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AFTER-ACQUIRED PROPERTY.

The phrase "After-acquired property" in the law of insolvency is used technically to denote the property that is acquired by the insolvent, (including therein what devolves on him by inheritance but not property in the order and disposition of the insolvent or that in his reputed ownership) between the date of his adjudication and that of his discharge. With reference to property of this description the law does not appear to be quite settled as to the rights of the insolvent, his creditors, the trustee in bankruptcy, etc. Cases on the subject can be classed into the following groups:—

(*a*) as between the insolvent and the trustee in bankruptcy;

(*b*) as between the trustee in bankruptcy in that first and that in a subsequent bankruptcy where such a thing arises, each representing the creditors under the respective bankruptcy;

(*c*) as between the insolvent and third parties; and

(*d*) as between the trustee in the bankruptcy and third parties.

There is also a distinction made between real and personal estate.

Before examining the above cases in detail it may be stated that the Indian Legislature has, in making the provisions of the insolvency law, followed those of the English law on the matter, with one exception—if at all an exception—which will be referred to later. And the Indian decisions have followed the English decisions in interpreting the statutes even where the latter are based on the technicalities of English conveyancing, not applicable to Indian conditions,—a use of English precedents

that has been deprecated time and again—in the distinction between real and personal estate.

First let us consider the provisions of the various statutes.

(*a*) The law of insolvency relating to the matter applicable to the Presidency towns of India was embodied in the provisions of 11 and 12 Vict., Chap. 21, S. 7, which reads thus:

> " The Court is hereby authorised and required to order that all the real and personal estate and effects of such petitioner . . . and all the future estate, right, title and interest and trust of the said petitioner in or to any real or personal estate or effects . . . which such petitioner may purchase or which may revert, descend, be devised and bequeathed or come to him and all debts growing due to him before the Court shall have made its order in the nature of a certificate do vest in the Official Assignee . . . and such order when so made shall by virtue of this Act relate back to and take effect from, the filing of the petition and shall instantly and without conveyance or assignment vest all the real and personal estate and effects and debts as aforesaid in the Official Assignee."

The Act of 1909 now in force re-enacted these provisions in Ss. 17 and 52 though not in exactly the same language.

(*b*) In the mofussil the Act of 1907 was the first *ad hoc* legislation dealing with insolvency. Prior to that, the Code of 1882 provided for the insolvency of judgment-debtors. There, however, no provision appears to exist for the vesting of after-acquired property, unless it be S. 357 which enables the attachment and sale of the property acquired by the insolvent after, what may be called, his personal discharge, for the satisfaction of his scheduled liabilities either till they are satisfied to the extent of a third or till the expiry of 12 years from the date of the order of personal discharge. On the other hand, there is a distinction made between the property vesting in the Receiver under S. 354 and that dealt with under S. 357. The Act III of 1907 however specifically makes provision for the vesting of after-acquired property by S. 16 (4). Act V of 1920, the statute now in force, re-enacts the above provision in S. 28 (4).

(*c*) In England the Act of 1869, not to go earlier, contained the relevant provisions in Ss. 14, 15 (3) and 17. The Act of 1883 re-enacted the above provisions in the same language in Ss. 20 (1), 44 (2) (*i*) and 54 (2). The Act of 1914 is the statute now in force and contains the relevant provisions in S. 47.

Before proceeding further it is desirable to analyse the provisions of the several Acts and compare them, leaving out of account, for the present, the Code of 1882, which really is no comprehensive piece of insolvency legislation.

There are two features to which attention may be invited.

(1) There is no difference in the time or manner of vesting of, what may be called, the existing property, *i. e.*, property belonging to the bankrupt at the commencement of the act of bankruptcy or the date of the petition to which the adjudication relates back as the case may be, under the provisions of the several statutes, and the after-acquired property. A corollary to the above is that there is no distinction made in the several statutes with regard to the rights of the insolvent after the adjudication in respect of either class of property.

(2) There is no difference between real and personal property. The time of vesting is immediately or forthwith on adjudication; and no conveyance is required to pass the property from the insolvent to the trustee in bankruptcy; it is statutorily effected. All kinds of property vest at the same time and in the same manner except those which are exempted which do not vest at all.

(3) In spite of the similarity, if not the identity, in the language in the several provisions of the law above referred to, the decisions under the various Acts have made distinction on both the points above mentioned and have given rise to a conflict, which for England, has been settled by the latest statute of 1914, but for India is yet unsettled.

(4) The underlying principles in the two schools of thought may be stated thus: the one which regards the insolvent, so to say, as civilly dead on adjudication; and the other which regards him as capable of dealing with the property until the trustee intervenes, postponing the vesting of the property until that time. It is to be observed, however, that neither school of thought carries its doctrines to their logical conclusion. The first school recognises the existence of the insolvent, at any rate, for the purpose of acquiring the property, even though for an instant, before it, *i. e.*, the property so acquired, becomes vested in the trustee in bankruptcy by the operation of the statute, while the second school does not consider the ownership of the insolvent ownership in the real sense of that term, pure and simpliciter. His dealings with the property in the interval are protected against the trustee in bankruptcy only so far as the parties dealing with him do so *bona fide* and for value.

(5) Now I shall attempt to trace the conflict in some of the decisions and it will be interesting to study how judicial precedent has been evolved out of a legislative enactment to suit equitable considerations, which do not perhaps fit in with the strict letter of the law.

(6) Reverting to class 1 of the four groups indicated at the beginning, what is the legal relation between the insolvent on adjudication and the trustee in bankruptcy? There are two possible views:

(*a*) the proprietary *persona* of the insolvent falls on the trustee in bankruptcy who steps into the shoes of the insolvent somewhat in the nature of a universal heir. *Official Assignee of Madras* v. *Ramachandra Aiyar*[1].

(*b*) the trustee is an assignee of the insolvent's property.

On the first view the insolvent possesses no contractual capacity whatever and no contractual obligations can be enforced against him. All that he earns—even a disqualified person may acquire a benefit—belongs to the trustee, the insolvent being a mere possession or chattel so to say of the trustee occupying a position analogous to that of a slave under the ancient systems of law. The strict construction of the letter of the statute would seem to assimilate the insolvent to such a position. But such a view is an anachronism at the present day.

On the second and the more humane view, the vesting order passed on adjudication must be deemed, statutorily, without the necessity of any conveyance, to assign all the property of the insolvent, in existence or *in futuro*. There was at one time a doubt whether there can be a conveyance of property not in existence But since the decision in *Holroyd* v. *Marshall*[2], *Tailby* v. *Official Receiver*[3] and *Lind*, In re, *Industrials Finance Syndicate, Ltd.* v. *Lind*[4] it has been settled that there can be such a transfer, and that it cannot be attacked on the ground of being too sweeping and comprehensive. But it is a transaction operating on the conscience of the assignor when the property comes into existence, in order to mature a contractual right which it till then was, into an actual transfer, by virtue not of any fresh act or conveyance but of the original conveyance. Now however a question may arise as between the

1. (1922) I. L. R. 46 Mad. 54: 43 M. L. J. 569.
2. (1862) 10 H. L. C. 191. 3. (1883) 13 A. C. 523 at 543.
4. (1915) 2 Ch. 345.

insolvent and the trustee in bankruptcy whether the former could appropriate sufficient for his maintenance. Obviously he must be entitled to do so. As expressed in some cases it is the unwritten law: the insolvent must live to acquire property—even a slave must be fed. When a person voluntarily conveys all his present and future property the conveyance may be attacked as unenforceable, because it would be impossible for any such person to gain his freedom or to gain a fresh start in life. An answer to this is furnished in this that the conveyance is treated as divisible in so far as it prevents the debtor from maintaining himself. (Ghose on Mortgages, pp. 186, etc.) Similarly in the case of the statutory conveyance under the bankruptcy acts operating to immediately vest future property in the trustee, the objection that the bankrupt cannot then make valid payments to his butcher or baker, raised by James, L. J., in Ex parte *Dewhurst*, In re *Vanlohe*[1], does not appear to be a serious one.

(7) Now to the second of the group of cases mentioned above.

Now the trustee in bankruptcy represents the insolvent and the creditors, but so far as the acquisition of property is concerned it is the former aspect that is to be stressed. As between the respective trustees in successive bankruptcies each is the representative of the bankrupt, and when the title has passed to the first it would seem that the second has none. Each acquires title by the same mode and that in favour of the first is earlier in point of date and so his must prevail. And this was the decision of the Court of Appeal in In re *Clark*, Ex parte *Beardmore*[2]. But, in the Divisional Court from which the appeal was taken, decision was given in favour of the second trustee on considerations based upon some supposed equity in favour of those who became creditors in the interval between the two bankruptcies and who may be supposed to have in some way contributed to the acquisition of property. The view was pressed that the subsequent creditors were really paying the prior creditors; but that is inevitable in any bankruptcy where the person who supplied the goods to the bankrupt on credit has to share rateably with other creditors the price of those goods. The view is based on the exception to the *eo instanti* theory of the property vesting introduced or rather formulated

1. (1871) L. R. 7 Ch. App. 185. 2. (1894) 2 Q. B. 393.

by *Cohen* v. *Mitchell*[1]. This exception was held by the Court of Appeal not applicable to this case. It would be useful to consider the rule in *Cohen* v. *Mitchell*[1] and again to recur to this case.

(8) The rule in *Cohen* v. *Mitchell*[1] referred to above takes us to the fourth of the class of cases referred to at the beginning. The oft-quoted and celebrated rule is this :

" Until the trustee intervenes all transactions by the bankrupt after his bankruptcy with any person dealing with him *bona fide* and for value in respect of his after-acquired property whether with or without knowledge of the bankruptcy are valid against the trustee."

This proposition was drawn by Lopes, L. J., concurred in by all the three Lords Justices and laid down by the Master of the Rolls (Lord Esher, Fry and Lopes, L. JJ.). This proposition was admitted by the Judges themselves to be wide in terms; but the principle of it was said to be involved in the earlier decisions. Later learned Judges did not seem to take quite the same view and placed restrictions upon the proposition until it was adopted in its entirety by the legislature in 1914.

(9) Let us however briefly examine the earlier decisions which are said to involve the principle embodied in the generalised rule.

There is a class of cases where the process of the acquisition of the property itself involves the alienation so that the after-acquired property cannot be said to be legitimately free from it. *Kerakoose* v. *Brooks*[2] may be taken as the type of this class. In this case an undischarged insolvent borrowed a sum of money for purchasing the stock-in-trade and goodwill, etc., of the Imperial Hotel at Madras and executed a bond and also an agreement that he would execute a security over the goods to be purchased for the repayment of the loan and he did execute the security bond. Here the purchase, the agreement to execute the security and the execution of the security bond were regarded as a single transaction and the after-acquired property was the Imperial Hotel subject to the security. Hence the security was held to prevail against the Official Assignee. This class of cases therefore does not need the doctrine of the postponement of vesting in order to support the alienation.

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1. (1890) 25 Q. B. D. 262. 2. (1860) 8 M. I. A. 339.

(2) There is a class of cases where the Official Assignee is estopped from asserting his right. The principle of these cases depends on the ordinary doctrine of estoppel, nothing peculiar to the Bankruptcy law. Difficulties may no doubt arise as to whether certain circumstances constitute such an estoppel.

(3) There is a class of cases where the bankrupt has been allowed to sue for the recovery of the property against a trespasser.

The bankrupt can, in this case, be regarded to be acting only for the Official Assignee and acquiring property for him and as is usual in such cases notice is given to the Official Assignee who is impleaded as a party and in whose favour a decree is passed. *Sriramulu Naidu* v. *Andalammal*[1] and *Ramanatha Aiyar* v. *Nagendra Aiyar*[2].

The maintainability of such a suit by the insolvent is rested on a special kind of property said to exist in the insolvent in respect of after-acquired property. (*Sriramulu Naidu* v. *Andalammal*[1]—a suit by an insolvent co-sharer against others for his share; *Ramanatha Aiyar* v. *Nagendra Aiyar*[2]—a suit for dissolution of partnership that came into existence after adjudication.) It is such special property which enables the insolvent to use the property till the trustee intervenes, *e.g.*, to collect rent as recognised in In re *New Land Development Association and Gray*[3] which held that *Cohen* v. *Mitchell*[4] rule did not apply to real estates. That there is some such property in the bankrupt which is even transmissible to his heirs is indicated by the decision in *Fatimabibi* v. *Fatimabibi*[5]. It vests in the trustee in a second bankruptcy to enable him to institute such a suit. *Morgan* v. *Knight*[6].

