* v. *Rylands*[4] as unsuitable to Indian conditions. The Privy Council accepted more or less his view on the matter. His training in Roman Law and his knowledge of Comparative Jurisprudence gave him the courage to differ from the Lord Chancellor in that case. This is what he said: "The rule upon which the relative rights of men are to be determined is no mere unbending formula. . . . The true reason of the rule is that although not an immediate, national economy, wealth and prosperity, with all other objects of man's ethical interests, are mediate sources of law. This has had, always will have, and always ought to have, an important influence upon the construction of legal propositions. In the present case I say—Agriculture is the oldest of arts. It is still the one of the greatest primary importance. Human life cannot subsist without it, and, despite the Lord Chancellor, human life is more important than property." His interjection in a case "he knoweth not the law who knoweth not the reason of the law" shows his attitude on the question of the application of the English Law. His disquisition on cause of action and *res judicata* is still illuminating reading and is frequently quoted, and he had the boldness to differ as to what constituted a judgment *in rem* from such great authority as Smith, the author of Leading Cases and his view has been accepted. Like his contemporaries in England, he was for freedom of contract and deprecated Story's view as to the power of Court to interfere with the provisions of contract between parties on the ground of their being penalties. Though his views on certain matters like the powers of impartible owners to alienate were not accepted, he was one of those who gave right direction on most points of general law in this Presidency.

To Scotland and Innes belongs the credit of clearly defining the interest of the ryotwari proprietor not to be evicted except in the ways known to the statute, relinquishment or sale. To Innes also belongs the credit of putting the right of the ryotwari proprietor to water on the right basis as a *jus in re* and not merely as a contractual right.

The times of these reports have been often referred to as the age of great Judges and great Advocates. Mr. Mayne, Mr. Norton and Mr Sullivan crossed swords with Judges like Holloway and Scotland. There is no

4 (1866) L.R. 3 H.L. 330.

doubt a certain element of *laudator temporis acti* in this sort of picture and in some respects, for instance, in manners the Bench seems to have in recent years improved very much with occasional lapses which more often than not prove the rule, but all told, judging from the reports, they seem to mark some of the best part of the life of the High Court. The Madras High Court Reports are fairly well-edited series. The facts are given fully and so also the judgment of the Lower Court whenever necessary. The arguments are occasionally though not always given. In addition to the High Court reports, we had a short-lived series known as the Madras Jurist. There was another series known as the Indian Jurist which came up to more modern times. It was of the type of the Indian Cases.

For Bombay, the modern law commences with the Bombay High Cuorts. The period opens with Sausse, C.J., and as puisnes among others Sir Joseph Arnould, a distinguished Judge, the biographer of Lord Denman. Sausse was succeeded by Couch and Westropp successively. Both of them were originally puisnes and subsequently became Chief Justices. The judgments of Westropp, the Privy Council has recently said, require respectful consideration; in fact, he is one of the strong Judges of the Bombay High Court. He has been party with West, J., to some of the most elaborate judgments on Hindu Law. Widow's right of maintenance, stridhana in Mitakshara, congenital blindness and status of illegitimate son among others have been dealt with most elaborately. On some points he may have been overruled, but his judgments were never slipshod or ill-considered. In this, the Bombay Judgments in the early reports, the same cannot be said of recent reports, contrast favourably with the judgments of the other Courts. Partly this may be due to the fact that the continuation of Peishwa sovereignty till 1830 made it possible to have learned Dharma Sastra Pundits in that part of India which was not possible elsewhere where learning of that sort had long gone under, and the passion for completeness of the Judges may also partly account for it. West, J., is the other Judge whose name is a byeword for judicial learning and elaborateness of treatment. Though on some occasions, the elaborateness errs by excess, there is no question that every subject receives at his hands the fullest and most illuminating treatment. His Sanskrit learning placed him in a specially advantageous position. One of his most elaborate judgments is about the incidents of the Muliwarg tenure where he and Sir Michael Westropp laid down that the Government

could enhance the assessment in the case of that tenure and, in doing so, has traversed over such a wide ground that in fact the judgment along with the judgment of Sir Michael Westropp may well be considered a treatise on the subject of ryotwari tenure and it has settled the law. In a later case he and Sir Charles Sargent, J., considered the Kumri tenure and that case is the leading case on the rights of the Crown over waste land. Mr. Justice Janardhan is the first Indian Judge, but so far as I have been able to see, he appears for a moment on the judicial stage in *Ramji* v. *Chinto*[5] and then disappears. Mr. Justice Nanabhai Haridas is the first real Indian Judge in the Bombay High Court. His judgments begin to appear from 10 Bombay High Court Reports. He has been a party to several well-considered judgments. He has the reputation of a learned Hindu lawyer and a sound Judge generally. His judgment on the limits of coparcenary and that on the rights of survivorship of illegitimate sons are well known. Sir Charles Sargent is the next Chief Justice who was a puisne before he became Chief Justice. He is also regarded as a strong Judge of the Bombay High Court

The early reports for the High Court of North-West Provinces are the Agra Reports and Full Bench Decisions and the North-West Provinces Reports. The North-West Province had no Supreme Court and we have had occasion to refer to the Sudder Adawlut Reports of that province already. There is nothing special to be said about the Sudder Adawlut reports of that province. They were all published on a uniform plan and were equally as elaborate or rather the reverse of it as elsewhere. An ambitious student of law who wants to trace the history of the land tenures, or any other branch of law of that province might look up these reports, but others rarely make any reference to these old series but that is not the case with the Agra and the North-West Province High Court Reports. The Agra Full Bench rulings cover the period 1866-1867. The Agra High Court Reports (1866-1868) and the North-West Provinces from 1869-1875. They contain many useful judgments but it must be confessed that the judgments of that High Court remain somewhat scrappy and lack the elaborateness of the judgments of the Calcutta, Bombay and Madras High Courts. The only Judges of consequence among them seem to be Sir Walter Morgan, C.J., and Turner, J, who both of them became later Chief Justices of Madras. The Bengal Law Reports, the

5 (1864) 1 Bom H.C.R. 199.

Madras High Court Reports and the Bombay High Court Reports contain some of the most learned judgments of those respective High Courts, whereas the same cannot be said of the North-West Provinces High Court Reports. The reputation of Allahabad was always low except when Mahmud, J., for instance, in later days, gave it distinction by his dissenting judgments. It is more the dissenting judgments of that Court that have become famous and in fact in good many instances settled the law at any rate for other provinces and finally for the Allahabad High Court itself.

High as the value of these various High Court Reports, of the highest value are the judgments of the Privy Council from the year 1836 reported in Moore's Indian Appeals which bring us right up to the Indian Appeals. These reports are the most valuable of all the reports dealing with India. There, you will see the foundation laid for the whole fabric of Indian Law. As early as 1 M.I.A. in the *Mayor of Lyons case*,[6] their Lordships lay down the limitations subject to which the English Law can be taken to be imported even into the Presidency towns. Their Lordships lay down the rules of exposition of Hindu Law in the *Ramnad case*.[7] They settle the rule of succession for self-acquisition of the member of a joint family in the *Sivaganga case*,[1] the rule as to converts in *Abraham's case*,[8] the requisites of a valid custom in the Ramnad and other cases and the powers of managers in *Hurroomanpersaud Panday's case*.[9] *Bhoobun Moyee's case*[10] is the starting point for the discussion as to the restrictions on the exercise of the power of adoption by the widow by reason of supervenient events. Widow's power of adoption with the sanction of sapindas is laid down in the *Ramnad case*,[7] which has been commented upon, followed and explained in numerous other cases which form highly interesting literature. Widow's powers of disposition are settled by *Vencata Narrainapah's case*[11] and other subsequent cases. The rule of *benami* is elaborated in several decisions in those volumes. The power of disposition by will and the limits of such disposition are also settled by *Soorjoomoney Dossee's case*[12] and other cases. The doctrine of son's liability for father's debts starts with *Hunoomanpersaud Panday's*

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1. (1863) 9 M.I.A. 544.
6 (1836) 1 M.I.A. 175
7 (1868) 12 M.I.A. 397.
8 (1863) 9 M.I.A. 199
9 (1856) 6 M.I.A. 393.
10. (1865) 10 M.I.A. 279
11 (1861) 8 M.I.A. 529.
12. (1857) 6 M.I.A. 526.

*case*.[9] The rule as to succession to mutts and the powers of matathipathis are considered in 11 and 13 M.I.A. The doctrine of alluvion, the rule as to succession to impartible estates, the incidents of many important tenures, the Lakhiraj, Ghatwali and other tenures in Bengal and the Polliem tenure in Madras were dealt with by the Privy Council with so much elaborateness that they have supplied abundant authority for the consideration of cognate questions.

In those early days, there were many Judges with curious notions of evidence and the Privy Council had occasionally to come in with somewhat elementary looking advice such as, a case cannot be decided on suspicion but only on evidence, that you cannot dismiss a man's case without consideration because he has produced a forged document or because he has uttered an untruth on one point and that if you borrow a rule of English equity, you should not borrow it without its qualifications. It must be said to the credit of the great English Judges who decided the cases in those volumes that they decided the questions relating to India freeing themselves from the technicalities of English Law and permitted the introduction only so much of English Law into India as was not conditioned by the peculiar historical and social circumstances of England. Nor can it be said that they disposed of cases without a complete discussion of the law on the subjects they had to deal with—even the Hindu Law subjects—at any rate when Sir Hugh Cairns and Sir Roundel Palmer appeared; for you will find the arguments and references are so complete that you wonder how that completeness was attained. Abundant references to authorities even now untranslated will be found in the arguments. The reports of Moore are the fullest that you have in any series relating to India. Complete history of the case from the start to the end, extracts and sometimes the full judgment of the Lower Court and the arguments of Counsel on both sides are given with a fullness which leaves nothing to be desired. The English of some of the judgments is magnificent and in fact has very little to compare with in later days. A reading through of those volumes is an essential pre-requisite to any lawyer in India who wants to master the principles of Indian Law. Some of the judgments of the Privy Council of this period are to be found in Acton, Knapp and Moore's Privy Council and so also in Morley's Digest. Most of the cases found in the Weekly Reporter, Sutherland's Privy Council judg-

9 (1856) 6 M.I.A. 393.

