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A NOTE ON MUHAMMAD SAHIB *V.* KUNTHANMAL SOWCAR, (1940) 2 M.L.J. 185*

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Mr. Justice Horwill has laid down in this case dealing with a debt incurred subsequent to 1932, that S. 12 of the Madras Agriculturists' Relief Act (IV of 1938) entitled a creditor to interest on any sum remaining outstanding after the debt had been scaled down, from the date up to which it is scaled down, that is, *only from the date of the decree* and that the past interest having been paid off in full long before the Act came into force the plaintiff was entitled to a decree only for the balance of the principal outstanding.

The judgment does not indicate the rate of interest specified in the promissory note which was of the year 1933 and whether any payment was made towards interest in October of that year when the debtor paid Rs. 100 for principal out of the Rs. 300 for which the note was originally executed. Presumably it was, for no creditor will ordinarily allow any payment for principal without the interest till then due being paid. It may also be assumed that when the interest was paid in full on 18-11-35, it was paid according to the promissory note rate. The plaintiff in the suit had claimed interest from 22-3-38 up to the date of suit. No interest on Rs. 200 seems to have been claimed from 18-11-35 up to the date of suit. Evidently the interest paid on 18-11-35 very nearly equalled or exceeded the amount of interest calculated on the 5 per cent. basis from the date of the bond up to 22-3-38, for in that case alone will there be no

* In C.R.P. 1756 of 1939, (1940) 2 M.L.J. (N.R.C.), p. 28, it has been held that in cases under S. 8 interest should be calculated on the amount scaled down, not from the date of the decree scaling down but from 1—10—1937 at the rate mentioned in S. 12; in a case falling under S. 9, the decision in (1940) 2 M.L.J. 758 suggests that the starting point for interest on the amount scaled down will be 22—3—1938.—*Ed.*

interest outstanding on the 5 per cent. basis on 22-3-38. The Rs. 7-8-0 claimed for interest up to the date of suit should have been calculated on the 6¼ per cent. basis on Rs. 200 from 22-3-38 up to the date of suit. His Lordship equates the date up to which the debt is scaled down with the date of the decree, and holds that from that date that amount carries future interest under S. 12 of the Act. With due respect to his Lordship this does not appear to be the correct interpretation of S. 12. A distinction should be drawn between the time of scaling down and the date up to which the debts are scaled down as contemplated in S. 12. It is true that debts are scaled down under Ss. 8 and 9 so far as the principal and interest are concerned with a view to fix the legal liability under the statute intended to benefit the agriculturists coming within its scope. Under S. 8 the scaling down of interest takes place up to 1-10-37 in that it wipes off the interest outstanding altogether. The principal outstanding on that date carries subsequent interest at 6 per cent. from that date up to the date of payment. No question of the decree affording any starting point for payment of future interest can possibly arise. S. 8, sub-S. (2) provides for a case of wiping off the liability altogether. Sub-S. (3) provides alone for the payment of the amount that would make up the shortage between sums repaid by way of principal or interest and twice the amount of the principal. It may be that the principle of discharge by double payment or approximating to double payment can be applied even taking into consideration any payments made after 1-10-37 and even after 22-3-38. There has however been no decided case so far on this point.

The Act came into force on 22-3-38. The crucial dates mentioned in S. 8 are 1-10-32 and 1-10-37, the former with reference to the starting of the indebtedness and the latter with reference to the ascertainment of the amount repayable on that date, as mentioned in sub-S. (1) thereto. S. 12 refers to future interest on the debt that is scaled down in cases where the debt was incurred prior to the Act and S. 13 refers to those that are incurred subsequent to the Act. The application of S. 12 presents no difficulty. If Mr. Justice Horwill's interpretation is correct, a new date is introduced as the date up to which the debt is scaled down, *viz., the date of the decree.* Suppose the parties do not go to court but try out of court to settle the amount due under the Act, then according to the learned Judge that would be the date up to which the debt is scaled down for the purpose of carrying future interest if the settled amount is not paid. 1-10-37 and 22-3-38 will not be according to his Lordship the respective dates up to which the debt is scaled down according as S. 8 or S. 9 is applicable to the facts of the case. The correct interpretation will be that the words "from the date up to