But the property is not such that it represents the entire interest in it, *e.g.*, a decree in a mortgage suit impleading only the insolvent mortgagor in the absence of the Official Assignee will not be effective to dispose of the mortgagor's interest. *Kala Chand Banerjee* v. *Jagannath Marwari*[7] reversing *Jagannath Marwari* v. *Kalachand Banerjee*[8].

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1. (1906) I. L. R. 30 Mad. 145: 17 M. L. J. 14.
2. (1923) 45 M. L. J. 827.
3. (1892) 2 Ch 138.
4. (1890) 25 Q. B. D. 262.
5. (1892) I. L. R. 16 Bom. 452.
6. (1864) 15 C. B. (N. S.) 669.
7. (1927) L. R. 54 I. A. 190: I. L. R. 54 Cal 595: 52 M. L J. 734 (P.C.).
8. A. I. R. 1925 Cal. 785.

(4) Then there comes the class of cases where a third party has dealt with the insolvent with reference to after-acquired property and the trustee in bankruptcy later on impeaches the dealing.

It is here that equitable considerations have been invoked in favour of the third parties and the stringency of the statutory provisions divesting all rights from the insolvent has been relaxed and the reasoning employed to wriggle out of the strict terms of the section has not been always logical.

In In re *Clark;* Ex parte *Beardmore*[1] Vaughan Williams, L. J., in the Divisional Court, observed:

> "According to strict construction the property immediately vests; but notwithstanding the words of the section it seems to me that in the very nature of things, which not even an Act of Parliament can alter, property which comes into existence during a bankruptcy cannot vest in the trustee without his doing something to assert his title thereto"

To resort to the very nature of things in the interpretation of a statute appears to be treading on forbidden ground. Is not a vested interest to take effect at a future time known to law? The title fastens on the property as soon as it comes into existence. Why is an act of assertion, apart from the vesting under the statute, necessary to confer the title? There can be a present conveyance of future property. And the learned Judge concludes that (1) the property will not vest in the trustee until he intervenes; (2) that in the meanwhile it will vest in the bankrupt (apparently that property in the insolvent being in its content co-extensive with that of the trustee in bankruptcy when he intervenes throughout the period that it so exists). These conclusions directly contradict the terms of the section. In the same case and in the same Court the other learned Judge, Wright, J., said: "In theory property acquired by the trading of an undischarged bankrupt is acquired for the benefit of his estate in the bankruptcy; but it has long been established that in practice the presumption is the other way until the trustee in the bankruptcy intervenes."

The above statement of the law is far too wide and goes far beyond what is necessary for the protection of an innocent third party. It would embrace a volunteer from the insolvent. There has been no single case where the title derived from the

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1. (1894) 2 Q. B. 393.

bankrupt for no consideration has been upheld against that of the trustee. The contrary has been assumed and certainly there is no equity in favour of a volunteer. Therefore we may take it that one essential requisite for resisting the title of the trustee is the passing of consideration. Must it also be valuable consideration? It would seem yes.

One type of cases under this class is where the bankrupt has parted with his money (it is assumed in all further discussion that the purchaser—including in this term all persons who derivatively hold from the insolvent—has paid value) and later the trustee tries to follow the money. The trustee's right is negatived. Dealing with the uncertificated bankrupt, says Sir W. M. James, L. J., in Ex parte *Dewhurst*, In re *Vanlohe*[1]:

> "These have been going on for centuries, and this is the first attempt to follow into the hands of the person receiving the money which has been paid away for value by an uncertificated bankrupt"

and summarily rejects the attempt. The reason is, it is said, in some of the cases that the money has been consumed and money is by its nature and object intended and used for such consumption and is therefore not available. The reason is not quite convincing; for why should it not equally be applicable in the case of volunteers?

This reason however has been extended to goods, choses in action and personalty. Justification seems to be declining as the extension is made from one thing to another. That these are rather ephemeral as compared with realty and that more formal methods are prescribed by law for the conveyance of the latter from one person to another does not appear to furnish a sound basis for distinction.

Another class of cases is where the bankrupt has traded with the knowledge and consent of the trustee and in the course of the trade has dealt with the goods. The title of the alienee in these cases can be rested on the ground of estoppel or implied agency—the bankrupt having been held out by the trustee as his agent to carry on the trade. The question arises whether apart from any representation of the trustee which has led the alienee to deal with the insolvent as if he were the owner and which will attract the doctrine of estoppel the mere fact of the trustee's knowledge of the trade by the insolvent

1. (1871) 7 Ch. App. 185.

and his failure to intervene will enable the alienee to resist the claim of the trustee.

The wide language, in which this class of exceptions to the statutory rule has been stated, favours the alienee. One ground, as has been suggested already, is that goods are, if one may say so, consumable. Another is that the bankrupt is the agent of the trustee in so far as dealings with third parties are concerned; at any rate where the trustee has knowledge of the trade that the bankrupt is carrying on and where the goods are dealt with within the scope of the agency, the principal, the trustee, will be bound. The same reason must be available to uphold transactions affecting real property forming part of and had, in the course of, a business. For instance, if there was a business of buying and selling immoveable property, such property sold in the course of that business would be beyond the reach of the trustee. The essential qualification no doubt is that it must be in the course of the business. This carrying on of a business may be conceived of as an avocation in which the bankrupt is engaged in acquiring property and if in the course of that avocation and for the carrying of it, he parts with property that must be deemed to be covered in the general process of acquisition. (Per Kay, L. J., in In re *New Land Development Association and Gray*[1], "When business is carried on and personal property dealt with, such dealing consumes it, the consumption goes on as a consequence of the carrying on of the business.") Considered in this aspect the necessity for the trustee's knowledge and consent in respect of the bankrupt's trade does not seem to be quite apparent. Hence, in some later cases, this element is not regarded as essential; but, at the same time, they swept away the other requisite that the transaction must be in the course of a business, and protected any dealing for value. The analogy of a prior mortgagee standing by and suffering a subsequent mortgage to be made without giving notice of his security and thereby being postponed to the later mortgage has been suggested in *Tucker* v. *Hanuman* in order to resist the claim of the trustee. For the above reasoning it is immaterial whether the third party knew of the bankruptcy or even of the fact whether the bankrupt was undischarged.

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1. (1892) 2 Ch. 138.

On grounds similar to those stated above in the case of goods, dealings with choses in action have been protected.

To recapitulate briefly, leaving aside the question of estoppel, the following exceptions, if really they are such, were recognised to the rule of immediate vesting of the property in the trustee under the statute :

(1) the insolvent was allowed a right of suit in respect of the property, though the trustee would be made a party and the decree passed in his favour ;

(2) the liens and obligations to which the property may be subject at the time of the acquisition will be valid against the trustee ;

(3) where the insolvent carries on a trade with the knowledge and consent of the trustee, his dealings in respect of the personal property in the course of the trade with third parties for value were protected.

At this stage came the epoch-making decision in *Cohen* v. *Mitchell*[1]. By a bold stroke it gave an extensive application to what was supposed to be the principle underlying the above exceptions; and enunciated the rule in the general terms already set out above. It will be convenient to reproduce it here. It runs thus:

"Until the trustee intervenes, all transactions of the bankrupt after his bankruptcy with any person dealing with him *bona fide* and for value in respect of after-acquired property whether with or without knowledge of the bankruptcy are valid against the trustee"

Lopes, L.J., who framed the rule regarded it as a development of the principle contained in *Herbert* v. *Sayer*[2] and Ex parte *Dewhurst*[3] We shall presently refer to these cases and see how far the rule is logically deducible from the principle of these cases. Before doing so we shall examine the case *Cohen* v. *Mitchell*[1] itself.

In this case Arthur Cohen became bankrupt and then he traded in buying and selling agricultural machines. To enable him to do so Hyam Cohen advanced moneys at various times. One Foale seized some of the machines and Arthur Cohen brought an action against him for conversion. As he had no money to continue the action he assigned the cause of action to Hyam Cohen for moneys advanced and sums necessary to carry

1. (1890) 25 Q. B. D. 262. 2. (1844) 5 Q. B. 965.
3 (1871) 7 Ch App. 185.

on the action. It resulted in a verdict for £120. The trustee in bankruptcy claimed the money before it was paid out. Hyam Cohen claimed under the assignment. Foale interpleaded and paid the money into Court. The argument for the trustee was that the cause of action was property acquired by the bankrupt and which therefore vested in him; Hyam Cohen took it with knowledge of the bankruptcy; and as he had intervened before the money was paid out he was entitled to it. For Hyam Cohen it was contended on the other hand that this was a transaction of sale entered into with the bankrupt in the course of the trade and so binding on the trustee. And further that under the earlier decisions transaction for value with an uncertificated bankrupt are protected whether the third party has or has not knowledge of the bankruptcy, the crucial point of time being when the trustee intervenes. The Court of Appeal enunciated the general rule stated above. The reason appears to be that the earlier cases have recognised a distinction between the modes of vesting of property existent and after-acquired property, *e.g.*, considering the bankrupt as agent of the bankrupt; and that it will conduce to convenience to conceive of the bankrupt having proprietary rights in after-acquired estate until the trustee intervenes. But from the facts as stated above it is possible to regard the assignment as an essential condition of the trade carried on and the property acquired as subject to the assignment to Hyam Cohen somewhat analogous to *Kerakoose* v. *Brooks*[1] discussed above. Then it is the after-acquired property subject to the assignment that vests in the trustee.

Now to return to the cases said to form the basis of the rule framed by Lopes, L. J., *Herbert* v. *Sayer*[2] is a case where the bankrupt was allowed to sue on a bill as its indorsee. The Chief Justice of the Common Pleas said:

> "The trustee can when he pleases disaffirm the bankrupt's acts; but until he does so the bankrupt's acts are all valid."

If we regard the bankrupt as an agent acting and acquiring property for the trustee's benefit as suggested by the learned Chief Justice, the right of the trustee to disaffirm the acts of the bankrupt is not confined merely to cases outside the scope of the agency, as in the ordinary case of principal and agent, but to whatever acts he may choose. In case he disaffirms is he bound to restore the benefit that the bankrupt may have derived?

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1. (1860) 8 M. I. A. 339.
2. (1844) 5 Q. B. 965.

Yes, it would seem, if it formed part of the property seized by the trustee, for then it must revert back to the agent who would be an implied trustee for the third party. Here it is that the two constructions of the statutory provisions referred to, and the preference shown to one of them, by the Chief Justice of the Common Pleas are of aid. If however the benefit received by the insolvent did not reach the trustee's hands but had been consumed by him, the trustee, it would appear, would not be liable to indemnify the third party for the loss of the benefit. Says the Chief Justice:

"In this case, the effect of the statutory enactments may be either to transfer immediately such property or contracts from the bankrupt to the assignee vesting the property in the bankrupt for an instant only or to give the assignee the beneficial interest and to make the bankrupt acquire property or contract for his benefit only in the nature of an agent. The cases accord with the latter construction of the statute and it is most consistent with convenience ; for otherwise there would be no protection for persons dealing with an uncertificated bankrupt. Not only would they acquire no title by purchases from him, but payments for such purchases and for all debts due to the uncertificated bankrupt would be invalidated. The legislature by several statutes have protected all such payments by and to, and all dealings and transactions with the bankrupt *bona fide* made or entered into without notice of the bankruptcy before the fiat; but there is no such provision by the statute law to such payments, dealings and transactions after the fiat ; and the only way by which they can be rendered valid and great confusion, inconvenience, and hardship prevented is by adopting the latter construction and holding that the bankrupt acquires the property and the contracts for the assignees, who may whenever they please disaffirm his acts, but until they do so his acts are valid."

I have quoted the passage at length so that one may be able to consider its implications and see how far *Cohen* v. *Mitchell*[1] develops the principle contained therein.

The above passage may be reduced into the form of three propositions as follows :—

1. Title vests in the trustee at the moment of the acquisition; but it is the beneficial title;

2. The bankrupt's acts have to be regarded in the nature of the acts of an agent for his principal for the latter's benefit;

3. The trustee may whenever he pleases disaffirm the acts of the bankrupt and until he disaffirms the acts are valid;

and as a reason for the construction of the statute which would yield the above results in preference to the one which would treat the bankrupt as a mere trespasser, protection must be given to third parties dealing with the bankrupt after bank-

1. (1890) 25 Q B D 262.

ruptcy, as similar protection is given to them in respect of transactions between the date of the presentation of the petition or the act of bankruptcy as the case may be and the date of the adjudication.