ments and the various High Court Reports are also to be found in Moore's Indian Appeals but a few of them are not so found and they will be found collected in Sanjeeva Rao's publication called the Indian Reports. The Judges that have taken part in these judgments are Lord Lyndhurst in *Freeman* v. *Fairlie*,[13] Lord Brougham in *Mayor of Lyons case*,[6] Baron Parke in some cases relating to contract, agency, etc., Knight Bruce, V.C., later L.J. in many cases like *Hunoomanpersaud Panday*,[9] *Gopeekrist Gosain*[14] (on *benami*) and *Sreenutty Soorjeemoney Dossee* v. *Denobundoo Mullick*,[15] Lord Kingsdown in *Bhoobum Moyee Debia's case*[10] and *Abraham's case*,[8] Lord Justice Turner in the *Sivaganga case*[7] and *Vencata Narrainapah's case*,[11] Lord Westbury is responsible for *Appovier* v. *Rama Subba Aiyan*[16] the leading case on partition and joint family, Dr. Lushington for the decision in *Ardaseer Cursetjee* v. *Perozeboye*[17] and Lord Justice James in *Umrithnath Chowdhry* v. *Goureenath Chowdhry*.[18] Sir James Colvile, the ex-Calcutta Supreme Court Chief Justice has to his credit a number of epoch-making judgments, *cf.* Ramnad adoption case (*The Collector of Madura* v *Moottoo Ramalinga Sethupathy*[1]), *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram*[19] laying down the rule of reverter, *Bhugwandeen Doobey* v. *Myna Baee*[20] laying down the rule of limited power of disposition of the widow under the Benares School. He is also responsible for the judgment which lays down that the enumeration of the Bandhus in the Mitakshara is not exhaustive (*Gridhari Lall Roy* v. *The Bengal Government*[21]). He is responsible also for applying the English rule as to enforcing of conjugal rights to Hindus and Mahomedans. (*Moonsee Buzloor Ruheem* v. *Shumsoonnissa Begum*[22]). Knight Bruce and Turner, the two great Chancery Lawyers have to their credit the doctrine of *Benami*, *de facto* guardianship, the doctrine of inquiry supporting sale, and several matters relating to wills and future estates. Baron Parke, Lord Brougham and Lord Lyndhurst take part only in decisions relating to contract and general law. You find one curious feature, however; Lord

1. (1863) 9 M.I.A. 544
6 (1836) 1 M I A. 175.
8 (1863) 9 M I.A 199.
9 (1856) 6 M.I.A. 393.
10 (1865) 10 M.I.A. 279.
11. (1861) 8 M.I A. 529.
12 (1857) 6 M.I.A. 526
13 (1828) 1 M I A 305.
14 (1854) 6 M I A. 53
15 (1862) 9 M.I.A. 123 at 134
16 (1866) 11 M.I.A. 75.
17 (1856) 6 M I.A. 348.
18. (1870) 13 M.I.A. 542.
19 (1866) 11 M.I.A. 139.
20. (1867) 11 M.I.A. 487.
21. (1868) 12 M.I.A. 448.
22. (1867) 11 M.I.A. 551.

Chelmsford, an Equity Lawyer, setting his face in *Pattabirami Aiyar* v. *Venkatrao Naicken*[23] against the importing of equity doctrines into India and Sir James Colvile later on condoning such importation. (*Thumbusawmy Moodelly* v. *Hossain*[24].) All these English Judges have already become familiar to us in the course of our discussion of English reports and do not require a separate consideration now.

Though the various High Court reports were published by the Government through official reports there was no statute dealing with the subject. It was also felt that it was "expedient to diminish the multitude and expense of the Law Reports published in British India and to improve their quality." With a view to the furthering of these objects the Governor-General in Council proposed to authorise the publication of the reports of cases decided by the High Courts of Judicature and the Law Reports Act was passed. So far as one could judge there seem to have been only the Weekly Reporter and Indian Jurist in Calcutta and the Madras Jurist in Madras competing with the official publication. Even this was thought an intolerable multiplicity and it passes one's comprehension what the framers of the Act would have thought of the present multiplicity of reports. It is enacted by S. 3: "No Court shall be bound to hear cited or shall receive or treat as an authority binding on it the report of any case decided by any of the said High Courts on or after the said day other than a report published under the authority of the Governor-General in Council." This section gives the Government monopoly of publication but it does not take away the authority of unpublished precedents or give a published decision a higher authority than that possessed by it as precedent. As Chief Justice Maclean says in the case I have referred to already "that section was framed to constitute a monopoly if the Judges so desired for the authorized Law Reports. It only says that no Court shall be bound to have cited the report of any case, etc.; it does not prevent the Court from looking at an unreported judgment of other Judges of the same Court. This always has been done and can and ought to be done. A judgment is none the less an authority because it has not been reported. Otherwise the question of whether such a judgment could or could not be so regarded would depend upon the mere whim of the reporter." It is through the loophole thus provided, that private publications escape and the

23 (1870) 13 M I A. 560
24 (1875) L.R 2 I A 241 I L.R. 1 M. 1 (P.C).

incompleteness and costliness of the official publications make them thrive. From time to time, however, protests are made, even by the highest tribunal the Privy Council against citation from private reports but the process is going on—even their Lordships not being above it.

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## THE CHILD MARRIAGE RESTRAINT ACT.

MR. P. R. GANAPATHI AIYAR, ADVOCATE, writes:

The above Act, more popularly known as Sarda's Act, has received the consent of the Governor-General and is stated to come into force on 1st April, 1930. The legislators who voted for the same when it was being passed in the Legislative Assembly congratulated the Government members and said that the passing of the same with the Government bloc was an epoch-making event. Those who voted against it and who think that the legislation as embodied in the Act is a tyrannical use of the powers of the majority thus got up also regard it as an epoch-making event. This aspect of the matter will be referred to on a future occasion.

Doubts are being expressed in some responsible quarters as to the validity of this legislation. It is highly necessary to consider whether such doubts are in any way well founded.

To consider the above it is necessary to see what the original Bill out of which the present Act grew was. The Bill, as originally introduced by the Hon'ble Rai Sahib Sarda, was not to prohibit Hindus to whom alone the above Bill was made applicable from performing marriages of their girls before puberty which, according to the religious law, ought to be performed by certain classes of Hindus or to compel people to perform post-puberty marriages but merely to make marriages of Hindu boys and girls below certain ages void with a proviso, however, enabling such persons as are bound by their religious law and feeling compelled to obey it to perform marriages even below that age under certain conditions. The condition is only to regulate the marriages, *viz.*, the taking out of a license from the Magistrate of the District who is bound to grant the same on the guardian stating on oath that he conscientiously believes that the religious law enjoins such a marriage.

The framer of the Bill in the Statement of Objects and Reasons appended to it states the object to be twofold: (1) To

put a stop to girls below 12 years of age becoming widows, and (2) to prevent the physical and moral deterioration of boys and girls by removing obstacles to their physical and mental development. We are not here concerned how moral deterioration comes in by marriages being performed and what mental development has to do with moral development or deterioration.

The two objects as stated in the Objects and Reasons were proposed to be effectuated by declaring invalid the marriages of girls below 12 years of age and of boys below 15 years with certain exceptions as stated already. The Bill though it affected a rule of Hindu Law of Marriage and, therefore, required the previous consent of the Governor-General, did not affect the sacramental character of the marriage and did not disable persons from performing certain religious rites. As Rai Sahib M. Harbilas Sarda expressly stated: "In order, however, to make the Bill accessible to the most conservative Hindu opinion, provision is made in the Bill that for conscientious reasons, the marriage of a Hindu girl would be permissible even when she is eleven years old." As stated in Medical Transactions, Vol. IX, Part I, at pp. 308 and 309: "Most of the females of this country begin to menstruate after the 12th or at the 13th year of their age." This is no new discovery. The Sage Apastamba as cited in the Smriti Chandrika states that girls attain puberty at 12.

When the principle of a Bill is accepted it is referred to a Select Committee. Indeed it is stated that the reference to a Select Committee presupposes that the Assembly in which the Bill is introduced and carrying the motion for Select Committee accepts the principle of the Bill. Even so, when the Select Committee to which the Bill is referred changes the principle of the Bill entirely and if this principle affects the religion or religious rites or usages of any class of His Majesty's subjects, the previous assent given by the Governor-General to a different principle which had also that effect cannot be taken to have relation to the new principle introduced by the Select Committee.

S. 67, sub-sec. (2) of the Government of India Act enacts: "It shall not be lawful, without the previous sanction of the Governor-General, to introduce at any meeting of either Chamber of the Indian Legislature any measure affecting . . . . (*b*) the religion or religious rites and usages of any class of British subjects in India." This clause is bodily introduced in the Manual of Business and Procedure of the Legislative Assembly as section 62-B.

If the principle for which consent was originally given was departed from and an entirely new principle be adopted, the fact that this entirely new principle is adopted by the Select Committee would not justify its being passed without the previous sanction of the Governor-General and the fact that the Governor-General subsequently gives his consent when it goes to him after passing both Houses cannot be taken to have any relation back or to dispense with the necessity for the previous consent.

The Bill introduced by Mr. Sarda was referred to a Select Committee and the Select Committee introduced many radical changes and indeed the Act as it stands at present is almost a reproduction of the Bill as changed by the Select Committee. The changes in so far as they bear on the present question as to the validity of the Act are in the main two: (*i*) The applicability of the Bill to all classes including Hindus and Mahomedans (when the original Bill applied in terms only to Hindus); and (2) penalising persons who perform what is styled as "child marriages." "Child" is defined to be a person who, if a male, is under 18 years of age, and if a female, is under 14 years of age, and "child marriage" is defined as a "marriage to which either of the contracting parties is a child". As it is admitted that a girl in India attains her maturity at the age of 12 or at the most 13, this legislation penalises persons who, according to their religious law, ought to marry their girls before puberty and as according to such religious law a girl married after puberty is a "Vrishali" and the husband of such a girl is a "Vrishalipati" unfit and disqualified to perform or be associated with the religious rites prescribed for such persons by their religion, this new principle as evolved by the Select Committee and as now passed affects the religious rites and usages of such persons.

Indeed, the Select Committee which thus radically changed the Bill recognised that the Bill as changed by it was a new one. According to them, the original Bill declared that marriages below certain ages void, that this elicited a strong expression of feeling that it was objectionable and that they had to recognise the objections to be insuperable. To obviate this they say they introduce a new Bill to effectuate according to them the original object. The fact, however, is it is a new Bill. They say: "We do recognise that the substitution in Select Committee of what is formally a new Bill is an unusual step."