which it is scaled down" in S. 12 mean one or the other of the dates mentioned above, no matter when, after the commencement of the Act, the parties try to settle accounts out of court or through court. According to his Lordship's view the principal outstanding on 1-10-37 will carry no interest whatever; likewise, the principal outstanding on 22-3-38. This view will render S. 12 absolutely nugatory. In trying to interpret S. 12 his Lordship has virtually ignored its operation in respect of interest subsequent to the two dates implicit in the section. Post decree interest is provided for in the Civil Procedure Code at 6 per cent. S. 12 of the Act was not intended to provide for this. It was only intended to provide for interest after scaling down for, otherwise any delay on the part of the creditor to resort to court will result in his not getting any interest for the interval between 1-10-37 or 22-3-38, as the case may be, and the date of suit and this could hardly have been intended in an expropriatory legislation of this kind which must be interpreted strictly.

SUMMARY OF ENGLISH CASES.

NOBLE *v.* SOUTHERN RAILWAY CO., (1940) A.C. 583 (H.L.).

Workmen's Compensation Act (1925), S. 1 (2)—Death of Railway employee caused while walking along the railway line which was forbidden —Accident if arising out of and in the course of employment.

A fireman was employed on piloting duties, *i.e.*, if a driver was not acquainted with the railroad, he had to travel in the engine cab and show it to him. A safe route from the depot to the station was provided and walking along the railway line was prohibited. The fireman while walking along the forbidden route to an engine was knocked down and killed by an electric train. In a claim by his widow for compensation,

Held, reversing the decision of the Court of Appeal in (1939) 2 All.E.R. 817, that though the accident did not arise out of the employment but occurred while the deceased was contravening the regulations as to his proper route from the engine house to the station, still as the workman was walking along the line for the purpose of and in connection with his employers' trade or business the accident must be deemed to arise out of and in the course of the employment and his widow would be entitled to compensation.

Clarke v. *Southern Railway Co.*, 96 L.J.K.B. 572, overruled.

KNIGHTSBRIDGE ESTATES TRUST, LTD. *v.* BYRNE, (1940) A.C. 613.

Trade Marks Act (1939)—Redemption—Provision for redemption in eighty half-yearly instalments—If clog on equity of redemption—If offends rule against perpetuities.

The respondents, the owners of a large freehold estate owed on a mortgage dated 6th May, 1927, carrying interest at 6¼ per cent. per annum, 3,00,000*l.* to a certain company. In January, 1931, the appellant society agreed to grant to the respondents a loan of 3,10,000 at 5½ per cent. interest per annum repayable over a period of forty years by half-yearly instalments, the whole money to become payable on any default. On 6th November, 1931, a mortgage embodying the agreement was executed in favour of the appellants. On 25th February, 1937, the respondents issued a writ claiming to be entitled to redeem the mortgaged property on the usual notice notwithstanding the provision for repayment by eighty instalments spread over forty years claiming that the condition was illegal and void as a clog on the right to redeem and not capable of being enforced.

Held [affirming the decision of the Court of Appeal in (1939) 1 Ch. 441]: (1) The mortgage was a debenture within the meaning of S. 74 of the Companies Act, 1929; (2) the rule against perpetuities did not apply to mortgages; and (3) the terms of the mortgage were not so stringent or oppressive as to justify interference of the Court.

COHEN *v.* COHEN, (1940) A.C. 631 (H.L.).

Divorce—Desertion—Presentation and service upon deserting spouse of petition for dissolution of marriage—Effect on period of desertion.