Compare the above with the rule in *Cohen* v. *Mitchell*[1] which also can be stated in the form of a number of propositions thus:

1. Title does not vest in the trustee until he intervenes;

2. Until such intervention the acts of a bankrupt are those of an owner exactly similar to those before the bankruptcy;

3. The trustee cannot disaffirm retrospectively. This can have a meaning only where another *bona fide* purchaser for value had derived title from the trustee's alienee. The very expression "disaffirm" implies a prior completed act. The rule in question says that an act when once it is complete cannot be impeached by the trustee.

As regards the reason, the actual protection given by the rule in *Herbert* v. *Sayer*[2] does not go as far as that given in cases of dealings before the date of adjudication while that given by the rule in *Cohen* v. *Mitchell*[1] is wider in that it embraces also cases where the third party had knowledge of the bankruptcy, and even, of the absence of an order of discharge.

The other case on which the rule in *Cohen* v. *Mitchell*[1] is based is Ex parte *Dewhurst*, In re *Vanlohe*[3]. The judgment in this case is a short one and lays down no general principles. The bankrupt had taken a lease and paid the rent in advance and the trustee sued for the rent paid. It was held that he could not recover Presumably the trustee repudiated the lease; for otherwise clearly he cannot approbate and reprobate. Assuming he repudiated the lease and the surrender of the lease was valueless, can he sue for the money as having once belonged to the bankrupt's estate? This decision says that he cannot. Logically it would seem that he would be able to sue, unless on the ground that money is in its nature consumable and had been consumed. The decision itself would seem to rest on the fact that it was money that was the subject-matter of the litigation; at any rate no wider principle is stated. It may also be worthy of note that in decisions later than *Cohen*

1. (1890) 25 Q. B. D. 262. 2. (1844) 5 Q. B. 965.
3. (1871) 7 Ch. App 185.

v. *Mitchell*[1] it was stated that the extension of the rule to realty was not warranted by the earlier decisions.

Thus it would seem that the rule in *Cohen* v. *Mitchell*[1]—that the property does not vest in the trustee until he intervenes—is not warranted by the earlier decisions in all its implications and in its entirety. But when once it is accepted, there seems no reason, in principle, in view of the clear language in which the rule is couched, to limit its application to personalty. Curiously enough when two years later, the rule in question came up for consideration in In re *New Land Development Association and Gray*[2], Chitty, J., was emphatically of opinion that though the language is wide, the Judges in *Cohen* v. *Mitchell*[1] never had in mind real estates. One is familiar with the process of restricting the operation of a rule stated in a case and couched in wide language with reference to the particular facts of the case; but can you so explain away the very basis of a decision, unless thereby say euphemistically—as is sometimes done—that the decision referred to is not sound law. But the very same Judge in a still later case in In re *Clayton and Barclay's Contract*[3], would not extend the limitation of the rule to a chattel interest in land, although he admitted, that some at least (the counsel contended all) of the reasons that induced him to make an exception in favour of real estates, were equally applicable to leasehold interest. Indeed it would appear that Chitty, J., was of opinion that his decision in the previous case was wrong and would have wished that it had not been confirmed in appeal and created a binding precedent on him, and he had been left quite free again to apply the rule whose language was wide enough to include all property as he stated in this case. As Neville, J., put it in *Official Receiver* v. *Cooke*[4] one cannot understand why the language of the statement in *Cohen* v. *Mitchell*[1] should be interpreted differently in the case of real and personal property and is not satisfied with the reason of Chitty, J., in In re *New Land Development Association and Gray*[2] for the distinction and having established the distinction cannot understand how he held in In re *Clayton and Barclay's Contract*[3] that leaseholds came within the rule. It will be curious to notice that Neville, J., does establish the distinction for which he says in the above passage there is no

1. (1890) 25 Q. B. D. 262.
2. (1892) 2 Ch. 138.
3. (1895) 2 Ch. 212.
4. (1906) 2 Ch. 661.

warrant and excludes the equitable real estate from the operation of the rule in *Cohen* v. *Mitchell*[1]. It is worthy of note however that Neville, J., is not satisfied with the state of the law.

This distinction between realty and personalty for which there is no warrant even in England according to Neville, J., was adopted in India where the peculiarities of the English Law as to personalty and realty need not and perhaps should not be imported: vide *Rowlandson* v. *Champion*[2] and *Sriramulu Naidu* v. *Andalammal*[3], which accepts its authority on the point. *Alimahmad Abdul Hussein* v. *Vadilal Devchand*[4] however sees no reason for the distinction and extends the rule to immovable property.

Now the avowed object of circumventing the strict letter of the statute is to protect innocent third parties dealing with the insolvent. If so there would seem to be no reason for extending the protection to those that have notice of the bankruptcy, and much less to those that have the knowledge that the person that they are dealing with has not obtained his discharge. The analogous cases cited of those before the fiat restricts the protection to those who have no knowledge of the act of bankruptcy or the presentation of the petition.

We may take the analogy of a person, apart from insolvency, assigning his property not *in esse* but *in futuro*. Such an assignment has, after some struggle, obtained recognition in law. In order however to give protection to intervening purchasers (including in this term all lesser kind of dealing for value), it has been stated that the prior interest is an equitable interest which will not prevail as against a *bona fide* purchaser for value—*bona fide* implying want of knowledge of the prior assignment. No doubt under the Indian Law the distinction between legal and equitable estates is not quite valid and an agreement to convey does not create any interest in the property. Still the specific performance of a contract to sell cannot be enforced against a subsequent purchaser for value without notice. If we apply the analogy to the case of the compulsory assignment in bankruptcy, we get the protection given by *Cohen* v.

1. (1890) 25 Q. B. D. 262. 2. (1893) I. L. R. 17 Mad. 21
3. (1906) I. L. R. 30 Mad. 145: 17 M. L. J. 14.
4 (1919) I. L. R. 43 Bom. 890.

Mitchell[1] in its widest interpretation with this qualification that the third person should have no notice of the bankruptcy. There is no hardship in the matter either. The knowledge of the bankruptcy should put him on enquiry and there is no equity in favour of the person who would not make the enquiry. Even this is an extension in violation of the terms of the statute.

In England the rule in *Cohen* v. *Mitchell*[1] was adopted in later cases, though an exception to the rule was recognised in respect of real estates—legal and equitable—without reason until the legislature in 1914 finally set its approval to the rule in its widest ambit including real estates also.

In India in the Presidency towns the law in force at present is the Act of 1909. Naturally the provisions resemble the provisions of the statute then in force in England. Thus though the clear language of the later English statute of 1914 was not available for the Indian legislature to model the terms on the terms of the rule in *Cohen* v. *Mitchell*[1], the same rule can be evolved and in fact has been evolved by decisions as was done in England prior to the statute. So far as the mofussil is concerned we have the Act of 1920, an enactment later than 1914, which however repeats the old language. A legitimate inference that can be drawn therefrom is that the legislature being aware of that statute of 1914, did not think it fit to interfere with the existing provisions. Is it the reason that it thought that the rule in *Cohen* v. *Mitchell*[1] is deducible from its terms and that there was no necessity to alter it? Or is it the reason that it thought that such a provision was not safe for the mofussil? Either alternative is somewhat difficult of acceptance. For the first, if the legislature was aware of the English Bankruptcy Act of 1914, it must have been equally aware of the necessity for the clear expression in the terms of the statute of its object in view of the confusion created by the previous variety of the interpretation and the conflict of case-law. As regards the second there seems to be no valid reason for a difference between an adjudication in the mofussil and in the metropolis. The adjudication in the mofussil station may be based on the ground of residence while the place of business may be the Presidency town and the transactions may be equally at the mofussil and in the Presidency town. There

1. (1890) 25 Q. B. D. 262.

may be a difference in the machinery between a mofussil and a metropolitan administration but there need be no difference on a matter of principle as the one now in question, based merely on the accident of the place of adjudication.

On the wording of the provisions in both the Acts—Provincial and Presidency—the interpretation to be applied must be the same, for the terms are identical almost. It is noteworthy—despite what may be supposed to be the intention of the Indian Legislature, in confirming the strict interpretation of the expression "vest forthwith," and from its abstention from adopting the language of the English Act of 1914 in its enactment of the Act V of 1920—that the trend of decision under both the Acts has been to adopt the rule in *Cohen* v. *Mitchell*[1], now embodied in England in the Act of 1914. A different note was struck in *Ma Phaw* v. *Maung Ba Thaw*[2], that the word "forthwith" found in the Act of 1920 excluded the applicability of the rule in *Cohen* v. *Mitchell*[1] to cases coming under it. The earlier decisions which followed *Cohen* v. *Mitchell*[1] were distinguished on two grounds which appear to some extent mutually inconsistent, *viz.*, (1) that the wording of S. 28 (4) was materially different from the wording of S. 7 of 11 and 12 Vict., Ch. 21, and (2) that the cases under the latter statute modified its words on grounds of convenience. The second ground is fairly intelligible, while as has been shown above the first ground is untenable. The Court however added a suggestion for the amendment of the language on the lines of the English Bankruptcy Act of 1914. The applicability of the rule in *Cohen* v. *Mitchell*[1] was not necessary for the decision of the case. For on the facts it was found that the transaction was neither *bona fide* nor for value. Further the transaction itself does not appear to be a dealing with an uncertificated bankrupt within the meaning of the rule in *Cohen* v. *Mitchell*[1]. The transaction was a partition between the insolvent and his co-heirs with reference to property inherited by them, in which the insolvent was allotted a much less than his due share and this the Official Receiver questioned. Further with the greatest respect, the appeal appears to have been dismissed under O. 41, R. 11, Civil Procedure Code, perhaps not after such discussion as was otherwise possible.

1. (1890) 25 Q. B. D. 262. 2. (1926) I. L. R. 4 Rang. 125.

The very next year, however, in *Official Assignee* v. *N. P. A. K. Chettyar Firm*[1] the same Court preferred to follow the weight and unanimity of the decisions of the various High Courts in India and accepted the principle of *Cohen* v. *Mitchell*[2]. It is to be noted however that the learned Judges were inclined to think that the strict wording of the Act is against that principle; though somewhat inconsistently with that opinion, the earlier case of *Ma Phaw* v. *Maung Ba Thaw*[3] was distinguished on the ground that the word "forthwith" occurring in the mofussil enactment did not occur in the Presidency Act.

In our High Court an opinion has been recently expressed that an authoritative consideration by a Full Bench of the applicability of the rule in *Cohen* v. *Mitchell*[2] to cases under the Indian Acts—especially under the Provincial Act—would be necessary in view of the decision of the Privy Council in *Kala Chand Banerjee* v. *Jagannath Marwari*[4].

This decision of the Privy Council is not one on the matter on hand. The exact point at issue there was the necessity of impleading the Official Receiver as party as owner of the equity of redemption in a suit by a mortgagee. The argument against such a necessity was based on S. 16 (5) of the Act of 1907 which preserved the rights of the secured creditors in spite of the insolvency. The Privy Council repelled this argument which had been accepted by the High Court. It is to be noted that the argument for either position is equally applicable in respect of pre-adjudication property of the insolvent. No doubt in this case the mortgagor having died during the pendency of the suit the property devolved on the son who had been adjudicated insolvent. Further is the case in question one of dealing with the property within the meaning of the rule in *Cohen* v. *Mitchell*[2]?

There is perhaps an understandable distinction between the case of a bankrupt as a plaintiff representing the trustee for obtaining a benefit to the estate and one as a defendant where he is to be bound or to be foreclosed with reference to property.

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1. (1927) I. L. R. 5 Rang. 229. 2 (1890) 25 Q. B. D. 262.
3. (1926) I. L. R. 4 Rang. 125.
4. (1921) L. R. 54 I. A. 190: I. L. R. 54 Cal. 595: 52 M. L. J. 734 (P. C.).

The Privy Council no doubt at one place stresses on the word "forthwith" but with reference to another matter and another argument.

The consideration by the Full Bench of this question has not yet happened and the Legislature has not yet taken up the matter to place it beyond doubt in India. In the meantime it is believed that the requirements of the construction of the statutes and the equities in favour of innocent third parties would be met by treating the assignment by operation of law effected by the vesting order on a footing analogous to that by act of parties in regard to property *in futuro* and giving protection to all persons who have dealt with the insolvent for value but without notice of the bankruptcy.

R. KRISHNASWAMI,
Advocate, Madras.

LEGAL DISABILITIES OF UNTOUCHABLE CLASSES.

The following has been sent to us for publication by Mr. Jerome A. Saldanha, B.A., LL.B., Ex M. L. C., Mangalore:—

We are not concerned here with the social and religious disabilities of the several castes and classes in India called Untouchable or Depressed, but the legal disabilities which prevent them from the use of public places maintained out of public funds, and freedom of contract and movement. There is no definition of "public" in our Imperial Acts so far as can be traced. *The Madras General Clauses Act* lays down that the term "public" includes "any class of the public or any community".