According to sub-section (2) of section 67 of the Government of India Act, as already stated, "It shall not be lawful, without the previous sanction of the Governor-General, to introduce at any meeting of either Chamber any measure affecting the religion or religious rites and usages," etc. The section is explicit It shall *not be lawful* at all *to introduce* at any meeting a Bill of that nature. The original Bill *had no reference to the Mahomedans*. The Bill *as changed* by the Select Committee and as now passed affects *Muslims*. It affects the liberty given to the Muslims under their religious law. This is a violation of the provision contained in sub-section (2) of section 67 as aforesaid. Then again, the original Bill did not affect the sacramental character of a Hindu marriage. The Bill as amended by the Select Committee and as now passed vitally affects the sacramental character of marriage by penalising persons compelled to perform the marriages of their girls before puberty under their religious law resulting in the disqualification of persons marrying according to its provisions from performing the religious rites prescribed by their religion. This principle has not received the previous sanction of the Governor-General without which it is not lawful to introduce at all a measure involving such principle. Indeed, as already stated, the Select Committee recognised the Bill as changed by it as substantially a new Bill. Now the Indian Legislature has no power of legislation apart from the Government of India Act and can exercise powers conferred upon it by the said Act subject to the conditions and restrictions imposed by it. The consideration of the Bill by the Indian Legislature as changed by the Select Committee is, therefore, entirely *unlawful* and is, therefore, *ultra vires* of its powers and such an Act is, therefore, invalid and entirely illegal.

The above result is also in accordance with the other provisions of the Government of India Act. S. 84 deals with the question of validity of Indian Laws. It enacts by sub-section (1) that "A law made by any authority in British India shall not be deemed invalid solely on account of any one or more of the three reasons mentioned therein." The three reasons stated have no reference to the present question. Sub-section (2) of section 84 declares that "the validity of any Act of the Indian Legislature or any local legislature shall not be open to question in any legal proceedings on the ground that the Act affects a provincial subject, or a central subject, as the case may be, and the validity of any Act made by the Gover-

nor of a province shall not be so open to question on the ground that it does not relate to a reserved subject." This section only prevents Courts from declaring an Act of the Indian Legislature invalid on the ground that the Act dealt with by the Indian Legislature affects a provincial subject. This, therefore, supports the view that the Act of the Indian Legislature can be questioned on other grounds and where the Government of India Act has enacted that it *shall not be lawful to introduce* certain measures *without previous sanction*, a *violation* of such an *express mandatory provision* will render an Act relating to such measures *invalid* and it will be open to Courts to question the validity of the Act on such a ground.

It may be noticed that the language employed with reference to a law enacted by the Indian Legislature [section 67, sub-section (2)] is in striking contrast to the provision enacted by the Government of India Act with reference to a law made by the local legislatures. As regards such local laws the proviso to sub-section (3) of section 80-A of the Government of India Act expressly declares that "an Act or a provision of an Act made by a local legislature, and subsequently assented to by the Governor-General in pursuance of this Act shall not be deemed invalid by reason only of its requiring the previous sanction of the Governor-General under this Act." This is only consistent with the enacting clause in sub-section (3) which merely says that "the local legislature *may not*, without the previous sanction of the Governor-General under this Act." Here it is only permissive. The provision as to previous sanction is *not so mandatory* as in the case of the Legislative Assembly. With reference to the latter the language of section 67 of the Government of India Act as already stated is very explicit. "It shall not be lawful" to introduce at all without previous sanction. The fact that in section 80-A it is specifically provided that the want of previous sanction in the case of local legislature does not invalidate an Act while no such similar provision is made in the case of an Act of the Legislative Assembly is very significant.

No doubt where the Legislature is supreme, it may be that the fact that the forms of procedure have not been strictly followed but nevertheless a Bill has been passed through both Houses and has received the Royal Assent cannot affect its validity and the Act cannot be impeached on the ground that the forms of procedure have not been followed. But even in England where the English Parliament is supreme, a Bill requires the assent of both Houses of Parliament and the con-

sent of the King; so that when legislation was enacted to make a Bill passed by the House of Commons solely into an Act notwithstanding the refusal of the House of Lords to pass the same, when certain conditions are complied with, it has been found necessary to provide specifically that the certificate of the Speaker of the House of Commons that the provisions of the Statute has been complied with shall be conclusive and shall not be questioned by any Court of Law. *See* section 3 of 1 and 2 Geo. V. c. 13. But for this provision it would have been open to Courts to consider whether the conditions prescribed by the Statute have been complied with. This only strengthens the view that in India where the Indian Legislature has only such powers as are conferred by the Statute (The Government of India Act) and those powers can be exercised only subject to the conditions and restrictions prescribed therein, and there is no provision in the Statute as in S. 3 of 1 and 2 Geo V. c. 13, Courts are at liberty to consider whether the conditions have been complied with and to declare invalid a law passed not in accordance with such conditions and restrictions.

It is only necessary to consider the provision in section 84 which enacts that "A law made by any authority in British India and repugnant to any provision of this or any other Act of Parliament shall, to the extent of that repugnancy, but not otherwise, be void" This provision only applies to a case where an Act has been passed after complying with all the formalities prescribed by the Government of India Act but some of the provisions are contrary to the provisions of this Government of India Act or any other Act of Parliament. It has no application to a case where the formalities prescribed by the Government of India Act or the rules framed thereunder for the passing of a measure into a law have not been observed.

It is thus clear that the Child Marriage Restraint Act is invalid and cannot be regarded as having any binding force.

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## SUMMARY OF ENGLISH CASES.

CLAN LINE STEAMERS, LIMITED *v.* BOARD OF TRADE, (1929) A.C. 514.

*Shipping—Charterparty T. 99—Vessel requisitioned by Crown—Charterparty excluding marine risks but accepting liability for consequences of warlike operations—Steering gear*

*breaking down—Consequent collision with another vessel engaged in warlike operations—Sinking—Liability under the charterparty.*

A vessel *Clan Matheson* was requisitioned upon the terms of a Charterparty T. 99 which excluded liability for marine risks but insured against loss from warlike operations. When this vessel was sailing in convoy with other vessels in columns, her steering gear broke and as a result she swung right across the bows of another vessel *Western Front* which was then admittedly engaged in warlike operations. The *Clan Matheson* was not then so engaged In an action against the Crown for loss,

*Held,* negativing the claim, that it is a well-settled principle of marine insurance law that *causa proxima non remota spectatur*. But this does not mean that everything which happened before the actual impact took place should be excluded. By the breakdown of the steering gear, *Clan Matheson* was a lost ship and that misfortune should be regarded as the real and proximate cause of the loss, though the loss would not have occurred had not the *Western Front* been in the position in which she in fact was.

Lord Sumner's remarks in *Attorney-General* v. *Adelaide Steamship Co*, (1923) A.C. 292 approved and followed.

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BOARD OF TRADE *v.* HAIN STEAMSHIP CO., LTD., (1929) A.C. 534.

*Shipping—Charterparty T. 99—Requisitioned vessel—Vessel proceeding from United States to England laden with a cargo of oats—Collision with another United States vessel carrying mines—Both vessels to blame—If loss due to warlike operations.*

Under the same Charterparty T. 99, a steamship *Trevanion* was requisitioned during the war with liability to loss by warlike operations. After the Armistice in 1918, but before war operations had ceased, *Trevanion* was proceeding from United States to England laden with oats. It collided with another vessel coming opposite with mines and was seriously damaged. It was found that both vessels were to blame.

*Held,* that if a vessel is engaged on warlike operations and collides, the negligence of the warship does not prevent the collision being a consequence of warlike operations; and the

fact that the contributory negligence of the other ship contributed to the collision makes no difference.

*Attorney-General* v. *Adelaide Steamship Co.* (*The Warilda*), (1923) A.C. 292 followed.

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FRENKEL *v.* MACANDREWS & Co., (1929) A.C. 545.

*Bill of Lading—Destination Liverpool—Liberty to touch ports outside the route—Vessel deviating from direct route—Accident during deviation—No express statement in Bill of Lading of the course of voyage—Parol evidence to prove liberty to deviate—Admissibility of.*

A merchant of Malaga shipped oil per S.S. *Cervantes* of the respondents' fleet to Liverpool and the Bill of Lading merely gave the destination as Liverpool without stating the course of voyage and added "Liberty to touch at any ports whatsoever although they may be outside the route without it being considered a deviation....." It was found that the respondents would call at Malaga either first as in this case or on their return journey from Mediterranean. The steamship loaded cargo at Malaga and instead of going to Liverpool direct deviated towards Cartagena and in that deviation was swung by a gale and caused loss to the oil. In an action for damages, it was contended that parol evidence was inadmissible to prove the customary deviation and that the accident having occurred outside the contract route, the exemption clause in the Bill of Lading cannot be availed of.

*Held,* the route of a vessel declared to be lying at one port and bound for another must be construed as a direct route and the circumstance of knowledge that it was not or might not be direct will not affect that construction It will only permit calling at those ports which are on the course of the voyage, although not exactly the sea course which the ship would take. But that principle will not apply to a case where there is no port of *departure* and a port of *destination* so named in the Bill of Lading and if there are two routes followed, evidence is admissible to prove them, as either can be included in the Bill of Lading.

*Leduc* v. *Ward*, (1888) 20 Q.B.D. 475 and *Margetson* v. *Glynn*, (1892) 1 Q.B. 337; (1893) A.C. 351 distinguished.

CHAPMAN OR OLIVER *v.* SADDLER & Co., (1929) A.C. 584.

*Negligence—Death of a dock labourer while engaged in receiving cargo—Rope sling giving way and bags falling on him—Accident after stevedores' duty ended and duty of receivers of cargo begun—Liability for negligence whether stevedores' or porters' (receivers)—Customary to the porters to use the same rope slings for their portion of work.*

While a load of bags was being swung by the shore crane over the staging on the quayside, the rope sling that held the bags gave way and the bags fell on the deceased who was engaged as a dock labourer by the porters to receive the bags and remove them to the quay. The accident having happened after the bags were placed on the steelyard, from which stage the porters' duty began, it was contended that the stevedores were not liable for the accident to the porters' servant. It was found (*i*) that it was the duty of the stevedores to provide the ropes and in fact they had a man to make the slings and examine them before use; (*ii*) that the porters rely for the safety of the sling on the care of the stevedores, and (*iii*) that the stevedores also knew that the porters rely on them solely. In fact the nature of the business is such that the porters can have no real opportunity to examine.