In so far as it lays down a general principle applicable to all cases in which a deserted spouse presents a petition for divorce or judicial separation, that filing a petition for judicial separation puts an end to desertion, the decision in *Stevenson* v. *Stevenson*, (1911) P. 191 is unacceptable and should be overruled. The question whether a deserting spouse has reasonable cause for not trying to bring the desertion to an end, and the corresponding question whether desertion without cause has existed for the necessary period must depend on the circumstances of the particular case.

(1939) 2 All.E.R. 596, reversed.

LOWRY *v.* CONSOLIDATED AFRICAN SELECTION TRUST, LTD., (1940) A.C. 648 (H.L.).

Income-tax—Company—Shares issued to employees at par as remuneration for services—Premium which the shares would have brought to the company if issued to public—If deductible against profits.

A company by special resolutions increased its share capital by the creation of certain redeemable preference shares and 400,000 new ordinary shares of 5*s.* each and 10,000 of such shares were reserved for issue to the employees of the company. 6,000 of those shares

were allotted to the employees at par as remuneration for services rendered. If issued to the public the shares would have fetched a premium of £1-18-9 per share. In a claim to deduct such premium against profits, for income-tax purposes,

Held [reversing (1939) 1 All.E.R. 353 (C.A.), *Lord Wright and Lord Romer*, dissenting].—Issuing shares is not a trading transaction and does not in any way affect the gains and profits of the company and hence the company is not entitled to the deduction claimed.

SOUTHERN FOUNDRIES (1926), LTD. *v.* SHIRLAW, (1940) A.C. 701 (H.L.).

Company—Contract of employment of managing director for 10 years—Alteration of articles giving power to remove director—Exercise of power—Liability of company for breach of implied term.

The S. F. Company agreed by a contract of 21st December, 1933, to employ the plaintiff as managing director (of which he was to be a director also) for ten years and the company could not remove him under its articles of association. In April, 1936, the company altered its articles giving power to F. F. Ltd. (who had acquired financial control of S. F. Co.) to remove any director of S. F. Company and also providing that the appointment of any person as managing director should determine if he ceased from any cause to be a director. On 25th March, 1937, F. F. Ltd. exercised the power to remove plaintiff from being a director of S. F. and *ipso facto* his managing directorship ceased. In a claim for damages for breach of contract,

Held [affirming (1939) 2 All.E.R. 113 (C.A.), *Viscount Maugham and Lord Romer*, dissenting].—Though the alteration of the articles was not in itself a breach of contract, the exercise of the power by F. F. Ltd. caused the breach of contract by S. F. company and the defendants were liable for damages.

NICHOLAS *v.* COMMISSIONER OF TAXES, STATE OF VICTORIA, (1940) A.C. 744 (P.C.).

Income-tax—Bonus shares issued out of accumulated undistributed profits of company—Value of shares to be included in taxable income of shareholder.

Where fully paid bonus shares are issued out of the accumulated undistributed profits of a company, the value of such shares should be included in the assessment of taxable income of the shareholder.

LIQUIDATOR, RHODESIA METALS, LTD. *v.* COMMISSIONER OF TAXES, (1940) A.C. 774 (P.C.).

Income-tax—Mining claims in Africa acquired by English company for development and sale—Sale of undertaking in England at profit—Capital appreciation—Liability to assessment in Africa as receipt within that territory.

The appellant company was incorporated on 30th November, 1935, as a private company with a nominal capital of £10,000. On the same day another company Swithin Ores and Metals was incorporated with a capital of £100,000. One *E* was a large shareholder and chairman of both the companies. On 5th December, 1935, E who was entitled to a number of mining claims in Southern Rhodesia sold some of them for £37,500 and on 12th December, 1935, sold certain others to the appellant company for £ 5,000 cash. On 20th January, 1936, Swithins increased its capital to £200,000. On 27th January, 1936, by special resolution the appellant company was voluntarily wound up and *W* was appointed liquidator. On 15th March, 1936, the whole undertaking of the appellant company was sold to Swithins for £152,000 payable as to £150,000 in fully paid shares and as to £2,000 in cash. All the purchases and sales were in England.