The Places of Public Resort Act (Mad. II of 1888) provides for the inspection of places of public resort and entertainment and licensing of the same by competent authority, but it does not apply to places of public worship. It must be borne in mind that places of public worship, churches, temples, mosques and so on are not open to all the public but are confined to bodies of particular religion, sect or caste for whose use they are constructed or established and maintained. Thus churches exclusively meant for a particular sect of Christians exclusively are not open to other sects whose creed or rites differ essentially from those of the former. There are temples

which from ancient usage are confined to members of a particular caste or castes, or community privileged to use them, from which others not so privileged may be excluded by injunction from Courts, Magistrates or the Police. We have the interesting case of *Anandrav* v. *Shankar Daji*[1], in which the Chitpavan Brahmins sought to exclude a particular class of Brahmins (Palshes). Their suit was upheld on the ground that it was established by immemorial usage that the use of the temple had been confined to Chitpavan and some other privileged Brahmins to the exclusion of the defendants.

The principle of this ruling though not the form of action was followed in the Parsi case of Rangoon in which a person not belonging strictly to the Parsi community by race and caste (though Zoroastrian in religion) was held not entitled to the use of the Parsi temple in Rangoon, *Saklat* v. *Bella*[2], which relied upon the famous Bombay Parsi case *Sir Dinshaw Manekji Petit* v. *Sir Jamsetji Jijibhai*[3].

The Madras Courts also have had to decide on rights of lower castes to temple entry. In upholding the claim of a certain class of Brahmins to enter the inner precincts of a temple in *Venkatachalapathi* v. *Subbarayudu*[4] the Judges quoted without dissent the following observations of the Court of the first instance:—

"A temple of course is intended for all castes, but there are restrictions on entry. Pariahs cannot go into the court of the temple even. Sudras and Banyas cannot go into the hall of the temple. Brahmins can go into the holy of holies."

Reference here may be made to *Dewan of Travancore* v. *Vaki Jeraji*[5] in which it was held that a Bhatia though a foreigner was entitled to worship from the hall of the famous temple Ambalapuzha in Travancore. In *Gopala* v. *Dharmakarta Subramanya Aiyar*[6] the right of Illawayar caste (Sudra) in Tinnevelly to worship in the Wahamandapam (or the outer big hall next to the central half hall which is next to the holy of holies—garbagriham) was upheld.

The Madras High Court has had to consider also the claim of the once backward castes like the Shanars or Nadars rising in status by taking to more respectful or respected occupations—

1. (1883) I.L.R. 7 Bom. 323.
2. (1925) I. L. R. 3 R. 582: 49 M. L. J. 821 (P. C.).
3. (1908) I.L.R. 33 B. 509.
4. (1890) I.L.R. 13 Mad. 293.
5. 14 T. L. R. 56.
6. (1914) 18 M. L. R. 410.

agriculture, trade or money-lending, to entry into Hindu temples reserved to higher castes, including even Sudras like Vellalas and Marawars, but denied to non-caste people and untouchables. This claim on the part of Nadars was rejected by the High Court of Madras in a case of the Madura District, in which caste orthodoxy was once stuck to with great tenacity. This decision upheld by the Privy Council, even after the original plaintiff—the hereditary trustee—had given in at the last moment, to save the consequence of which the High Court reinforced the cause of the orthodox worshippers by adding some of them as plaintiffs. *Sankaralinga Nadan* v. *Rajeswara Dorai*[1].

The claim of the same community to the use of a public well in a village in the same district was rejected by the Madras High Court in *Mariappa Goundan* v. *Vaithilinga Mudaliar*[2] while the claim as to the use of the public tank close by was allowed as less liable to pollution and more capable of removal of pollution nearly like a river. The following remarks of Justice Sadasiva Aiyar, a social and religious reformer, in delivering his judgment, are pertinent as applying the awakening of the public conscience in the country:

"While the function of courts no doubt is to ascertain, compare, explain and ratify the statutory, customary and common laws, and not to create laws, Courts could not be deprived of the power of moving slowly with the better sense of the community, which is changing its custom for the better."

So far as Hindu converts to Christianity maintaining with some vigour the Hindu caste system socially are concerned, the Madras High Court has rejected the claim of superior castes to relegate lower castes to particular portions of a church even by agreement against the wishes of the ecclesiastical authorities (*Kattalai M. Pillai* v. *Bishop of Trichinopoly*[3]). But the custom of allocation of particular parts of churches according to castes still persists in several churches in South India.

LEGISLATION AS TO PUBLIC PLACES BEING OPEN TO ALL CLASSES.

A Bill was brought by Mr. Veerian which passed into Madras Act I of 1927 amending the Madras Local Boards Act, 1920.

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1. (1908) L.R. 35 I. A. 176: I. L. R. 31 Mad. 236: 18 M. L. J. 387 (P.C).
2. 1913 M. W. N. 247.
3. (1916) 30 M. L. J. 423.

After S. 157 *add* as below—

"157A. All roads vested in or maintained by Local Boards shall be open to persons of whatever caste or creed."

In S. 167 after the words "Public markets" *add*—

"and such markets shall be open to persons of whatever caste or creed."

This amending Act further makes obstruction of the use of public roads and markets punishable with a fine of Rs. 100.

A more comprehensive Bill was brought by the writer to amend the District Municipalities Act, 1920, which was enacted into Madras Act XVI of 1929 under which Ss. 180-A and 227-A were inserted and S. 259 was amended.

They provide that all streets vested in or to be vested in or maintained by a Municipal Council shall be open to persons of whatever creed or caste, that all wells, tanks and reservoirs (not private property), when maintained by the Municipal Council, shall be open for use and enjoyment to persons of whatever creed or caste, and that all markets constructed, repaired or maintained out of Municipal funds (therefore deemed to be public markets) shall be open to persons of whatever caste or creed. Obstruction thereto is rendered penal and liable to a fine of Rs. 100.

The importance of these provisions lies not so much in the declaration of the rights of all castes or creeds to the use of public roads, wells, markets, which is common law of the country, but in converting roads, wells and markets maintained out of Municipal funds into public ones and making obstruction to the use of them punishable. It may be mentioned by the way that all public roads and streets vested in any local authority, it is declared in Land Encroachment Act (Madras Act III of 1905), for the purposes of that Act, are deemed to be property of Government.

The need for some stringent legislation like the Amending Acts mentioned was felt keenly from the existence of various restrictions on the freedom of movement from place to place even along public streets and on the use of public markets and wells especially in Malabar, in which district Mahatma Gandhi has discovered such a thing as invisibility besides untouchability as a disability of the depressed classes.

The common law as to the use of public streets was propounded by the Privy Council in *Sadagopa Chariar* v. *Rama Rao*[1] affirming the Madras High Court's decision in *Sadagopachariar* v. *Rama Rao*[2] that all streets in a ryotwari village are public streets vested in Local Boards and that all members of the public have equal rights in them in a lawful manner. The following quotation from the judgment of the Madras High Court appealed against in the case is pertinent here:—

"We do not think that the custom which the plaintiffs plead is a reasonable one or such as Courts should recognise any more than the Courts would recognise the practice widely prevalent in Malabar by which men of the Cheruman caste are obliged to leave the public road if they meet of the Nair caste on it."

This ruling was followed in *Baslingappa* v. *Dharmappa*[3], *Dundappa* v. *Secretary of State*[4] and *Mannada Mudali* v. *Nallaya Goundan*[5].

Slavery in the shape of serfdom of the labouring classes survives in several places in India, especially in Malabar and South Kanara, which the Workmen's Breach of Contract Act, Madras Planters' Labour Act, Assam Planters' Labour Act and other such labour legislation sought to extend to coffee, tea and rubber plantations. But happily the first has been repealed by the Legislative Assembly, the second has been repealed as a result of the writer's Bill to amend it so far as the penal provisions were concerned, and the other labour legislation has been amended or ended so as to remove every vestige restrictions on the freedom of contract. Further, if all the recommendations of the Royal (Whitley) Labour Commission are carried out, the conditions of workmen and labourers largely recruited from the depressed classes will be free from several oppressing features.

Further, the amendment of legislation of Local Boards and Municipal Acts referred to above ought to be supplemented by more comprehensive provisions for removing several other disabilities that depressed classes still suffer especially in villages.

J. A. SALDANHA, B.A., LL.B.,
Ex M. L. C., Mangalore.

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1. (1907) L. R. 34 I.A. 93: I. L. R. 30 Mad. 185: 17 M. L. J. 240 (P. C.).
2. (1902) I.L.R. 26 M. 376. 3. (1910) I. L. R. 34 Bom. 571.
4. (1916) 18 Bom. L. R. 460.
5. (1909) I.L.R. 32 M. 527: 19 M. L. J. 467.

SUMMARY OF ENGLISH AND PRIVY COUNCIL CASES.

BANCO DE PORTUGAL *v.* WATERLOW & SONS, LTD., (1932) A. C. 452: 101 L. J. K. B. 417.

Damages—Breach of a term of contract—Contract for printing and supply of Bank notes—Term of contract not to print notes except on bank's express authority—Printing of large number of notes without bank's consent or knowledge—Circulation of such notes—Loss to the bank—Measure of damages.

In 1922 the Banco de Portugal entered into a contract with the W. Company (defendants) for the printing and supply of Portuguese bank notes. The Bank had an exclusive licence for the issue of bank notes as legal tender in Portugal and the currency was inconvertible. According to the contract, W. Company supplied to the Bank 6,00,000 notes of a face value of 500 escudos and the Company had also agreed with the Bank not to print notes from the plates in their possession without authority or knowledge of the Bank. But 5,80,000 notes of 500 escudos were unlawfully printed at the company with the help of the original plates or impression of it and put into circulation by a group of criminals. They were very much like the genuine ones and could not be distinguished easily. As soon as the Bank saw the forgery, they resolved to withdraw from circulation the notes of 500 escudos made from that plate and exchange them for others of the same or other denomination at their Bank and on December 7 issued a notice that all 500 escudo notes be exchanged by December 26. As a result, the forged notes also were received by the Bank and paid for during that period The Bank thereupon brought a suit against W. Co., for damages for breach of contract, negligence or conversion and claimed as damages the face value of the unauthorised notes paid by them. It was contended for the defence that the loss if any was caused solely by the Bank's own voluntary act in withdrawing them from circulation and exchanging them for other notes, and that in any event the damages were only the cost of printing the new issue of notes and not the amounts which the Bank chose to give in exchange for the forged otes.

Held, that the defendants, W. Co., were liable for the loss sustained by the plaintiffs by the reissue between the 7th and 26th December, and that the loss arose naturally in the usual course of things as a result of the breach. The withdrawal of the whole issue was a reasonable and indeed the only practicable step for the Bank to take in order to remedy the situation which had arisen and maintain its credit.

As regards the quantum of damages, held by a majority Viscount Sankey L.C, Lord Atkin and Lord Macmillan (Lord Warrington of Clyffe and Lord Russell of Killowen dissenting), that the proper measure of damages was the face value of the notes exchanged by the Bank for the unauthorised notes and the cost of printing them. The position is "that the Bank by issuing its promise to pay a fixed sum issues a bit of its credit to that amount; like the trader, it is bound to pay the face value in currency; like the trader, it is liable on default to judgment for the face value exigible out of its assets; and like the trader, if it is compelled by the wrong of another to incur that liability, its damages are measured by the liability it has incurred." This liability is in no way affected by the question of convertibility.

WILKINS *v.* LEIGHTON, (1932) 2 Ch. 106.

Damages—Nuisance—House on a natural steep slope with a retaining wall—Adjoining land built on—Collapse of retaining wall by pressure of the new house—Liability of the owner of the new house.

About the year 1882 a house *A. H.* was built on a natural slope. When it was being built the site of the house and garden was levelled to a considerable extent. In order to prevent weathering, a retaining wall 70 feet long by 13 feet high was built by the owner of *A. H.* In 1925 the owner of the adjoining site built a house on it *B. E.* In 1931 a part of the retaining wall fell and it was found that it fell owing to the additional pressure thrust on it caused by the weight of the house *B. E.*, though its stability may have been affected also by the effect of the south-westerly gales. It was found that if the foundations of *B. E.* had been carried down to a level with the garden of *A. H.*, no additional strain would have been imposed on the wall. In an action by *A. H.* against *B. E.* for a mandatory injunction to restore the wall and for damages for nuisance,

Held, that the action failed. *Rylands* v. *Fletcher*, L. R. 3 H. L. 330 has never been applied to anything brought on land in its normal use. There has been only a normal user of the land here, namely building.