*Held*, the stevedores under the circumstances were not in the same position as gratuitous bailors. The circumstances of the case, namely, the knowledge of the stevedores that it will be used in a dangerous operation, and that the only persons who could inspect were themselves, raised a duty on their part to take proper steps to see that the ropes were safe, and failure in that duty rendered them liable for negligence.

*Caledonian Ry. Co.* v. *Warwick*, (1898) A.C. 216 distinguished.

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HYMAN *v.* HYMAN, (1929) A.C. 601.

*Divorce—Covenant by the wife in a deed of separation not to sue for increased alimony or maintenance—Decree for dissolution of marriage on the ground of husband's adultery—Wife if can go behind the covenant and claim increased maintenance.*

A covenant by the wife, contained in a deed of separation, not to take any action in England or elsewhere to compel the husband to allow her any alimony or maintenance beyond a sum agreed to between them by the deed of separation, does not

preclude the wife from petitioning for maintenance under S. 190, Supreme Court of Judicature (Consolidation) Act, 1925. after she had obtained a decree for divorce. The Court will take into consideration the amount agreed to and fixed in the separation deed in calculating the amount of maintenance.

*Gandy* v. *Gandy,* (1882) 7 P.D. 168 doubted and distinguished.

*Bishop* v. *Bishop,* (1897) P. 138 approved.

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MAINE AND NEW BRUNSWICK ELECTRICAL POWER COMPANY, LTD. *v.* ALICE M. HART, (1929) A.C. 631.

*Interest—Sale of land and water rights—Conveyance for power works—Covenant to pay an extra sum if water-power beyond 2000 horse-power were developed and used—Each extra unit to be "immediately paid for"—Construction of covenant—Interest on extra sums payable—Contract silent as to interest—Interest if allowable—Amount and time depending upon the power developed and on the contingency of excess being developed.*

By means of a contract of sale, land and water rights were purchased by the defendants for the purpose of developing water-power from the Aroostook Falls near by for electrical purposes. The defendant company, among other terms, which were all executed, also covenanted that if water-power to a greater extent than two thousand horse-power should be at any time developed and used, the said company shall pay the vendor or his representatives an extra amount per each extra unit developed immediately as and when it is so developed and used.

*Held,* the water-power in the agreement does not mean the average power produced over a reasonable period of time and the defendants were liable to pay for excess immediately upon each occasion when any excess power is developed and used. Also as the covenant does not provide for interest on the payments and the liability to pay and the amount to be paid being contingent upon an uncertain event happening "there is no sum certain payable by virtue of a written instrument at a certain time" within the meaning of the New Brunswick Judicature Act, 1909, which is the same as the English and Indian enactments. Further the contract being fully executed on both sides, the action being upon the covenants which do not give interest, the plaintiff cannot claim interest unless it is given to him at common law or under statute. In such a case there is no place for the exercise of equitable jurisdiction.

TUNOCH *v.* BROWNIESIDE COAL CO., LTD., (1929) A.C. 642.

*Workmen's compensation—Accident in the course of employment—Physical discovery but disfigurement by blinding the eye—Consequent failure to obtain employment—"Recovered from the injury as to be fit for employment of a certain kind"—Meaning of—Whether includes workman's employment at the time of the injury.*

The applicant, a miner, sustained injuries as a result of which he completely and permanently lost the sight of his right eye but was physically able to resume his former employment and earn his former wage. The workman tried his best to secure an employment as a miner or quarryman, but the blindness of his eye stood in the way of his securing one. The question if the workman is entitled to compensation on the basis of total incapacity, when the workman had physically recovered so as to be able to perform his former work,

*Held,* the workman was entitled to compensation on the basis of total incapacity. What S. 9 of the Act contemplates is a man injured recovering so as to be fit for work, but not fully recovered, that is being still left with a disability due to the accident which prevents him from getting employment and earning. "Employment of a certain kind" in S. 9, sub-section (4) includes also the workman's original employment at the time of the injury.

View of Viscount Dunedin as to what is meant by kind of work in sub-section (4) altered as being too absolute.

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WILSONS AND CLYDE COAL COMPANY, LTD. *v.* BURROWS, (1929) A.C. 651.

*Workmen's compensation—Reference to medical referee to examine about the condition of the workman—Referee's certificate stating workman 'completely recovered'—Application before arbitrator to remit back for further examination as to the possibility of recurrence of incapacity—Power of arbitrator to remit—Workmen's Compensation Act,* 1925, *S.* 19.

At the instance of the employer, a workman, who was receiving compensation, was examined by a medical referee who certified that the workman "had completely recovered and was fit for his ordinary work." The employer thereupon applied to the arbitrator to end the payments and before the arbitrator the workman produced a skiagram taken at the Royal In-

firmary disclosing latent conditions probablising the recurrence of the incapacity and moved for remitting the case to the medical referee for further examination in that light and passing a suspensory award.

*Held,* the arbitrator had authority to pass a suspensory award if the report of the medical referee showed that there was, in spite of a perfect ability to work at the moment, some latent lesion which may probably break out in the future as the result of the accident. But where the referee who had the whole question as to the condition of the workman—including in that not only the present but the future condition as well—issues an unambiguous certificate stating that he has completely recovered, the certificate is binding on the arbitrator and he has no capacity to remit it back to him for further enquiry in the light of the skiagram inspection.

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HALL *v.* PELMADULLA VALLEY TEA AND RUBBER CO., (1929) A.C. 662.

*Registration—Ceylon Trusts Ordinance No. 9 of 1917, S. 93—Prior contract to sell—Subsequent purchase with notice of the contract—Prior contract unregistered—Non-registration involving no breach of the registration law—Not registered because properties to be sold were not then ascertained—Subsequent purchase if subject to the contract to sell.*

By a contract to sell, one *T* agreed to convey certain land of which he was not then possessed to the defendant company, after acquiring it himself. This contract was unregistered and could not be registered also as no sufficiently definite description of the lands affected by it could be given. The defendants were in anticipation of such acquisition allowed by *T* to take possession. The lands were acquired in 1921 and in 1923 he conveyed the same to the plaintiffs by a registered sale-deed. This action was brought by the plaintiffs for recovering possession. It was found that the plaintiffs had, at the time of sale, notice of the contract to sell.

*Held,* that to entitle the defendant to the benefit conferred by S. 93 of the Trusts Ordinance of 1917 (Ceylon), the prior registration of the contract to sell is made a condition precedent and the fact that the non-registration was due to the fact that it was not capable of registration did not entitle the Court to relax the condition. The object in the mind of the legislature in imposing such a condition, even if it could be known, would not affect the meaning of the words used.

[S. 93.—Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract. Provided that in the case of a contract affecting immoveable property, such contract shall have been duly registered before such acquisition.]

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CHEARIG THYÉ PHIN *v.* LAM KING SANG, (1929) A.C. 670.

*Trustee—Limitation—Advance by trustee (i) to himself, and (ii) to third persons—Interest on—Claim to principal barred—If claim to interest also barred—Advance to agent before statutory period—Alteration in books to principal's name within 12 years—If brings the debt within limitation period—Limitation Ordinance (Straits Settlements)*, 1896.

In a suit brought by the personal representative of two persons entitled to share in the income of a portion of the estate of one *C*, as to which portion he died intestate, against the executors and trustees of the estate of the testator *C*, an account as from March, 1908, of the receipts and payments was directed, it being held that the claim to share of income prior to that was barred by limitation. On taking accounts among other items, the Court allowed also (1) interest on an item which was money lent to the trustee himself before 1908, (2) interest on certain advances made by the trustee prior to that date to a third person *A*, and (3) on the principal on item (2) which was paid away before March, 1908 to *A's* agent and entered in agent's name but altered to principal's name after March, 1908.

*Held*, as regards (1), the advance being to the trustee himself, he becomes only a debtor to the estate and no question of wilful default arises. Consequently on the principle of *Hollis* v. *Palmer*, (1836) 2 Bing. N.C. 713, interest being merely an accessory to the principal, it cannot also be recovered. That rule cannot apply in case (2) as this sum was due not from the trustee himself but from a third person with whom there was a special contract to pay interest at a specified rate As for (3) the alteration into principal's name was not the record of a new debt but merely transfer of the old debt paid away before the crucial date and as such should be excluded from the account.

*In re* COCKERILL. MACKANESS *v.* PERCIVAL, (1929) 2 Ch. 131.

*Will—Devise of land to* A *absolutely subject to payment of annuities, road charges and death duty—Land to be offered to* B *at a fixed figure if* A *should sell it within a particular period —*B *to bear annuities and road charges—*B *if should also bear death duty—*A, *if bound to offer to* B.

By his will, a testator devised land in favour of *A* absolutely subject to and charged with the payment of certain annuities, outstanding charges for a road which he was making, and estate and other death duties But if the said devisee *A* should be desirous of selling the property within 20 years of his death, the devisee should offer it first to a named person *B* at 300*l.* per acre, such offer to be subject to the payment by *B* of the said annuities and road charges. The properties were so sold to *B* and the question arose if *B* should pay the death duty or *A*.

*Held,* by Eve, J, that *A* should pay it because (1) *B* took the property not under the devise but by the voluntary sale by *A*, *A* not being bound to sell at all, (2) the testator by omitting the death duty in the list of charges to be borne by *B* indicated his intention that the purchaser *B* was not to be subject to any such liability, and (3) the restriction on alienation by *A* is void for repugnancy and therefore the devisee was free to have sold the property without first offering it to *B*.

*Muschamp* v. *Bluet,* (1617) Sir J. Bridg. 132 and *In re Rosher,* (1884) 26 Ch.D 801 followed.

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A DEBTOR, *In re,* (1929) 2 Ch. 146.

*Bankruptcy—Decree* nisi *in a divorce suit—Respondent ordered to pay the petitioner's costs to the petitioner's solicitors —Solicitors to collect and lodge the amount into Court—Failure to pay—Bankruptcy notice issued by the solicitors—Non-compliance with the same—Bankruptcy petition—If sustainable —If the order is a* "final *order"—If solicitors are "creditors."*

After a decree *nisi* in a divorce suit, an order was made by the Divorce Court directing the co-respondent to pay to the solicitors of the petitioner a sum as for the costs of the proceedings, the solicitors to lodge such amount into Court. Shortly after, the decree *nisi* was made absolute. The costs not having been paid, the solicitors issued to the co-respondent a Bankruptcy notice and on non-compliance filed the petition

in Bankruptcy. The question being raised if the order for costs was a "final order" and the solicitor a "creditor" within the meaning of S. 1, sub-sec. (1) of the Bankruptcy Act, 1914,

*Held,* by the Court of Appeal, that the order did not purport to finally determine the rights of the parties to the sum mentioned in it and was only an interlocutory order. The direction to pay into Court showed that it was to be the subject of a further and future order.