Held, on the evidence that this was the culminating step in a scheme designed when the claims were bought and was made for the purpose of concluding the operation of profit making which was on hand when the liquidation was commenced. The appellant company received the profits from a source within African territory (namely the mining claims which they had acquired and developed there for the very purpose of obtaining the particular receipt), and the receipt was therefore liable to assessment in Rhodesia.

UNITED STEEL COMPANIES, LTD. *v.* CULLINGTON, (1940) A.C. 812 (H.L.).

Income-tax—Finance Act (1926), Ss. 32 and 33—Amalgamated company—If entitled to deductions in respect of losses and wear and tear to machinery to which the old companies which were amalgamated were entitled to.

Two companies *A* and *B* were amalgamated into a new company in 1930. *A* and *B* companies continually showed losses for which they were unable to obtain relief under Income-tax Act, 1918, S. 34. *B* company was further unable to give effect to the deductions for wear and tear to machinery which it was entitled to. In respect of the deductions thus carried forward by the two old companies relief was now claimed by the amalgamated company,

Held, the new company cannot claim the right to deductions in respect of the losses and wear and tear of the old companies. (1939) 1 K.B. 644 ; (1939) 1 All.E.R. 454 (C.A.), affirmed.

BISMAG, LTD. *v.* AMBLINS (CHEMISTS), LTD., (1940) 1 Ch. 667 (C.A.).

Trade Marks Act (1939), S. 44—Use by defendant of plaintiff's trade mark in relation to plaintiff's own goods—If infringement.

Plaintiffs had registered "bisurated," as trade mark in respect of (1) their patent medicines and (2) chemical substances for use in pharmacy. Defendants carrying on business of manufacture and sale of medicinal preparations issued pamphlets showing the exorbitant cost of patent medicines and their analysis and offering the same prescription at much less cost.

Held [*MacKinnon,L.J.*, dissenting, reversing (1940) 1 All.E.R. 156]. —There was an infringement of the registered trade mark of the plaintiffs.

ESTATE OF THOMAS MILWARD, *In re*, (1940) 1 Ch. 698.

Will—Construction—Gift over on death of devisee leaving no "child or children"—To be construed as meaning "issue" when necessary.

Where there is a provision in a will for a gift over on the death of the devisee leaving no "child or children" as a matter of construction it is open to the Court if it thinks fit to do so to give a wider meaning to the expression "child or children" as meaning "issue" if the words were intended to have the wider meaning.

BARING'S SETTLEMENT TRUSTS, *In re*: BARING BROTHERS & Co. *v.* LIDDELL, (1940) 1 Ch. 737.

Settlement—Forfeiture—Provision for determination of life interest, if income "becomes payable to other person"—Writ of sequestration—Effect on provision.

A forfeiture clause in a settlement deed provided that in the event of a certain income becoming vested in or payable to another person a life estate was to determine. On the issue of a notice of writ of sequestration to the person entitled to the life interest,

Held, that it resulted in a forfeiture.

HENDERSON, *In re*: HENDERSON *v.* HENDERSON, (1940) 1 Ch. 764.

Will—Trustees under will—Friction between—Jurisdiction of Court to appoint new trustees against will of existing trustees—Trusts Act (1925), S. 41 (1).

Under Trusts Act (1925), S. 41 (1) a Court has jurisdiction in a proper case to appoint a new trustee against the will of an existing trustee. Accordingly where there is friction (not due to dispute as to facts) between the two trustees under a will the Court is entitled to appoint a new trustee.

DIGBY *v.* GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD., (1940) 2 K.B. 226.