St. Anne's Well Brewery Co. v. *Roberts*, 140 L. T. 1, followed.

To make the occupier liable for nuisance, the plaintiff must prove that he had knowledge of the existence of the nuisance and as there was no evidence to show that the defendant knew of the existence of any nuisance or was guilty of any negligence, the action failed even on that ground.

GENERAL MEDICAL COUNCIL *v.* WARING, (1932) 2 Ch. 115.

Dentists Act, 1921—Constitution of Dental Board—Qualification of members thereof—Nominee of General Medical Council—Also a member of Branch Council—If ceases also to be member of Dental Board, though before normal expiry of term.

H became a member of the Dental Board as one of the three members appointed by the General Council of Medical Education, etc., in 1929, his qualification being that he was a member of the Branch Council for England of the General Medical Council. In 1932, *H* ceased to be a member of the Branch Council and but for it, he would have been member of the Board till 1934. The question arose if his appointment to the Board terminated by reason of his ceasing to be a member of the Branch Council.

Held, that though there is no express provision in the act to the effect that the loss of the particular qualification for appointment should disqualify a member from continuing to hold office, yet from the careful manner in which provision is made for the constitution of the Board insisting on a qualification as a condition precedent to election, it is reasonable to hold that such qualification should continue to be held during the period of office.

In re BURFORD. BURFORD *v.* CLIFFORD, (1932) 2 Ch. 122: 101 L. J, Ch. 321.

Practice—R. S. C., O. XVI-A, R. (1) cls. (b) *and* (c)*—Third party notice—Trust fund lost by administrators and their solicitors —Claim by beneficiaries against both of them—Third party notice by administrators to their solicitors—If and when issuable.*

W. B. and *G. B.*, the administrators with the will annexed employed *C* as solicitors with regard to the administration of the estate of the testator. The beneficiaries under the will brought an action against the administrators *W. B.* and *G. B.* and the solicitors *C* for recovery of a sum of 1878*l.* lost to the estate during the management. It was alleged that the administrators handed to the solicitor a number of cheques signed in blank on behalf of the estate, that the solicitor in breach of trust filled in one of the cheques with the name of *A. W. Co.*, as payees, that *A. W. Co.*, were a firm of stock brokers whom *C* instructed to purchase 1800*l.* 5% War Loan for the estate, that *A. W. Co.*, received payment of the cheque but were then in insolvent circumstances and never in fact delivered the War Loan bonds. The claim was that in so dealing with 1878*l.*, the defendants *C* were guilty of a gross breach of trust. The defendants admitted the issue of the blank cheques but threw the blame one on the other for negligence and breach of trust. The defendants *W. B.* and *G. B.* thereupon served the defendants *C* with

a third party notice under R. S. C., O. XVI, R. 12 claiming (1) to be indemnified against the plaintiff's claim or contribution and (2) for a declaration that the said sum of 1878*l.* was lost owing to *C's* negligence and breach of fiduciary duty as solicitors for the administrators. Bennet J., held that two conditions should be satisfied under R. 12 before the third party notice can be given: (1) that the defendant serving the notice has to satisfy the Court that the relief or remedy which he claims relates to the original subject-matter of the action and (2) that it must be substantially the same as some relief or remedy claimed by the plaintiff. But while plaintiffs claim restoration to the estate of the sum, the defendants *W. B.* and *G. B.* claim damages to compensate them for it, which are different reliefs.

Held, by the Court of Appeal reversing Bennet J, that the notice was proper. What is meant by 'substantially the same' is that it must be the same in substance though not in form, because it is impossible that the issues between the defendants *inter se* should ever be the same in form as between the plaintiffs and defendants. What is meant by the rule is that if the claim made by a defendant against his co-defendant is connected with the claim which the plaintiff makes against both defendants, and is one which in the event of the plaintiff being successful will determine which of the two defendants ought to bear the ultimate loss, it is one in which the claim made by the defendant against his co-defendant is substantially the same as that made by the plaintiff against both the defendants within the meaning of the rule.

In re RECKITT. RECKITT *v.* RECKITT, (1932) 2 Ch. 144.

Will—Construction—Direction to pay an annuity free of income-tax—If free of sur-tax also.

By his will a testator after giving certain specific and pecuniary bequests provided by clause 12 as follows:—" I bequeath to my trustees the sum of 2,00,000*l.* upon trust to invest the same in any of the investments hereinafter authorised and to hold the said investments upon trust thereout to pay my wife during her life the annual sum of 5000*l.* free of income-tax."

Held, that sur-tax or super-tax is, in spite of some features differentiating it from income-tax, in essence an additional duty of income-tax within the income-tax statutes and therefore the freedom prescribed in cl. (12) includes freedom from super-tax as well as income-tax.

Michelham's case, 15 Tax Cases 737, followed.

In re *Bates*, (1925) Ch. 157 distinguished as a special case on the words in the will in that case.

In re *Crosse*, (1920) 1 Ch. 240 and In re *Doxat*, (1920) W. N. 262.

POWSZECHNY BANK ZWIAZKOWY W POLSCE *v.* PAROS, (1932) 2 K. B. 353.

Practice—O. XIV, R. 6, Rules of Supreme Court, 1883—Suit on a promissory note by an indorsee against the maker—Fraudulent indorsement contrary to the promise to the maker—Leave to defend conditional on payment—Validity of.

A suit was brought on a promissory note by the plaintiff as indorsee from *K* the payee against the maker. The defence was that the note was given to *K* upon the terms that he should negotiate the note only with his own bank and not otherwise but that *K* in breach of the condition fraudulently indorsed it to the plaintiff. The plaintiff filed an affidavit that he is a holder in due course of the bill having taken the said note in good faith and for value from the said *K*.

Held, that when a defendant presents a *prima facie* case of fraud in the plaintiff, the Court ought to act on that and give him leave to defend without imposing the condition that he should pay money into Court. The mere statement in the plaintiff's affidavit that he took the note in good faith and for value is not enough to decide that issue in his favour. In proceedings under O. XIV, what the Court has to ascertain is whether there is a triable issue. If there is, no matter how strongly the Court may anticipate that it will be decided in plaintiff's favour, it must order a trial.

Kodak, Ltd. v. *Alpha Film Corporation*, (1930) 2 K. B. 340 distinguished.

BAILEY *v.* MARCHIONESS CURZON OF KEDLESTON; AND SAME *v.* DUGGAN, (1932) 2 K. B. 392.

Practice and procedure—Suit on contract with mother to act as her son's 'bear leader'—Breach of contract—Suit against son for indemnity in respect of liabilities incurred for him—Consolidation of the two suits—Rules of the Supreme Court, O. XLIX, R. 8.

Two suits were brought by the plaintiff, one against the mother and the other against her son by a former marriage. The plaintiff acted as a companion to the son to exercise a general supervision over him and manage his affairs in consideration of a salary of 2*l.* 2*s.* a day and travelling allowance. The mother dismissed him from service and these actions were brought for damages for breach of the contract and wrongful dismissal against the mother and for indemnity for liabilities incurred and disbursements made by him on the son's behalf against the son. The plaintiff applied to consolidate the suits.

Held, that *Lee* v. *Arthur*, 100 L. T. 61, is no longer good law. Since then much greater latitude is allowed in making these orders, with the object of avoiding multiplicity of actions, and where various interests in one common subject-matter are involved, all the persons concerned, within reasonable limits, may now be joined as parties, so that the Court may adjudicate upon their various rights and interests.

Horwood v *Statesman Publishing Co.*, 141 L. T. 54, followed. Passage in Annual Practice, 1932, p. 875 following *Lee* v. *Arthur*, not approved.

REX *v.* DAILY HERALD. *Ex parte* THE BISHOP OF NORWICH, (1932) 2 K.B. 402.

Contempt of Court—Jurisdiction of King's Bench Division to issue writ of attachment—Complaint to Consistory Court—Publication calculated to prejudice the fair hearing of the complaint.

The King's Bench Division has inherent jurisdiction to correct an inferior Court and so also in proper circumstances to protect an inferior Court. This inherent jurisdiction over the Consistory Court remains untouched by the Ecclesiastical Courts Act, 1813 and the Ecclesiastical Courts (Contempt) Act, 1832. The King's Bench Division has therefore jurisdiction to issue a writ of attachment for contempt of the Consistory Court against the person publishing a statement tending to prejudice the fair trial of any legal issue or to interfere with the admission of justice by it. *Rex* v. *Daily Mail*. Ex parte *Farnsworth*, (1921) 2 K. B. 733; *Ricketts* v. *Bodenham*, 4 A. & E. 433; and *Burder* v. *Veley*, 12 A & E. 233 relied on.

PAYNE *v.* ALLCOCK, (1932) 2 K.B. 413.

Revenue—Finance Acts 1920, 1922, 1926, and 1928—Motor Car—Private car—License taken out as private car—Used also for conveyance of goods—Car not adapted for such purpose—If liable to duty as for a car conveying goods.

The appellant had taken out a license for a Singer Motor Car and paid the duty chargeable thereon on the basis of horse-power. The car was a private saloon and not adapted specially for use for the conveyance of goods. If charged as for a car adapted to convey goods, it was liable to a greater duty. The appellant in the course of his trade carried goods by his car occasionally.

Held, by Lord Hewart C.J. and Avory J., Macnaghten J., dissenting, that the user was wrongful. To be subject to higher duty it is enough if it should be used for the conveyance of goods. It is not

further necessary that it should be constructed or adapted for such use to fall under S. 14 of the Finance Act, 1922.

The Finance Act, 1922, S. 14 provides:—

Sub-Section (1): "Where a licence has been taken out for a mechanically-propelled vehicle at any rate under the Second Schedule to the Finance Act, 1920 and the vehicle is at any time while such licence is in force used in an altered condition or in a manner or for a purpose which brings it within, or which if it was used solely in that condition or in that manner or for that purpose would bring it within, a class or description of vehicle to which a higher rate of duty is applicable under the said schedule, duty at such higher rate shall become chargeable in respect of the licence for the vehicle."

Sub-Section (2): "Where a licence has been taken out for a mechanically-propelled vehicle, and by virtue of such user as aforesaid, a higher rate of duty becomes chargeable, and duty at the higher rate was not paid before the vechicle was so used, the person so using the vehicle shall be liable to a penalty of an amount equal to three times the difference between the duty actually paid on the licence and the amount of duty at such higher rate or twenty pounds, whichever amount is the greater"

McCALL BROTHERS, LIMITED *v.* HARGREAVES, (1932) 2 K. B. 423.

Bill of Exchange—Bill drawn to order of drawer—Accepted by Company—Indorsement by third party as security—Intention to make the third party liable—Subsequent indorsement by drawer but put beneath the third party's—Suit by drawer as indorser on the note—Statute of Frauds, 1677, S. 4 and Bills of Exchange Act, 1882, S. 20.

The plaintiffs, who were cloth manufacturers, were owed a large sum of money by *W. Co.*, for cloth supplied and so refused to deliver further cloth unless the account was secured and provision for payment of future deliveries made. It was agreed that bills should be drawn on and accepted by the *W. Co.*, and they should be indorsed by the defendant without recourse against the plaintiffs as drawers. It was orally agreed that the defendant was to make himself responsible on the bills. Bills were drawn on the *W. Co*, and accepted by them. The defendant signed on the back of the bills and the plaintiffs subsequently indorsed them, writing their name underneath and not above that of the defendant. In an action on the bills,

Held, that under S. 20 of the Bills of Exchange Act, 1882, the drawers have authority to complete the bills by adding their indorsement and it does not matter whether the drawer's indorsement is written above that of the defendant, or as here below.

McDonald (Gerald) & Co. v *Nash & Co.,* (1924) A. C. 625 and *National Sales Corporation, Ltd.* v. *Bernardi,* (1931) 2 K. B 188 followed *Shaw & Co.* v. *Holland,* (1913) 2 K. B. 15 must be deemed to be overruled by *McDonald's case.*

Though in one sense the agreement is one of a guarantee for the acceptor, the true effect of the agreement by the defendant is that he undertakes all the liabilities of an indorser and agrees that he will not have recourse against the drawer who is also the holder. The Statute of Frauds was not therefore an answer to a claim on the bill.

Steele v. *M'Kinlay,* 5 A. C. 754 followed.

Singer v. *Elliot,* 4 Times L. R. 524 doubted and distinguished.