*Per Lord Hanworth*—The petitioning husband, for whose indemnity the costs were awarded, was alone the principal "creditor" and the solicitors were merely acting as a necessary part of the machinery by which to reach the creditor.

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*In re* SILVA SILVA *v.* SILVA, (1929) 2 Ch. 198.

*Lunacy—A person of unsound mind not so found by inquisition—Purchase of a freehold house as a residence out of funds belonging to the lunatic by order of Court—Order of Court silent on whether the house should retain the character of the fund or not—Effect of purchase—Rights of the heir and next-of-kin in the house.*

By an order of the Court, a freehold house was purchased out of funds belonging to the lunatic and left with his wife in trust for the lunatic. The purchase was made in the ordinary course of management to provide a house for the residence of the lunatic. The lunatic died issueless, his wife having predeceased him. The order of the Court was silent as to whether the property so purchased was to be preserved to the next-of-kin as personalty.

*Held,* the purchase being in the ordinary course of management, the Court need not be expected to pay any more regard for the interests of those coming after the lunatic than the lunatic would have done if he had made the purchase himself. The property will therefore go to the heir as reality unless the Court had directed otherwise in the order for conversion as was done in *Attorney-General* v. *Marquis of Ailesbury,* (1887) 12 A.C. 672.

*In re Searle,* (1912) 2 Ch. 365 followed.

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LOWE, *In re.* STEWART *v.* LOWE, (1929) 2 Ch 210.

*Legitimacy—An illegitimate son and daughter—Son dying before January* 1, 1927—*Marriage of parents after the child-*

*ren's birth—Death of mother intestate—If son of the illegitimate son entitled to share in the mother's estate—Legitimacy Act, Ss.* 1, 3, 5 *and* 9.

*A* had two illegitimate children, a son and a daughter born at a time when she was free to have married their father. She subsequently married him in 1905. The son died prior to 1st January, 1927, leaving one child and the question arose if that child could inherit to *A's* estate on *A's* death intestate.

*Held,* that to render *A's* son legitimate, he should have been living at the commencement of the Act, the marriage having been earlier. The daughter having been then living became legitimated by law. S. 9 cannot help the grandson, for *A* left behind a legitimate daughter which gives her the status of legitimacy as though born legitimate.

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GREEN *v.* WEATHERILL, (1929) 2 Ch. 213.

Res judicata—*Suit against a married woman trustee—Action on basis of a breach of trust—Decree against her separate estate in* Scott *v.* Morley, (1887) 20 Q.B.D. 120 *form—Subsequent action on foot of her being a trustee—Payment by her to her sister after pleadings in the prior action had closed—Payee receiving with knowledge of the action and the claim thereunder—If can be sued as a constructive trustee.*

A testator by his will, among other bequests, devised a sum of 200*l.* in favour of certain persons which during his lifetime he had handed to his daughter to invest for him. The said daughter denied the entrustment and consequently the executor brought an action against her to recover the amount and got a decree payable out of the separate estate of the daughter. But after the pleadings in the suit had been closed, and the case set down for trial, the defendant daughter had paid out 135*l.* to her sister, who knew all about the action but was not made a party to that suit. Execution of the decree taken out in respect of the judgment was therefore unproductive and this action was commenced against the two sisters on the allegation that the daughter withdrew all the capital sum from the Bank with a view to defraud the just claim under the will and that the sister at the time when she received the amount knew or had notice of all the necessary facts.

*Held,* an action against a married woman who is a defaulting trustee may either proceed (*i*) on the basis of her having

committed a breach of trust and therefore to that extent rendering her separate estate liable for it, or (*ii*) on the basis that she is a trustee possessed of trust moneys which it is desired to place in safe custody. Judgment against the daughter having been recovered on one basis, it is not open to obtain a judgment in a different form by establishing practically the same facts. But the sister having received the amounts after the pleadings in the prior action closed, she becomes a constructive trustee of the sums paid to her with full knowledge of the action and is bound to pay the amount to the executor.

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CURTIS MOFFAT, LIMITED *v.* WHEELER, (1929) 2 Ch. 224.

*Vendor and purchaser—Under-lessee not to assign without lessee's consent—Under-lessee selling his interest—Contract silent about lessee's consent and also about purchaser's right to assign—Lessee refusing consent to purchaser but agreeing to purchaser's nominee—Purchaser agreeing subject to his solicitor's approval of title—Meaning of—Under-lessee's liability—Under-lessee if bound to consent to sale to his purchaser's nominee.*

An under-lessee of certain properties agreed to sell to the plaintiffs her under-lease interest for a certain sum subject to plaintiffs' solicitors' approval of title. Her under-lease contained a covenant that she should not assign to any person whom the lessee will not agree to. The lessee refused to consent to the assignment on reasonable grounds but was willing to consent in favour of a nominee put up by the plaintiffs. The defendant under-lessee refused to agree to that. In an action for specific performance of the contract to sell, it was contended (*i*) that the solicitors had not approved the title within a reasonable time, (*ii*) that the lessee refused to consent to the assignment thereby rendering performance impossible, and (*iii*) that the defendant was not therefore bound to proceed with the contract in favour of any nominee.

*Held*: "Subject to the approval" is a common term in contracts as the purchasers in their own interest would desire expert legal advice of a solicitor, which advice must be reasonable and given in good faith. But in the case, the title was approved within a reasonable time. The contract being silent as to the lessee's licence to assign, it was the vendor's duty to do everything in her power to obtain the necessary licence and having failed in it, she was liable in damages to the purchaser. But as

the lessees refused to consent to the assignment in favour of the plaintiffs, there can be no specific performance to sell to them. Yet there being no restriction against assignment in plaintiffs' contract, the under-lessee was bound to assign in favour of a solvent nominee, so long as the plaintiffs are willing to join in the assignment to the nominee for the purpose of guaranteeing to the defendant the performance of the covenants by him.

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ALDRIDGE *v.* WRIGHT, (1929) 2 K.B. 117.

*Easement—Right of way—Neighbouring tenements—User of the pathway ever since the first tenancy of the dominant tenement—Both tenements originally owned by one—Assignment of the servient tenement without reserving the right of way—No express grant of way proved—Assignment of dominant tenement later—Right of way if can be deemed to be impliedly reserved—Rule in* Wheeldon *v.* Burrows.

In 1895, a freeholder granted two building leases over two of his adjacent lands. In pursuance of it two buildings were raised Nos. 28 and 30. The leases did not contain any indication that there was to be a right of way across No. 30 for coal, rubbish, etc., being taken to and from No. 28. But it was found that ever since the first tenant of No. 28 occupied it, there was down to the time of suit a way enjoyed—the right of enjoyment not being clear—from No. 28 to the road next to No. 30 through No. 30. In 1901, the lease of No. 30 was assigned to the plaintiff's predecessor-in-title and in 1927 the lease of No. 28 was assigned to the defendant. The assignments being silent about the way, the question arose if there was to be implied in the assignment of No. 30 the usual right of way in favour of No. 28.

*Held,* by the Court of Appeal, the general rule is that on a severance of two properties anything like a right of way or other easement will be impliedly intended to be granted only if it is such as is reasonably necessary for the reasonable and effectual use of the part granted and that is based on the principle that a man shall not derogate from his grant. Unless a case falls under this rule known as the rule in *Wheeldon* v. *Burrows,* or some well-known exceptions to it discussed in the judgments, no reservation can be implied.

*Wheeldon* v. *Burrows,* (1879) 12 Ch.D. 31 followed.

FROST *v.* CASLON. FROST *v.* WILKINS, (1929) 2 K.B. 138.

*Election Law—Representation of the People (Equal Franchise) Act,* 1928, *S.* 1, *sub-secs.* (1), (2) *and* (3)—*Registration as voter—Occupation "for the purpose of the business of the person to be registered"—Director of a company occupying a room in the company's buildings on a rental—A room in a building if a "premises".*

A director of a limited company by an agreement with the company had an exclusive tenancy of a room in the company's premises to carry on his duties of director and the agreement entitled him to exclude every one, even his co-directors, who might desire to enter it. The question arose if such an occupation entitled the director to be registered as a voter under the Representation of the People (Equal Franchise) Act, 1928.

*Held,* by the Court of Appeal (Scrutton, L.J., dissenting) that the room was occupied by the applicant to do his work of managing director of the company and that it did not cease to be *his business* because it involved management of the company in the company's premises. Even per Scrutton, L.J., he will be entitled to be registered if in addition to the directorship of the company he carries on other businesses there.

*Per curiam.*—"Premises" are wide enough to include even 'part of a premises' provided it is capable of being 'occupied' within the meaning of S. 3.

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CARLTON HALL CLUB, LTD. *v.* LAWRENCE, (1929) 2 K.B. 153.

*Gaming—Money lent with knowledge that it is to be used for gaming in England—Security obtained therefor—Suit not on the security but on the consideration—If maintainable—Gaming Act,* 1710, *S.* 1 *and* 1835, *S.* 1.

A proprietary club lent moneys to the defendant with the knowledge that it was to be used in England for playing at Poker and Snooker and took a cheque therefor. But as a suit on the cheque will be bad, the club brought this suit as money due under an agreement made before the loan.

*Held,* that where money is lent for the purpose of playing a game which is unlawful in England, then if the game is played in a foreign country where the game is lawful, money can be recovered in English Courts; but if the game is played in

England, then the statute of gaming avoids not only the security but by implication the consideration also and hence the amounts cannot be recovered.

Majority view in *Moulis* v. *Owen*, (1907) 1 K.B. 746 followed.

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KIRKBY *v.* MINTY, (1929) 2 K.B. 165.

*Local Government—Omnibus carrying greater number of passengers than certified—Proceedings against conductor—Prosecution commenced without the order of the Commissioners of Inland Revenue—Proceedings if competent—S.* 21, *Inland Revenue Regulation Act,* 1890.

A Superintendent of Police preferred an information against a conductor of an omnibus for carrying a larger number of passengers than it was licensed to, but no previous order from the Commissioners of Inland Revenue was obtained to commence the proceedings.

*Held,* that considering the later repeals of the Railway Passenger Duty Act, 1862, what remains of the Act is not an enactment "relating to inland revenue" and therefore no previous sanction is necessary. Further, per Lord Hewart, C.J., the prosecution comes within the exception in section 21, subsection (2) of the Inland Revenue Regulation Act, 1890, it being a "proceeding on information of an officer of the peace".