Jenkins & Sons v. *Coomber,* (1898) 2 Q. B. 168 distinguished as a case of an action on the verbal agreement and not on the bill.

In re DIGBY AND PENNY, (1932) 2 K. B. 491.

Landlord and tenant—Agricultural Holdings Act—Notice to quit—Reasons not specifically given but stating as "in accordance with S. 12, sub-Sec. (1)"—If valid.

The Agricultural Holdings Act, 1923, provides that when a landlord turns out a tenant by a notice to quit, he must pay him compensation for disturbance, unless he sets out in the notice to quit that it is for any of the six reasons set out in S. 12, sub-Sec. (1) of the Act. The landlord gave a notice to quit which did not enumerate the reasons but merely said "In accordance with S. 12, sub-Sec. (1) (*a*) and (*b*) of the Agricultural Holdings Act, 1923, we....give you notice to quit . . . ." The tenant quitted the holding but claimed compensation for disturbance.

Held, that there is nothing unreasonable in supposing that the tenant was acquainted with the terms of the statute under which he held his farm, that as the notice said it was in accordance with S. 12, it was enough and it is not necessary that the reasons should be more definitely given. The claim to compensation therefore failed.

PLACE *v.* SEARLE, (1932) 2 K. B. 497.

Husband and wife—Enticement of wife by a stranger—Liability to damages.

In an action for damages by a husband alleging that the defendant had, without justification, persuaded his wife to leave him.

Held, by McCardie, J., that in view of the recognition of freedom of movement in women by modern legislation and modern decisions, *Winsmore* v. *Greenbank*, (1745) Willes 577 is no longer good law. The action cannot be rested on the same footing as that which lies for knowingly procuring a breach of contract, because no action will lie by husband against the wife for failure to discharge her domestic duties or by the wife against the husband for failure to fulfil his duties as husband.

Held, by the Court of Appeal (reversing McCardie, J.) that at the present day a husband has a right to the consortium of his wife and the wife to the consortium of her husband, and that each has a cause of action against a third party who, without justification, destroys that consortium. The methods of enforcing the right to consortium has materially weakened in the modern law but there are still means of enforcing the right. A person who procures, entices or persuades a wife to violate her duty to reside and consort with her husband commits a wrong towards the husband for which he is entitled to recover damages, unless the person who procured, enticed or persuaded her acted from 'principles of humanity'.

Sanderson v. *Hudson*, Times Newspaper, January 29, 1923, not approved. *Winsmore* v. *Greenbank*, (1745) Willes 577 yet good law.

TEMPERANCE LOAN FUND, LIMITED *v.* ROSE, (1932) 2 K. B. 522.

Money-lenders' Act, S. 6—Money-lender—Memorandum of renewal of loan—Surety for the repayment thereof—Omission of memorandum to comply with the requirements of the Act—Invalidity of the memorandum—Unenforceability against debtor—Surety if released.

R and *C* executed a joint and several promissory note on July 30, 1929, in renewal of a loan of January 30, 1929, which was to be repaid by the renewed date but was not. Along with the pro-note, a memorandum of the contract between the money-lender and the borrower was reduced to writing but it did not comply with the Money-lenders' Act in that it did not clearly show when the loan was made. It was held by the Court that the Court had no power to amend the memorandum, that the omission was a material omission and not merely a clerical error and vitiated the transaction and was therefore unenforceable against the debtor.

Held, that as the memorandum was bad as against the borrower, it was bad against the surety also. If it be held otherwise, the result

will be that the statute gives a defence to the borrower who has no merits, and who has had the money, but refuses a similar defence to a person who signs merely as guarantor and who has not had the money.

WINNIPEG ELECTRIC CO. *v.* JACOB GEEL, P. C A. No. 13 of 1932, dated 27th July, 1932.

(Manitoba) Motor Vehicles Act, S. 62—Burden of proof—Points to be proved by plaintiff—Plea of no negligence—Proof of—Evidence evenly balanced—Effect of.

Apart from S. 62, a plaintiff claiming damages for personal injury in a running down case would have to prove that he was injured, that his injury was due to the defendant's fault and the fact and extent of his loss and damage ; hence unless he succeeds in establishing all these matters he must fail. In virtue however of the statute he need only establish the first and the third elements, *i.e.*, that he was injured by the defendant and the extent of his damages. If he establishes those two matters, the onus is removed from him and it is then for the defendant to establish to the reasonable satisfaction of the jury, that the loss, damage or injury did not arise through the negligence or improper conduct of himself or his servants. This the defendant may do in various ways, as for instance, by satisfactory proof of a latent defect, or by proof that the plaintiff was the author of his own injury, or by proof that the circumstances were such that neither party was to blame because neither party could avoid the other. But the onus which the section places on the defendant is not in law a shifting or transitory onus. It remains on the defendant until the very end of the case when the question must be determined whether or not the defendant has sufficiently shown that he did not in fact cause the accident by his negligence. If on the whole of the evidence, the defendant establishes this to the satisfaction of the jury, he will be entitled to judgment; if however the issue is left in doubt or the evidence is balanced, even then the defendant will be held liable in virtue of the statutory onus, whereas in that event but for the statute the plaintiff would fail, because but for the statute the onus would be on him. *A fortiori* the defendant will be held liable, if the evidence actually establishes his negligence. (Lord Wright).

JOTTINGS AND CUTTINGS.

Speedometers—Magistrates throughout the country—and in the Metropolis—who have to deal with the excess of speed limits, are continually faced with the excuse that the defendant had no "speedometer" and did not know how fast he was going. Quite

lately it appeared that the Post Office vans—or some of them—are lacking in this useful article of equipment, and some strong words were said about the Postmaster-General and his duty to supply them. There may be such a duty if we look at the matter from the moral —or shall we say social—point of view: but at present there is no law that any vehicle at all shall carry a speedometer. When we get to the year 1933 the Minister of Transport's requirement that public service vehicles shall have speedometers will come into operation; and it is indeed strange that he should not have thought of requiring them until April of the present year. In view of what the magistrates so often say, we think it would be wise for the Minister to order them for all vehicles which are still confined to a certain speed limit. Though the excuse so often offered is no good in law, it does elicit sympathy—perhaps in cases where that sympathy is not deserved.—*L. J., 1932, p. 204.*

Lawyers in Parliament.—Vacation ends with the lawyers in Parliament very much as they were at the beginning. The ship of Government is, perhaps, less National than it was, but it shows no immediate signs of foundering or distress. Some young lawyers, disliking the flag or the direction of the voyage, have resigned their commissions and set out with Sir Herbert Samuel for what they believe to be a better destination Sir John Simon, however, remains; to the relief of those silks who would suffer if Sir John returned once more to the Bar and to that pre-eminence at the Bar which he alone appears to be able to resume at will. Despite the criticisms of those who did not like the legality of the German note —ascribed by popular opinion to his pen—he continues with unabated confidence on the quarter-deck and will never desert Mr. Micawber.

Lord Hailsham, Sir John's former and most formidable opponent at the Bar, appears to have greatly enhanced his reputation in Canada, not only at the Ottawa Conference, but particularly at the meeting of the Canadian Bar Association at Calgary. Nor did he hesitate to unbend in recreation hours. Although he was well and truly beaten in a cow-milking competition by a French Canadian lawyer and another transatlantic competitor, he is said to have completed the course without faltering and to have come in a good and sporting third.—*L. J., 1932, p. 218.*

Changing Law and Irish Precedents.—Events continue to provide the British Commonwealth of Nations with startling precedents, and there is no knowing where they will end. The resignation of Mr. McNeill is the latest constitutional phenomenon; and one won-

ders whether, in the queer development of our Constitution, it will become normal for a new Governor-General, or even a new King, to appear with every change of Government. One thing is certain. Constitutional law, the doctrine of Sovereignty as taught by Austin and explained by Dicey, is no longer adequate even as a theory with exceptions. The whole textbook will have to be re-written; but the learned author would do well to wait for further developments before committing himself to the new exposition.

Theoretically and technically, the passing of Mr. McNeill is in accordance with orthodox constitutional practice. For Mr. de Valera and the members of his Government are His Majesty's Ministers in the Irish Free State; and in accepting the resignation of Mr. McNeill, the King has acted in accordance with the advice of the Ministers aforesaid. So far, well. But suppose the Ministers advise His Majesty not to appoint any successor?—*L. J., 1932, p. 221.*

Lord Sankey on New Lawyers.—Lord Sankey was not unaware of the changes in common and constitutional law now proceeding so obviously before our eyes when, at Cambridge, he made reference to Maitland and Kenny, and observed that in a country where everybody is presumed to know the law it would not be a bad thing if those who were called upon to guide the destinies of the Empire should receive some elementary instruction in the law. But will that suffice?

According to the Lord Chancellor, "we are now on the threshold of an epoch of profound legal transformation. Our educational methods have to breed a race of lawyers able to utilise the spirit of law reform for the highest uses. They have to teach the importance at once of stability and change. To do so they must know not only how to grasp the philosophic content of legal decisions. We must turn out lawyers with a courage to criticise what is accepted, to construct what is necessary for new situations, new developments, and new duties both at home and abroad."

I wonder if amongst the "lawyers and teachers of the law" who bear the "burden of responsibility for the future happiness of England and the Empire," the Lord Chancellor included the Judges? If so, McCardie, J., is justified by the highest judicial personage for many utterances for which he has been so harshly criticised.—*L. J., 1932, p. 221.*

A Question of Sanctuary.—An unusual interruption of the Sunday morning service at St. Martin's-in-the-Fields Church recently has been the subject-matter of certain newspaper comment. The

facts were that a detective followed into church a man suspected of theft, and during the collection passed the plate to the suspect, who (it was alleged) promptly extracted half-a-crown in skilful manner from the plate. He was immediately arrested and charged with theft, but Mr. Graham Campbell (Bow Street) dismissed the case. Newspaper readers have commented on what they regard as having been a totally unnecessary interruption of Divine service; be that as it may, the correspondent who interests us is he who writes that, "Under the old institution of sanctuary such an outrage would have been impossible. Church soil was sanctified and protected from human punishment all who fled there." We have little patience with statements of this kind, for the privilege of sanctuary contained many important exceptions. Thus, persons apprehended with the stolen property on them could not afterwards take sanctuary; and we have it on the authority of "Coke" (Third Inst. 115) that felonies committed in churches always prevented the offender from availing himself of the privilege.—*S. J., 1932, p. 674.*

A New Arsenical Poison Terror.—At a recent inquest at New Brighton upon the death of a widow woman, it was disclosed that she had eaten four "rat-poison" biscuits left on the table by her son. The son, giving evidence, stated that he had been informed by the person from whom he obtained the biscuits that they were "not injurious to human beings." In appearance the biscuits were exactly like ordinary edible biscuits, with composition in the centre and bore no indication of their nature or of the purpose for which they were intended. The county analyst gave evidence that they contained arsenic, and the woman had taken a fatal dose—though death was in fact due to shock and exhaustion following the washing out of the deceased's stomach after discovery of the mistake. Witness was of the opinion that the word "poison" ought to have been moulded on the biscuits and that they should have been coloured green. This was, of course, what should have been done; but we should like to know this: There is an Arsenic Act on the Statute Book which forbids the sale of arsenic except by qualified chemists, and also makes it an offence even for a chemist to sell it without adding colouring matter so as to prevent the possibility of its being taken in mistake. Yet this most deadly of all poisonous substances may be handed about in plain biscuits after the manner disclosed at the New Brighton inquest, and as, presumably, products of this kind may be said to come within the ambit of requisites for "agricultural" purposes (rat destruction being a distinctly agricultural necessity) there is nothing to prevent any village grocer from being licensed to sell these biscuits under the

1908 Regulations, which permit of the licensing of any person without any chemical knowledge or qualification to sell them!—*S. J., 1932, p. 675.*

The Solicitor's Right of Audience.—A useful statement of the tribunals in which solicitors have a right of audience was contained in the paper on this subject read at the Bristol Meeting by Mr. Wortley, of Mirfield, and of the Law Department, London School of Economics. He showed how various are the tribunals before which the question may arise, and how the right of audience is determined partly by usage and partly by statute. In new legislation there is frequently a desire to exclude legal assistance, but in general this has been successfully resisted; and with the spread of quasi-tribunals, or tribunals which are bureaucratic in their nature, it is essential that the individual should be entitled to legal help. Whether the solicitor's right of audience is to be excluded in favour of counsel is another question, and in general, the solicitor has an equal right of audience in the inferior Courts, though he is excluded in the High Court, save in bankruptcy, and in the Court of Appeal, including bankruptcy. His right of audience at Quarter Sessions depends on local conditions, and the Law Society might well adopt Mr. Wortley's suggestion and provide an annual statement of the Courts of Quarter Session and other Courts that allow the right. Practical convenience also points to the adoption of his suggestions for the relaxation of the rules which forbid one solicitor to act for another in the County Court, and which also forbid managing clerks to appear there. Everyone knows that a managing clerk is often most competent in the conduct of legal business. Altogether usage and statute have left the solicitor's right of audience in a much too complicated condition.—*L. J., 1932, p. 224.*

Writs of Elegit.—The little town of Beccles in Suffolk was the scene recently of a Shrieval Court of Enquiry into a writ of elegit, the first held in the county for fifty years. The subject-matter involved would have appeared very strange to the draughtsmen of the statute 13 Edw. I, for it concerned only a small cottage owned by a local railway porter, and purchased for 60*l.* The jury impanelled duly found the defendant porter to be the owner, judged 9*l.* 2*s.* a fair annual rent, and were then discharged by the Under-Sheriff "with the thanks of the County of Suffolk for their services"! A writ of elegit issues out of the High Court, recites the judgment under which it is issued, and commands the sheriff to discover of what land defendant is possessed, and its value. The sheriff's return to

the writ—of vital importance to the creditor, as upon it his position as tenant by elegit depends—sets out the result of his enquiry, and this return is filed with the writ in the Central Office of the High Court. The judgment creditor must (*vide* Land Charges Act, 1925, sec. 6 (1)) secure the registration of the writ, for otherwise this and every delivery in execution thereof is void against a purchaser of the debtor's land. Having, however, satisfied this provision, the creditor is entitled to hold the land until the debt has been paid off. —*L. J., 1932, p. 225.*

Heirs of the Body: Crown and Peerage.—The view stated in *Halsbury's Laws of England* is, indeed, the accepted view, *i.e.*, that stated by Blackstone (14th Edition, by Christian, 1803, page 193), that in the case of females the title to the Crown devolves upon the eldest daughter alone and upon her issue, whereas in the case of land the title descends upon all the daughters equally as co-parceners. As Mr. Lang observes, a peerage cannot be held in partnership or joint tenancy. Unless the King exercises his prerogative in choosing one daughter to succeed to the peerage, the title remains in abeyance until only one daughter is left. But the authorities here do not accept Mr. Lang's view that "there is no reason to suppose that the descent of the Crown would follow any other course than the descent of a peerage." The authority for the contrary view is the passage in *Blackstone*, citing as his authority a similar view of Sir Edward Coke. But Mr. Lang doubts whether, in a matter of such importance as the descent of the Crown, even these venerable dicta could be accepted as authoritative.

The succession is, of course, governed by the provisions of the Act of Settlement, 1700 (12 and 13 Wm. 3, c 2), whereby the Crown was settled on the Princess Sophia, Electress of Hanover, and the heirs of her body, being Protestants. The words, as Mr. Lang points out, are (apart from the religious limitation) "the very words which, in the case of land, would create an entailed estate." And in deciding whether, in the present problem, the elder daughter would succeed in preference to the younger, the common law rule would be applied, since, on that point, the Statute has nothing to say.—*L. J., 1932, p 230.*

Princess Elizabeth and Princess Margaret: Coke and Blackstone.—What is the common law rule? According to Coke, as accepted and cited by Blackstone, the rule of descent is not the same in the succession to the Throne, as in the succession to land or to a peerage, and the rule of primogeniture applies even in the case of females, The opinion of these masters of the common law are of

tremendous weight. The fact that Blackstone cites Coke and that Coke cites no authority is of little moment. Coke did not cite authorities for many dicta which are accepted as authoritative statements of the rules of common law obtaining in his time. There is no authority of his age or reputation who has expressed a dissenting view. That the descent of the Crown was not invariably governed by the rule applying to the descent of land is clear: For example (see *Halsbury*, Vol. VI, page 320), "there can be no doubt that the ancient doctrines with regard to land, relating to the exclusion of the half-blood from the inheritance, never had any application to the descent of the Crown, and that collaterals were always admitted provided they could trace descent from the first monarch purchaser."

Moreover, the rule as stated by Coke and Blackstone is in accordance with common sense and necessity. Suppose an event in which the two daughters of the Duke of York were left as the only persons to be considered for the succession. There could not be two Queens, and without a Queen an Act of Parliament would be impossible. Some irregular proceeding like that of 1688 would be necessary. In such circumstances it would appear that the declarations of Coke and Blackstone as to the right of the elder daughter in preference to the younger would be accepted everywhere as complete, satisfying and wholly fortunate.—*L. J., 1932, p. 230.*

Police Reports and Running-Down Cases.—Before the Vacation, a paragraph in these notes dealt with the frequent complaints made by Judges and practitioners by reason of the refusal of the police authorities in certain boroughs and counties to supply statements made by witnesses of running-down accidents to the police at or about the time of the accident. A "police report" would indeed be given for the sum of five shillings, but not the actual statements made by the witnesses. The Judges were apparently at a loss to understand the reasons for non-disclosure, and I suggested that a lawyer-M. P. might easily ask the Home Secretary the reason why.

I know now that a lawyer M. P., Dr. S.J. Peters, of Cambridge, did in fact, on December 10, 1929, following some observations of McCardie, J., ask the Home Secretary of the time, Mr. Clynes, for an explanation. He had failed to elicit any reasons from the Chief Constable. He was dealing with the case of an eye-witness who, on being approached by a solicitor engaged in the running-down case, said: "I have made a statement to the police—I shall give no other." "You will, I am sure," wrote Dr. Peters to the Home Secretary, "readily agree that the whole worth of these (police)

reports—which in nine cases out of ten are made by an officer who comes on the scene some time after the actual occurrence—lies in the statements of the independent witnesses, taken by the police at the time. . . . If the statement made by a witness at the time of the accident is to be withheld, the witness might say something altogether different when in the box and completely defeat the ends of Justice."—*L. J., 1932, p. 230.*

How the Home Secretary Answered.—It is right that I should set out, verbatim, the explanation of the Home Secretary. "I have carefully considered," wrote Mr. Clynes, "your letter of December 10 regarding the refusal of the Chief Constable of Cambridge Borough Police Force to supply you with a copy of a statement made to the police by a witness to a road accident which has given rise to civil proceedings. The practice in this matter varies in different police forces, but, so far as I am aware, the general rule in the majority of forces is similar to that followed in the present case, and is in accordance with the principles followed in the Metropolitan Police Force, which were brought to the notice of the chief officers of police generally so long ago as 1912, viz., to supply interested parties or their representatives with a statement giving the salient facts of the occurrence as ascertained by the police from their own observation, together with the names and addresses of any witnesses known to the police. While I appreciate the considerations urged in your letter, there would be grave objections to requiring the police to furnish the parties, on their application, with full copies of the police reports and any statements made by witnesses.

"The reports are made primarily with a view to the consideration of the question which is the immediate concern of the police—namely, the institution of criminal proceedings; in any event such reports are in their nature made on a confidential footing, and ought to be so regarded. Though the practice varies, many Chief Constables would have the strongest objection to the full reports and statements of witnesses being handed to third parties; and I should not be disposed to require them to furnish the documents, even if it were within my province to do so.—*L. J., 1932, p. 230.*

Black Magic.—The "Black Magic" trial in Finland reached its last stages recently when a number of persons concerned in graveyard outrages were condemned to various terms of imprisonment. Thus an unexpected chapter is added to the astonishing judicial history of sorcery. Obviously, spiritualistic phenomena

would in other times have been treated as magical, but the oddest thing about witchcraft prosecutions is that they flared up most fiercely in the sixteenth and seventeenth centuries when Europe was supposed to be emerging into a blaze of enlightenment. What can one think of the Archbishop of Treves who ascribed the particularly cold spring of 1586 to witchcraft and burnt a hundred and eighteen women in consequence? What of the case of Mrs. Hicks and her nine-year-old daughter who were hanged at Huntingdon in 1716 for selling their souls to the Devil and raising a storm by pulling off their stockings and making a lather of soap? An alleged witch was burnt at Dornoch in Scotland in 1722. A good deal of information on the subject generally can be gathered from a work on Demonology published in 1595 by Nicholas Remy, a judge of Lorraine, who in fifteen years had presided at "the capital trials of nine hundred persons more or less," who suffered death for the crime of witchcraft. In Wurzburg, Bamberg and Geneva the death rate about this time was even higher.—*S. J., 1932, p. 715.*

Queer.—The "queer arrangements" whereby a Legal Aid Society helped the poor and "made a living" recently aroused the curiosity and comment of the Chief Magistrate concerning the "mysterious society which seems to advertise for business". The solicitor concerned—who declared, after experience, that he was sorry he had anything to do with it—was asked for his opinion as to whether an action would lie, and the case, if it seemed good, was taken up "on spec." The Society received 2*s.* in the £ if the action or the proceedings were successful; and nothing if nothing was recovered. The initial opinion was given by the solicitor without fee. "Business is done in a very odd way," said Sir Chartres. High Court Judges have also expressed surprise on learning of the existence of such business arrangements in other cases.

There are some things which are not done in this country, and speculative actions, in which fees or rewards and their amount are contingent on success and the extent of the sum recovered, are opposed to the spirit and the letter of the rule whereby the conduct of both branches of the legal profession are governed. Yet in other countries the speculative action is not universally condemned. In some places it is regarded as usual to bring an action "on spec." and for the lawyers' fee and its amount to depend on the success of the proceedings and the magnitude of the sum involved. Here it is condemned, and for reasons obvious and adequate.—*L. J., 1932, p. 252.*

Lords' Privileges.—Legal and other reforms are the talk of the moment, and amongst them is the old topic of the unfinished and unamended condition of the House of Lords. That ancient House is said, once more, to be balanced on the edge of the melting-pot. And if there are changes will the still surviving privileges of a member of the House be preserved when the changes are made? At the moment every noble lord has his privileges. He is immune from arrest in respect of civil proceedings. If he should indulge in treasonable practices or commit a felony he may demand trial at the hands of his peers; if he desires to wait upon his Sovereign he has the right of personal access; if he has taken the oath and been summoned to Parliament he may speak in the Lords' House with the absolute freedom enjoyed by a member of the lower House; and he need not serve upon a jury.

Further, it would appear that if he happens to be passing through the King's forests or one of them on his way to or from Westminster, he can, "both in going and returning, kill one or two of the King's deer without warrant, in view of the forester, if he be present, or on blowing a horn, if he be absent." This right, savouring of a remote past, has not recently been exercised, or, if it has, the fact has not been published. But the other privileges as hereinbefore set out still hold good in practice: they have not fallen into desuetude.—*L. J., 1932, p. 261.*

Crime and Punishment.—In *The Times* of Wednesday last Sir Henry Dickens supplemented what he had said at the Old Bailey on the above subject by a thoughtful and carefully considered article in which, after quoting words uttered long ago by an experienced judge—"The trying of a case is as easy as shelling peas: the difficulty begins when the question of sentence arises"—he expressed entire approval of the second branch of the apophthegm. Punishment, he said in effect, should, in the first place, deter and debar. Judges had, "as late as the 'eighties," been terribly severe, but there had been an inevitable swing of the pendulum towards leniency, and the pendulum had swung too far. Sentences should be suited to the "exigency of the time," and Sir Henry showed his thought that just now some mercy should be reserved for potential victims to whom prevention meant so much more than any cure. The state of crime in this country was alarming, and youthful violence aided by the quick "get away" afforded by motor cars should divert thoughts of mercy from the "poor young men" to the victim unconscious by the roadside. Many years ago flogging had been found to be a remedy for "garrotting," and the writer thoroughly believed that the "cat" or birch should be administered to young men concerned

in such cases as blackmail, " hold-ups, " or " smash-and-grab. " All who know him, however slightly, will realise that Sir Henry's measured words have no anger or irritation behind them, but only goodwill and anxiety for the public weal. His views on a difficult subject will therefore be given full weight and very careful consideration.—*L. T , 1932, p. 297.*

Rulings and Opinions of the Bar Council, From August 1931 to November 1932:—Advocates receiving jewels or other articles to raise loan on behalf of clients—A complaint was received by the Bar Council against an advocate alleging that the advocate undertook to raise a loan for the client to meet the expenses of litigation and for that purpose received a jewel from the client, but failed to carry out his promise.

The Bar Council resolved as follows:—

" The Bar Council disapproves of any advocate receiving or retaining jewels or other movables in satisfaction of the claims for fees or out-fees from clients or in accepting them for the purpose of raising a loan to meet the expenses of litigation." (Resolution, dated 24-9-1931.)