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SHEFFIELD CORPORATION *v.* LUXFORD. SHEFFIELD CORPORATION *v.* MORRELL, (1929) 2 K.B. 180.

*Landlord and Tenant—Due notice to quit given of the tenancy—Tenant defaulting to give possession—Suit to recover premises—Court's discretion in ordering possession—S.* 138, *County Courts Act,* 1888—*Undue postponement of possession if proper discretion.*

Two weekly tenants of dwelling houses were given due notice to quit but refused to give up possession. In an action to recover possession from them, the County Court Judge refused to make any order against one, and as against another postponed the delivery of possession by 12 months, holding that he had a discretion under S. 138, County Courts Act, both as to giving possession and as to the date at which possession is to be given.

*Held,* that though the language of the Act is permissive and not compulsory, yet as soon as the conditions necessary to bring a person within the statute are fulfilled, he becomes clothed with a legal right which entitles him to apply to the Court to be enforced in his favour. The due notice to quit having been given, the legal right of the landlord was complete and the tenant's right to remain in possession had absolutely ceased. The Court had then only the discretion to postpone delivery of possession, which discretion must be judicially exercised having regard to the nature of the tenancy, the term and the object which the legislature must be taken to have had in the enactment, and ought not to be so exercised as to deny the landlord of the justice which he is seeking.

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THE YORK, (1929) P. 178.

*Contract—Shipping—Collision—Damage—Damage not rendering the steamship unseaworthy—Contract to sell—Seller to open up at his expense the engines, etc., for the inspection by the purchaser—Repairing the collision damage while so opened up—Not fit to trade when opened up—Liability due to collision.*

A merchant vessel collided with another steamer in the midsea but the collision was slight and did not render the vessel unseaworthy. The vessel continued its voyage notwithstanding the collision. Admittedly the collision needed four days repair. While so trading and after the collision, the owners of the vessel entered into a contract to sell her to a Greek merchant and under the terms of the contract agreed to open up the engines, etc., for inspection by the purchaser. In pursuance thereof, the owners opened up the engine, boilers, etc., and also made use of the opportunity to repair the collision damage. It was agreed that when the steamship is opened up, it cannot trade. The colliding vessel was ordered to pay (*i*) the costs of the repairs, and (*ii*) the loss in trade profit by being detained for the four days without trade. On appeal against the second count,

*Held,* reversing Bateson, J., that damages are intended to be a compensation for loss caused by the wrongful act of the defendant except in certain special cases where there is an absolute rule of law entitling a man to a particular measure of damage, whether in the events that have happened he has suffered that damage or not. In this case, even if the wrong (collision) had not been done, still the owner would have lost the

use of the vessel and consequently trade profits for the four days in question, because he was obliged by his engagement under the contract to open up the ship. The fact that he was not able to trade had nothing to do with the collision and it could not be said that "work, which she would otherwise have done during the time, went undone to his measurable loss."

*The Strathfillan* v. *The Ikala*, (1929) A.C. 196 followed.

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THE YOUNG SID, (1929) P. 190.

*Costs—Discretion of Judge—Interference in appeal.*

There is no appeal from the discretion of a Judge as to costs, provided the Judge has exercised it judicially and did not deal with matters which had absolutely no connection whatever with the case. To lay down a hard and fast rule as to costs will be to fetter the Judge's discretion which must be exercised in each individual case on its own merits.

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## JOTTINGS AND CUTTINGS.

*Lord Halsbury.*—A life of any public man which comprised expeditions with smugglers and going up to Oxford by stage coach at its one extremity, and, at the other, poison gas and votes for women, must needs have an attraction for the reader; how much more so then when the career in question is that of a man like the late Lord Halsbury. Wonderful, however, as Mrs. Wilson-Fox's Life is as a record of varied experience, it will be more valued by lawyers for the light which it sheds on Lord Halsbury's attitude towards the legal problems and movements of his day. The part which he played in the difficult days of the passing of the Parliament Act of 1911 is probably fairly well known, but not every member of the Profession knows or remembers how enthusiastically he championed the cause which was embodied in the Criminal Evidence Act of 1898, which departed so far from the standpoint of the common law as to provide that "every person charged with an offence, and the wife or husband, as the case may be, of the person so charged shall be a competent witness for the defence . . . whether the person so charged is charged solely or jointly with any other person." Letters are reproduced which show the difficulties introduced by *Reg* v. *Thompson* and the attitude towards the question generally

of men like Sir Herbert Stephen, Mr. Justice Hawkins, and Sir Harry Poland, the last named of whom refers to the case of two prisoners tried together before Mr. Justice Gurney, where each wanted to call his wife. A. was told he could not call his wife, but the other, B., said: "My Lord, I am not really married, although we have been living together as man and wife for many years. Can I call Mrs. B."? "Oh, certainly," said the Judge, "you may call her, as you are not married." "The law," the writer concludes, "is in a discreditable and disgraceful muddle." There seems to be some slight confusion in the biographer's mind as to the dates of the Criminal Evidence Act and the Criminal Appeal Act which, nine years later, crowned the movement for the relief of the accused, an Act as to the wisdom of which authoritative opinion was again, it will be recalled, sharply divided. One other and very different episode will be noted with interest, namely, the manner in which Lord Halsbury came to have the unique distinction of possessing a Great Seal. Custom demanding that the old Seal should be broken up when, in 1897, a new one had been made, Queen Victoria, to the astonishment and confusion of the constitutionalists, stopped the official in the very act, saying impulsively, "Don't spoil it." "The merest tap was all that was given, and the Queen presented the unspoilt Seal to her Chancellor."—*L.T.*, 1929, p. 342.

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*Capital Punishment.*—On Wednesday in the House of Commons Mr. W. Brown moved: "That, in the opinion of this House, capital punishment for civil crimes should be abolished." He said that so far from capital punishment being a deterrent it had exactly the opposite effect, and that punishment should be remedial and not "punitive," whereas capital punishment beside being "irrevocable" was "punitive to the last degree." Commander Kenworthy, who seconded the resolution, urged that cases of premeditated violence leading to death were in the minority and that the "deterrent argument" had therefore no validity, but another member pointed out that the existing law deterred many burglars and others from carrying arms which might become the instruments of unpremeditated crimes. The Home Secretary said the Government viewed the sentiments which had been expressed during the debate with sympathy. The question had been debated in the House eighteen times during the last hundred years, and no one could rise from a perusal of the record of those debates without some doubt as to whether the abolition of capital punishment for the worst class of

murders could be safely undertaken. Sir H. Samuel moved as an amendment that "it is desirable that a Select Committee should be appointed to consider the question of capital punishment," and in the end this amendment was agreed to without a division. Experience gained in other countries, where, for instance, populations are much less dense, are often misleading, and the same remark applies to facts gleaned from our own social history during times when nothing remotely resembling the dole existed and the poor law was not too well administered, so that hunger and poverty had much more driving force.—*L.T.*, 1929, p. 343.

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*Dominion Status.*—Recent discussion has rendered opportune the appearance of Professor A. Berriedale Keith's vivid book on the *Sovereignty of the British Dominions*, published by Messrs. Macmillan & Co., Ltd. The Report of the Imperial Conference of 1926, variously regarded as a statement of existing fact, a creative declaration of sovereign independence rendering secession otiose, and a pronouncement weakening the Empire as an instrument of world peace, naturally looms large in the volume and explains its aim of considering the growth of the sovereignty of the Dominions, its present extent, and the limitations to which it is subject. With regard to this report two pregnant facts are emphasised—the first, that it has never been approved by any Parliament with the exception of that of the Union of South Africa, and the second, that it has never been communicated to foreign governments as a declaration of the British view. The author, in this volume, deals only with the Dominions technically so styled—Canada, Australia, New Zealand, the Dominion of South Africa, the Irish Free State, and Newfoundland. He is not concerned with Southern Rhodesia and Malta, which possess responsible government but have not yet been accorded Dominion status, and he adds that "India, though a member of the League and assured in due course of Dominion status, has not yet attained it." It will be recalled that the salient words of the declaration were those describing Great Britain and the Dominions as "autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations." The author remarks on this statement that, had the committee gone no further, the report might

have been justly criticised as "lacking to a certain extent in reality," but he calls attention to the rider, too often forgotten when summarising the results of the conference, the gist of which was that "the principles of equality and similarity appropriate to status do not usually extend to function," with regard to which "more than immutable dogmas are required."—*L.T.*, 1929, p. 363.

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*Doubtful Meaning of the Phrase.*—Lord Reading in his speech in the House of Lords this week spoke of the words "Dominion Status" as used in the recent pronouncement regarding India, as "conjuring up a position in advance of what might be described as responsible government". Lord Birkenhead said that Dominion Status did not mean at this moment what it meant before the last Imperial Conference, and no one could say whether it would mean in five years' time what it meant to-day. Lord Crewe spoke of it as a "vague expression". It would be absurd to minimise the influence of dogmas and phrases—especially those which are deemed very accurately to fit realities—in influencing actions and discouraging those which are incompatible, but realities come first in order of time. What as a part of the reality of the situation are the attitudes of the various Dominions towards the phrase in question? No imminent dangers overhang Canada and opinion there is in favour of the fullest autonomy. The same remark applies to the Union of South Africa, which has its difficulties within its own borders. History seems to have doomed our nearest Dominion to "ask for more". But Mr. Hughes's words, spoken in 1927, illuminate the attitude of Australia with its Asiatic preoccupations. He said frankly in that year, "I am for the Empire, because I know of no other way of being for Australia." New Zealand would probably echo that pronouncement. The Prime Minister of Newfoundland said quite candidly in the same year that Newfoundland did not wish for a status of equality with the Mother Country as it would be of no value to her. The author says of the report mentioned in the last paragraph that its emphasis is laid not on distinct sovereignty, "but on that unity of interest and aims which is of infinitely more importance than theoretic definition." That expresses our view on the relative importance of the considerations mentioned, yet we feel that definitions and dogmas have in this connection very real importance, and Professor Keith's

book to which we refer the reader, proves how fascinating the attempt to formulate them may be made.—*L.T.*, 1929, p. 363.

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*Secrecy in Divorce.*—When the Judicial Proceedings (Regulation of Reports) Act, 1926, was passed, we, with many of our contemporaries, voiced the opinion that the severe restrictions on publicity imposed by the Act would render resort to the Divorce Court much more common. It will, of course, be remembered that the facts which may be printed or published are, apart from particulars as to the parties and charges, limited to "the summing-up of the judge and the finding of the jury (if any), and the judgment of the court and observations made by the judge in giving judgment." In a recent case the President of the Division, Lord Merrivale, stated shortly the facts in his judgment as he thought it was not in the public interest that social crimes of the kind in question in that case should be committed and the particulars not be made known to the world in which the people lived. Publicity was, he thought, one of the deterrents from misconduct. The Act takes the decision as to publicity from the newspapers and entrusts it to the court, and a glance at the reports of divorce cases before and after the Act was passed will show how the discretion has operated. We do not advocate a return to the old system, but we think that in cases where the parties have exhibited nothing but callous cynicism the course taken by Lord Merrivale should be more often followed. Publicity may deter from immorality or it may deter from proceedings. The fact that it may deter from proceedings in just those cases where reconciliation may seem out of the question is unfortunate, but we suggest that the prevention of acts of especial heinousness is of first importance.—*L.T.*, 1929, p. 365.

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*The Bench and Politics.*—The Lord Chancellor, in the course of his address at the Guildhall last week, made a straightforward statement on the subject of the choice of judges and justices of the peace, saying that in his view politics should not enter into either set of appointments. This is a sentiment which all earnest-minded members of the Profession will emphatically endorse. Not once but several times have we said in these columns that integrity and competence should be the sole considerations in the appointment of justices of the peace, and what is true of the lesser office is equally true of the greater. What are wanted in the occupants of the Bench, be they judges

of the High Court or justices in Petty Sessions, are honesty of purpose and that temperament and cast of mind which have come to be known as "judicial." These are personal qualities and their possessor's politics should be of no account either one way or the other. What importance politics do have is a negative one. To quote the concluding parts of Lord Sankey in this connection: "Violent partisanship does not fit a man for judicial preferment, and is a real hindrance to the cause of justice."—*L.T.*, 1929, p. 387.

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*Judicial Changes.*—The announcement made last Tuesday that His Majesty has been pleased to appoint The Right Hon. Frank Russell one of the Lords Justices of Appeal to be a Lord of Appeal in Ordinary in the place of Lord Carson, can hardly fail to excite universal approbation amongst those who are interested in these matters. It has for some considerable time been felt by not a few members of the legal profession that the Chancery point of view has been somewhat inadequately represented—numerically—in those tribunals to which the ex-Lord Justice has just been elevated; but, coming as it does fairly shortly after Lord Tomlin's appointment, this announcement should satisfactorily remove all criticism on this score for many years to come. The Right Hon. Frank Russell is the fourth son of the late Lord Russell of Killowen, Lord Chief Justice from 1894 to 1900. He was called to the Bar by Lincoln's Inn in 1893 and was elected a Bencher of that Inn in 1913. After a successful career as a Chancery junior he took "silk" in 1908, and was for some time attached to the court of Mr. Justice Astbury, ultimately going "special". In 1919 he was appointed one of the Judges of the Chancery Division and proved to be one of the ablest Chancery Judges in modern times, and it was no surprise to the profession when in 1928 he was raised to the Court of Appeal on the retirement of Sir Charles Sargant.

At the same time the appointment of Sir Mark Lemon Romer to be a Lord Justice of Appeal is announced, thus filling the vacancy created in the Court of Appeal by the appointment of the new Lord of Appeal. This again can in no way be described as unexpected. Mr. Justice Romer was called to the Bar by Lincoln's Inn in 1890, of which Inn he was elected a Bencher in 1910. He took "silk" in 1906, finally becoming one of the leading "specials" of his day. After the death of Mr. Justice Peterson in 1922, Sir Mark was appointed to fill

the vacancy in the Chancery Division so created, and he soon established a reputation as a sound and exceedingly courteous judge. The new Lord Justice is a son of the late Lord Justice Romer, and it is interesting to recall that the last three judicial appointments have all been of men whose fathers in their day held high judicial office.—*S J.*, 1929, p. 753.

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*Husband Not Without Rights.*—Two cases in the Divorce Division, reported *sine nomine* in *The Times* of the 18th ult., re-affirm a proposition in law, which nobody ought ever to have doubted, that a wife's right to maintenance is an incident of cohabitation. If a wife leave her husband for good legal cause she carries her right with her, and ample provision has been made to enforce the right. If she leave for a cause which does not in law justify her in leaving she forfeits her right to maintenance. "Where on the true facts," said the learned president, "the husband is shown to have done his duty to the utmost of his ability, never wilfully to have failed in his duty to discharge his marital obligations, taking them generally as the relations of husband and wife, I find very great difficulty in conceiving a case where a woman can come forward, disclaiming her proper obligations to her husband, and making herself a complainant in law on the ground of her own wrong." In fact a married woman who expects her husband not to neglect to maintain her must not neglect the duties of a wife customary in her state of life. Usually they are to keep house and mother the children of the marriage, but the marriage bargain may be struck on another basis, according to the parties' walk in life, or expressed mutual understanding. It is good to find that the scales of justice are, as we conceive they should be, to be held evenly and not weighted in favour of either sex.—*S.J.*, 1929, p. 754.

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*The Confiscation of Enemy Private Property.*—It is difficult to right ancient wrongs, and though Lord Buckmaster, in the House of Lords on Tuesday, won general assent to his motion as to Ex-Enemy Property, the lapse of fifteen years and the transactions that have taken place in the liquidation of enemy property are said to make it impracticable to wipe out the past, and give to every German citizen in this country the property which by English Law, and on English views of International Law, was secured to him. A German citizen resident here before the war was entitled to the protection of the Crown

for himself and his property. The latter right was violated and the property confiscated on the hollow pretext that the owner could look to Germany for compensation. There was in this neither law nor reason, and the breach of law was not cured by the incorporation of the system in Art. 297 of the Peace Treaty. Under this, the Allied and Associated Powers reserved the right to retain and liquidate ex-enemy property. The hardship inflicted on persons of German nationality in this country was shown by Lord Buckmaster and Lord Parmoor when the former raised the question in the House of Lords on April 6, 1922, and some remedy was given by the appointment of Lord Blanesburgh's Committee, with a limited power of relaxing the practice under the Treaty. It is a matter, as is well known, in which Lord Blanesburgh has taken great interest. The present Government does not, of course, attempt to defend the breach of law involved in the confiscation of German property—robbery, Lord Passfield properly called it —but the confiscated property appears to have got so mixed up in international finance since, that there is difficulty in identifying it, and restoring it to its owners. Still, neither Lord Blanesburgh nor Lord Buckmaster was satisfied with this explanation. Lord Blanesburgh insisted that property still available, which appears to amount to a large sum, should be returned to the owners, and not handed over to the German Government, and Lord Buckmaster's motion for an account of this surplus was agreed to without a division.—*L.J.*, 1929, p. 267.

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*The Retirement of Lord Carson.*—It is announced that Lord Carson has resigned his office of a Law Lord. Following, in 1921, Lord Moulton, who was as brilliant as a judge as a scientist, it may be doubted whether Lord Carson will be remembered for his judicial work, and he made the mistake of carrying his politics into the serener atmosphere in which Law Lords live their contemplative, but eminently useful lives. It was a mistake which sprang from Lord Carson's most cherished convictions, and though the elevation to the House of Lords was, no doubt, genuinely intended to close the stormy incidents of his life, the negotiations for the Irish Free State Agreement brought him into the fray again, and so was raised the question of the liberty of a Law Lord to engage in political strife. It was generally agreed that Lord Carson was wrong, and such a contention is not likely to be revived. But Lord Carson's greatest time was neither in the House of Lords, nor earlier in

the services he rendered, as First Lord of the Admiralty and in other offices, in Mr. Lloyd George's War Cabinet. His reputation is founded on the commanding position which he attained as an advocate at the Irish Bar, and which he transferred undiminished to the English Bar. "I still adhere," Lord Birkenhead has written, "to the opinion that Carson was the greatest advocate the English Bar has produced since Erskine." However that may be, he was for twenty years in the front rank as a leader, but this did not satisfy the aspirations for his own people in Ireland, which sprang from the depths of his nature. That is a side of his career of which it would be out of place for us to speak.—*L.J.*, 1929, p. 283.

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*The New County Court Judge.*—It is not very often that a practising member of the Bar is the plaintiff in an action which becomes a leading case on the branch of the law with which it is concerned; and the fact that Mr. Artemus Jones, K.C., who has just been appointed a County Court Judge in place of the late Judge Roberts, was responsible for getting an important point in the law of libel settled by the House of Lords, adds interest to his appointment. The case, *Jones* v. *E. Hulton & Co.*, (1909, 2 K.B. 444); reported *sub nom. E. Hulton & Co.* v. *Jones* (1910 A.C. 20), is, of course, the authority for the proposition that in an action for libel it is no defence to show that the defendant did not intend to defame the plaintiff, if reasonable people would think the defamatory language to refer to him. The practice of inserting a note at the beginning of works of fiction to the effect that all the characters are purely imaginary, and that no reference is intended to any living person, is a result of this decision. Mr. Artemus Jones, who was called by the Middle Temple in 1901 and took silk in 1919, has had a varied common law practice, particularly on the North Wales Circuit; and last year he was appointed to represent Great Britain on the Anglo-Mexican Commission dealing with claims for damage arising out of revolutionary disturbances in Mexico during the preceding ten years.—*L.J.*, 1929, p. 284.

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## CONTEMPORARY LEGAL LITERATURE.

With the complexity of business methods and the expansion of trade, the responsibilities of the Banks have increased manifold and it is not infrequently that one finds the Banks made scapegoats of breaches by agents of instructions of their cus-

tomers. The *Law Journal* for August 3rd and 10th has a short note wherein are instanced some cases on both sides of the line, some wherein the Bank was held liable for negligence in the discharge of its duty and some where it was exonerated. In almost all the cases, the good faith of the Banks have been admitted but the question has turned on nice discussions about the information that the Banks must be deemed to have had from the cheques themselves or in the mode of their presentment. The Courts have in all those cases been confronted with the fact that either the customer or the Bank, both of whose hands are clean, are to suffer for the fraud of a third person. As the note points out, "the question in all such cases is whether or not the bankers were negligent in their dealings with cheques of bills of exchange passing through their hands and to avoid liability on the ground of negligence they must show there were not suspicious circumstances which would put them on enquiry." There was recently a case of that kind in the Madras High Court where the agent endorsed as agent cheques in favour of his principal but paid them into his own account with the Bank. It was held that it was sufficient to put the Bank on notice [*see* 57 M.L.J. (sh. n.) 49].