Advocate receiving fees from a company of which he is a director.—A reference was made by the High Court whether it was not desirable to have a rule forbidding advocates who might be permitted to be directors of Funds from appearing for the very same Funds in suits or other proceedings and receiving remuneration. The Bar Council after going through the opinions received from the various Bar Councils in India and from the Law Society and General Council of the Bar in England resolved as follows:—

" The Bar Council agrees with the view of the Hon'ble Judges of the High Court that it is undesirable that the advocates who are permitted to be directors of Funds should appear for the Funds of which they are the directors and receive remuneration. The Bar Council agrees with the principle underlying the ruling of the English Bar on this subject, namely,

'a barrister being a member of an executive committee of a society, should not accept a brief on behalf of the society'

reported at page 2514 of the Annual Practice 1932, and also agrees with the communication received from the Calcutta Bar Council. The Bar Council is further of opinion that for the time being it is not necessary to make a statutory rule regarding this, but that it may be left as a rule of etiquette and propriety as it is in England and in Calcutta. (Resolution, dated 13-12-1931.)

Bench and the Bar Mutual relation.—The opinion of the Bar Council was requested in the following circumstances:—

(1) Whether an advocate would be acting properly and in accordance with the best traditions of the Bar in bringing to the notice of the authorities concerned, any case where the temper exhibited by a judge in court and his consequent treatment of the Bar are derogatory to the courtesy due to the members of the profession, and

(2) Which is the proper authority to be addressed in the first instance?

The Bar Council resolved as follows:—

"The answer to the first question is in the affirmative. With regard to the second question, the proper authority to be addressed is the Advocate-General or the Bar Council. The Bar Council is of opinion that it would be much better if the materials are brought to the notice of the Advocate-General or the Bar Council through the Advocates' or Bar Association in Madras, or through the local Bar, if any, in the mofussil, as the communication will then have the sanction or the authority of the associations concerned, which are likely to be better acquainted with the details of the situation." (Resolution, dated 13-12-1931.)

Duty of an advocate to give notice when specially requested by the advocate for the other party.—The opinion of the Bar Council was sought as to whether it was not obligatory on an advocate for the appellant (or petitioner) to give notice with copies of petition, affidavit, etc., to another advocate who had previously intimated the former that he had received instructions from the opposite party to appear on his behalf and take notice of and oppose any petition for stay, etc

The Bar Council gave the following opinion:—

An advocate for an appellant (or the petitioner) is not bound to supply copies of the petition, affidavit, etc., though as a matter of practice prevailing among the appellate side practitioners such copies are given free of cost. If a notice in writing is given that an advocate has actually been engaged by the opposite party to make notice of and oppose any stay motion, then the council regards it as proper that the advocate should inform him about any stay motion which he intends to make, and that it is not right that he should make the motion without giving notice to the advocate of the opposite party." (Resolution, dated 17-12-1931.)

Advocates' Dress of Khaddar Gown.—The opinion of the Bar Council was sought by an advocate whether the requirements of the rule regarding the proper dress to be worn by advocates would be

complied with if a black gown made of handspun Khaddar, but cut in the prescribed style was worn.

The Bar Council resolved as follows:—

"Under the terms of the notification of the High Court, the advocate is bound to wear a black gown prescribed by the University of Madras for the B.L. degree which is a gown made of black stuff, cut like the Cambridge B.A. gown. The Council therefore sees no objection to the advocate wearing a Khaddar gown." (Resolution, dated 17-12-1931.)

Public Prosecutor while appearing for Crown—Stipulating fee from a Private Party.—The Bar Council was requested to express its opinion as to whether it was proper for a Public Prosecutor while appearing for the Crown in an appeal by an accused person to bargain for a fee from the complainant in the case (a private party) whether or not he takes the permission of the District Magistrate to do so, and whether in such a case it was not the duty of the Public Prosecutor to disclose the fact to the appellate Court when apparently he appears on account of a notice issued to him in his capacity as Public Prosecutor.

The Bar Council agreed with the principle laid down in G. O. Nos. 710, Judicial, dated 15th April, 1913 and 1914, Judicial, dated 31st July, 1916, and was of opinion that the duties of a Public Prosecutor while appearing for the Crown were distinguishable from those while appearing for a private party and it was therefore improper for him to bargain for a fee from the complainant when he appears for the Crown, whether or not he had the permission of the Magistrate to do so. (Resolution, dated 15-3-1932).

G. O. No. 710, Judicial, dated 15th April, 1913.

Para. 3. "The Government, on a reconsideration of the matter, consider that the duties of a Public Prosecutor are distinguishable from those of a counsel representing a private party, and they are therefore of the opinion that if a pleader appears as Public Prosecutor, he cannot at the same time, represent a private party. They accordingly direct, in supersession of G. O. No. 857, Judicial, dated 28th May, 1902, that a Public Prosecutor shall not accept any engagement or fee from a private party in any case in which he appears on behalf of Government."

G. O. No. 1914, Judicial, dated 31st July, 1916.

"It was ordered in G. O. No. 710 Judicial, dated the 15th April, 1913, that a Public Prosecutor should not accept any engagement or fee from a private party in any case in which he appeared on behalf of the Government. The question has now been raised whether this

order would preclude a Public Prosecutor from accepting an engagement from the complainant in a preliminary enquiry before a Magistrate when he has not been instructed by the District Magistrate to appear on behalf of the Government.

2. The Government find that there is no uniformity of practice in regard to the acceptance of such engagements by Public Prosecutors. They, however, consider it undesirable in the public interests that a Public Prosecutor should represent a private party in an enquiry of the kind referred to. The Government accordingly direct that no Public Prosecutor shall accept a private engagement or fee to appear in a preliminary enquiry."

Advocate appearing in a Court presided over by one of his relations.—A question was raised whether it was permissible for an advocate who happened to be a relation of the Presiding Officer of a Court to appear before him.

The Bar Council was of opinion that it could not be laid down that there was any breach of etiquette or impropriety in a relation appearing. The Council accepted the principle laid down in 1931 Annual Practice, 2422 which is as follows:—

"The Council is of opinion that whilst it is unobjectionable for a barrister in the ordinary course of a general practice to accept a brief in a Court of which his father or other near relative is a Judge, it is not right for such a barrister especially to devote himself to practise in that Court. It is almost inevitable that partiality will be suspected even although there may be no real ground for such suspicion. To practise might even lead to briefs being delivered to the barrister because it was believed that his client would have an unfair advantage over his opponent.

To deal with the matter practically the Council is of opinion that it should be recognised as a rule of the profession that no barrister should habitually practise in any county Court of which his father or near relative is the Judge.

The Council finds it difficult to lay down rules which would cover all cases. There is however no objection to a barrister practising in a Court where his father is one of several judges. In such a case it is impossible to know beforehand which judge will in fact try a case. For example, it has never been considered improper for a barrister to appear before his father in the High Court or in the Court of Appeal or in the House of Lords. It is of course of the utmost importance not only to avoid partiality but even the suspicion of it. The application of the principle is largely a matter of good taste." (Resolution, dated 15-3-1932.)

Advocate instructing Prosecuting Inspector of Police.—In answer to a question whether an advocate could instruct a Prosecuting Inspector of Police who was not an advocate, the Bar Council replied that it was not proper for an advocate to do so. (Resolution, dated 15-3-1932.)

Advocate's right to consent to adjournment.—The opinion of the Bar Council was sought by an advocate whether it was not a breach of professional etiquette for an advocate to oppose an application for adjournment made on account of the illness of the advocate on the other side, merely because his client would not agree to the adjournment.

The Bar Council gave the following opinion :—

" An advocate can agree to an adjournment notwithstanding the client's unwillingness, and it may be the thing to do in many conceivable cases. To say that, is not however to say that the advocate who refuses to agree does what is professionally improper. It is a matter of taste and accommodation, not one of etiquette." (Resolution, dated 15-3-1932.)

A joint Official Liquidator appearing for a party.—An advocate who was one of the three Official Liquidators in a matter requested the Bar Council whether he could appear for one of the creditors in an application taken by him against the directors for misfeasance, while a similar application for misfeasance had also been taken by the managing liquidator.

The Bar Council was of opinion that it was not proper for him to do so. (Resolution, dated 15-9-1932.)

Client's money—How to be kept.—Having regard to the observations of the Hon'ble the Chief Justice in the course of his judgment, dated 29-8-1932 in the matter of a Pleader, an advocate applied to the Bar Council for advice as to what he should do with client's moneys in his hands when the whereabouts of the client were not known.

The Bar Council replied that the advocate must keep the client's moneys separately ear-marked so as to make it available to the client at any time he asks for it, as for instance, by depositing it in a bank or post office. (Resolution, dated 7-10-1932.)

" It is the duty of a practitioner who receives money on behalf of his client to pay that money to his client. If the client chooses to come, well and good; if he does not, it is his duty to pay him and he is not entitled to retain the money in his hands."

BOOK REVIEWS.

LECTURES ON CONTRACTS, PART II, by Mr. T. S. Venkatesa Iyer, M.A., M.L., Advocate, Madras. Price Rs. 6.

We had occasion to review the first part of this work in our pages. The second part deals with the branches of special contracts, such as, Indemnity and Guarantee, Bailments, Agency, Sale of Goods and Partnership. The method of treatment adopted by the learned author is the same as in the first part of this work. He has given a full exposition of the English and Indian law on these branches in the lecture portion and commentaries on the sections of the Indian Contract Act, the Sale of Goods Act and the Partnership Act in the later portion of the part under review. One noteworthy feature of the commentaries of the Indian Sale of Goods Act and the Partnership Act is that the learned author has given under each section of the Indian Act, the corresponding section of the English Act. This will clearly bring into view the differences, if any, between the sections of the English and Indian Acts. He has also given in the appendices, the rules framed by the Government of Madras and by the Governor-General in Council under the Indian Partnership Act. We feel sure that both the parts of the work together will fully meet the requirements of the practising lawyer and the student alike.

THE INDIAN PARTNERSHIP ACT, by Anukul Chandra Moitra, M.A., B.L.

This is a commentary on the Indian Partnership Act clearly setting out the principles underlying its several sections and giving references to the Indian decisions and the more important English decisions. The learned author has incorporated in the work, passages from leading English writers on the subject wherever necessary, to elucidate the various points. The several appendices give all useful information on the possessual law applicable to partnership suits and to the execution of decrees therein. There is also an appendix dealing with accounting and book-keeping which we hope will be found useful.

THE INDIAN PARTNERSHIP ACT, 1932, by L. B. Bhopatkar, M.A., LL.B., Advocate, High Court, Bombay and Vice-Principal, Law College, Poona. Price Rs. 5.

This is an analytical and explanatory commentary on the provisions of the Indian Partnership Act. The chief object kept in view by the author of this work is not merely to give a commentary on the Act but also to elucidate the principles underlying the provisions

of the Act by clearly setting forth and expounding the points of similarity and dissimilarity between the Indian and English Acts. A comparative table is given at the beginning of the book with a view to afford the reader a clear idea of such provisions of the Indian Partnership Act which correspond with those of the English Act and the Indian Contract Act. All the important decisions in England and India have been referred to. The appendices give all the useful information connected with the subject of partnership. We think the learned author has succeeded in making the book a reliable guide to the study of the law of partnership.

THE DOCTRINE OF LIS PENDENS, by K. G. Kale, Advocate, Bombay High Court. Price Rs. 5.

The learned author has in this book dealt with the subject of *Lis pendens* in all its phases in about 200 pages. Each chapter deals with a separate aspect of the subject. The principles underlying the rule of *lis pendens* have been carefully analysed in the various sections of the book and all the Indian and the more important English decisions have been referred to by the author in their appropriate places. We have every hope that this book will be found useful in clearing up the ideas on the subject.

PRINCIPLES OF INDIAN MERCANTILE LAW, by Sen and Banerjee, Advocates, Calcutta High Court. Price Rs. 7-8-0.

This is a book written for students who have to qualify themselves for a course of Mercantile Law of the B. Com. Course of Indian Universities and accountancy. The distinctive feature of such a work is that it should be intelligible to any lay reader without a previous knowledge of any branch of law and the learned authors have succeeded in bringing out a book of this description, the principal basis of which is the portions of the Law of Contract dealing with Sale of Goods, Partnership and Negotiable Instruments. For the benefit of the students, selected questions from the University examinations have also been appended. We have every hope that the book will be found to be of assistance to those businessmen who require an exposition of the first principles of Mercantile law and to students preparing for examinations in the same.

[END OF VOLUME LXIII.]