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It is familiar to all readers of English Law that equity developed into anything like a definite system very late and even after that in its desire to follow the law as far as it could, several of its rules were by no means clear-cut and definite. It is the rigidity of system in Common Law that necessitated the intervention of "Equity" but even there with Lord Eldon and others reducing equity also to dry rules, it lost much of its flexibility. In the Law of Trespass, the slow progress which equity made is very visible and Professor William F. Walsh of New York University has, in an article entitled "Equitable Relief Against Trespass" in September issue of the *New York Quarterly Review*, shown how the strong desire of equity to leave the law controversies involving the legal title to Law Courts has been responsible for several anomalous rules in this branch of the law. Two suggestions are referred to in the article as to why equity declined to determine a controversy involving the legal title to land "(*i*) that the trial by deposition in equity was not as satisfactory as trial by oral testimony in open Court at law," and (*ii*) the inconvenience of calling suitors from all parts of the country to run up to Westminster, where alone the Chancellor sat. But as the Professor points out, the fact remains that equity

was often called on to determine such questions of fact. The equitable jurisdiction in cases of trespass originally began to prevent powerful defendants acting in defiance of law and molesting the weaker plaintiff but it unconsciously developed and now equity steps in to restrain acts of trespass (*i*) whenever the legal remedy at law is inadequate, or (*ii*) the plaintiff is being deprived of the substance of his estate—there being no dispute as to the plaintiff's title But where the title itself was in dispute, equity generally refused relief until the question of title was decided by a Court of Law. The recognition that mere trespass was also in the nature of waste and needed equity's intervention also came only later and now when the trespass is continuous or repeated continuously so as to ripen into an easement, injunction is issued to avoid multiplicity of suits—and it may be added—also to extend the arm of the law to effectually secure to the owner peaceful enjoyment of the property. Professor Clark's suggestion in his book on "Equity" that the plaintiff need not bring separate actions for each trespass, but may wait and recover for all trespasses up to the time of the trial can, as the learned writer points out, hardly secure adequate relief. The practical advantages of possession, which are not all realised by Courts, is well known and this suggestion is merely encouraging trespasses. The other suggestion to call a policeman to keep the defendant under bonds to keep the peace in a Magistrate's Court is often resorted to and there are provisions in the Criminal Procedure Code (India) to that end. Besides this, there are other cases of trespass in which ejectment will be inadequate and the learned writer refers to cases of an encroaching wall or building, where a mandatory injunction is issued to remove the encroachment.

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It is not alone in America that there is a tendency towards higher standards of admission to the Bar. Signs of it are very visible in Madras where the new Bar Council is spending several days for the question of legal education and necessary equipments for the profession A note in the *North Carolina Review*, 1929, p. 287, gives a short summary of the main rules made in Pennsylvania and California. In Pennsylvania any one intending to study law for admission to the Bar must first get himself registered at the beginning of his three years' study. At that time an investigation is made by a Board of local lawyers as to his character, record and reputation. During his three years' course in school or office he is under the super-

vision and guidance of an older lawyer to whom he is assigned. At the end of the course, a more stringent investigation into his character is made and he is to sit for an examination upon legal ethics and traditions. He is also to serve a clerkship of six months at least in a lawyer's office. The Bar in the other State, California, appears to have secured a charter of independence by Legislative Act only recently. The rules of admission. therefore have to take effect only a little later after those who have begun their course on faith of the old regulations have been enrolled and July, 1932, has been fixed for the commencement of the new rules by which two years' academic work followed by a three years' course to a law degree in an approved law school is made the minimum requisite. The student has also to get himself registered and pass a character investigation at the beginning of his period of study of law. These rules largely aim at the character of the member forgetting all the while that it is only later in life when he finds the many thorns in his way in the profession that he tries all means in his power to remove them.

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The address of Mr. Litchman delivered at a meeting of the Seattle Alumnæ of Phi Alpha Delta (Seattle, Washington) on *"The Practical Application of Legal Philosophy in Everyday Law Work"* [*American Law Review,* March, April, May, 1929] affords very interesting reading. His purpose in the address is to speak about the "why" of the law and how if an advocate knows the "why" of the law, he can present his case to the Court with better results. It is a truism that "after all, lawyers are paid by their clients, to obtain results" though in theory it may require to be tempered by the Advocate's duty to the Court. He discusses the philosophical theories of law under six heads: (*i*) The logical, (*ii*) the moral, (*iii*) the time-social evolutionary, (*iv*) the environmental, (*v*) the force-sociological. and (*vi*) evolutionary economic. They are being used in everyday work only without its being realised and the advocate who is able to marshal them all together and in apt places succeeds the best.

(*i*) *The Logical Theory*—This is the reasoning by direct example and, if that cannot be done, by analogy. This is the most common method and possibly the one that Courts governed by precedents have to follow The legislature does not reverence this theory at all and it goes on repealing past laws and re-enacting new laws as it thinks best. He thinks that this theory has

the disadvantage that it is merely mechanical and requires the Judge to decide which set of decisions approaches the facts of the case nearest.

(*ii*) *The Moral Philosophical Theory.*—Its greatest exponent is Rudolph Stammler. According to this school, law is announced or enacted to realise that which is for the social good at a given time. Equity Courts adopted this system and softened the harshness of the Common Law. One of its greatest slogans is "public policy." On several occasions when shelter was sought under an old rule of law, the Courts applying this theory of "human kindness" cast it aside and rendered justice to the victim of the old law.

(*iii*) *The Time-social Evolutionary Theory.*—This was recently propounded by Chief Justice Cardozo of New York Court of Appeals. According to him, time is an important element in the administration of law. As time rolls on, new customs come in and legal concepts must also change to accord with them. Social conditions and legal concepts must go hand-in-hand. If an old decision applicable to the case is cited, the exponents of this school will visualise a picture of the condition of society at the time and a picture of the society at the present time and see how far that rule can be followed at the present day.

(*iv*) *The Environmental Theory.*—This is more followed by the Legislature which takes note of the environments of the people for whom the law is to be made.

(*v*) *The Force-sociological Theory.*—This is an analogous theory and tries to make law a social tool and regulate it according to the social position of the litigants. This is also largely applied by Legislature. The social and political warfare between different classes of human society is sought to be regulated, the end in view being the peaceful existence of society as a whole.

(*vi*) *The Evolutionary Economic Theory.*—"Law, to this school, is viewed as a social tool set in motion by the Government . . . . to regulate the conduct of peoples towards each other, primarily in their relations towards property." This takes note of the economic developments in the country and develops law accordingly As an illustration, the writer instances the *Haverty case*, 134 Wash. 235. There a longshoreman was injured while employed on a vessel by the negligence of the hatch-tender, a fellow employee who failed to signal to him the descent of a load. The question arose if the stevedores were liable or the

hatch-tenders. Several doctrines were called in aid like the fellow-servant doctrine and non-delegable duty doctrine. Respondeat superior doctrine based on individual employment can have no application to cases where, as often happens in modern business, he is the servant of two or more employees. The Court held that the fellow-servant doctrine was of no use hereafter because of the changes in the economic, legislative and judicial world.

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## BOOK REVIEWS.

LEGAL ETHICS—The Advocacy Series, Vol. VII—by Messrs. P. Ramanatha Aiyar and N. S. Ranganatha Aiyar. Price Rs. 4.

A treatise on professional ethics preaching the highest degree of moral courage, unselfishness and backbone to the lawyer can only fall flat on an extremely discontented bar, which has begun to feel all the disadvantages of overcrowding and the keenest competition among its members. But the sincere hope, that "in a democratically evolving country, canons of professional ethics will tend to raise and to strengthen the standard of professional honour," has perhaps actuated the authors of this volume, the last of the series, to complete their endeavour with an exhortation to the members of a most honourable calling, to respond to all the great qualities of head and heart for which they stand. Highly sarcastic as it may seem if the legal profession were to be characterised as "superior even to war in many respects, even in the primary respect of ruin to both the parties," a close observer of individual vagaries as well as one having intimate knowledge of the intricate workings of the profession, may not completely disagree with the statement, when instances of the base purpose for which litigations sometimes get actually promoted by persons belonging to the profession are within his knowledge. The adoption of a code of Ethics by the members of the American Bar Association and that of San Francisco extracted in this volume amply conveys to us the great importance which such countries have attached to the formulation of a code of ethics for the maintenance of a proper standard in the legal profession. Hence it may not be out of place or untimely for the circulation of a book of this kind which deals with the real benefits that would accrue to the Bar as a whole, by its conforming to such ideals as would guide its members in their great and responsible task of acquitting themselves as men and

citizens. The numerous chapters of this volume, exhaustively dealing with the duties of the advocate towards his clients, his colleagues, and the Bench, have not omitted the attitude which Judges also ought to cultivate towards the Bar, which alone can perfect the system of administration of justice in the land. Though one may be inclined to feel satiated with the too many cuttings and extracts in the volumes of the series, he cannot possibly be indifferent to the untiring energy of the compilers of such information who richly deserve approbation.

We add our word of praise to the good opinion which the volumes of the series have been enjoying already.—*K.C.*

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MAXWELL'S INTERPRETATION OF STATUTES, 7th edition, by G. F. L. Bridgeman, 1929. Published by Messrs. Sweet and Maxwell. Price Rs. 22.

Maxwell's Interpretation of Statutes has been looked upon as the leading text-book on the subject and the opinions of its author have been freely quoted by Judges in their judgments. We therefore welcome the present edition of the work which has appeared nearly nine years after the last edition. The excellence of the work is so well known to the bench and the bar that it is unnecessary to dilate upon the plan of the work or its contents. It is, however, necessary to say that the present edition is slightly smaller in size than the previous one as some unnecessary and to some extent irrelevant matter has been deleted. Reference must be made to two new features in the present edition, *viz.*, the giving of the short titles of statutes for convenience of reference and the inclusion of the English Interpretation Act of 1889 on which the Indian General Clauses Acts are to some extent based, as an appendix to the work. Cases which have appeared since the publication of the last edition bearing upon the interpretation of statutes which otherwise are not sometimes easy to get at, have been referred to and noticed by the editor of the present edition in their proper places. We have no doubt that the present edition maintains the high excellence of the previous ones and will be found invaluable both by the bench and the bar.

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We have great pleasure in acknowledging the receipt of the All-India Ready Referencer, January to June, 1929, Civil, Criminal and Revenue, which is an exhaustive subject index to all the rulings of all the High Courts and other superior Courts