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

An insurance company (by the policy containing a section with marginal heading "Third party liability") undertook to indemnify the policyholder in respect of any claim by any person including passengers in the car against all risks through or in respect of his car. The indemnity was to extend to any person driving the car with the owner's order or permission. The owner having been injured in a collision and failing in his claim against the owner of the other car sued his own chauffeur for damages, who in turn claimed indemnity under the policy of insurance.

Held, (1) the chauffeur was bound by the arbitration clause in the policy. (2) (*Luxmoore, J.*, dissenting).—The authorised driver or person driving with the consent of the policyholder could not claim indemnity in respect of his liability to the policyholder who was injured by the driving of the car, and the insured is not a "Third party." (1940) 1 All.E.R. 514, varied.

CHANDLER *v.* EMERTON AND OTHERS, JUSTICES, (1940) 2 K.B. 261.

Licence for sale of liquors—"Occasional licence"—Application regularly for licence for 3 days in a week in a particular month every year—If ceases to be "occasional."

Applications were made regularly year after year by the applicant for "occasional licence" to sell intoxicating liquors on Tuesdays, Thursdays and Saturdays in the month of June when dances were to be held in the premises. The Justices held that the word "occasional" was a complete bar to the grant of such licences. On appeal,

Held, the word "occasional" does not constitute a complete bar to the grant of applications merely because they are made regularly.

GRIFFITHS *v.* DALTON, (1940) 2 K.B. 264.

Banking—Undated cheque—Right to fill in date—When to be exercised.

An undated cheque is not an instrument which the banker on whom it is drawn is bound to honour. But a person in possession of such a cheque must exercise his *prima facie* authority to fill in the date within a reasonable time. The question what is a reasonable time is a question of fact.

SOTHERN-SMITH *v.* CLANCY, (1940) 2 K.B. 276.

Income-tax—Insurance providing for annual payments in consideration of a single premium —Annual payments whether income or capital.

Under a contract called a "refund annuity" an insurance society in consideration of the payment by the annuitant of $65,243.22 (as capital invested) agreed to pay an annuity of $6510 annually during his lifetime. It was further guaranteed that the aggregate payments should not in any event amount to less than the amount of the capital invested.

Held, that the annual payments were capital and not income for purposes of income-tax.

JOPLING *v.* INLAND REVENUE COMMISSIONERS, (1940) 2 K.B. 282.

Stamps—Instrument of transfer of certain shares appropriated by the execution of a will in satisfaction of a legacy—Whether to be stamped as "conveyance or transfer on sale."

An instrument of transfer of certain shares appropriated by the execution of a will in satisfaction of a legacy left thereby to the transferee is chargeable with stamp duty as a conveyance or transfer on sale. The substance of the matter is that the executor proposes an appropriation, and the legatee consents to it, and by so consenting the legatee discharges the executor from his obligation to pay the legacy in money. It therefore amounts to a conveyance on sale.

KNEESHAW *v.* ABERTOLLI, (1940) 2 K.B. 295.

Income-tax—Payment for obtaining licence for monopoly of selling beer and wine—If deductible from profits for assessment.

A licence was granted to the assessee for three years for sale of beer and wine and the amount which was settled as the monopoly value was £75 payable in three annual instalments.

Held, this sum was a capital sum, and the fact that it was payable in instalments did not prevent those instalments from being capital for revenue purposes and the sum cannot be allowed as a deduction against the assessment in each year.

MILLS *v.* STANWAY COACHES, LTD., (1940) 2 K.B. 334.

Tort—Negligence—Damages for loss of expectation of life and for pain and suffering —Quantum.

The plaintiff's wife aged 34 and in good health was fatally injured in a motor accident and after being unconscious for 4 days died. In a claim for damages by the husband under the Fatal Accidents Act,

Held, that damages for loss of expectation of life should be moderate and ought not to exceed £1,000 in the case of adults.

FORSYTH *v.* THOMPSON, (1940) 2 K.B. 366.

Income-tax—Mutual society providing its members (who have to pay premiums) with weekly payments in the event of sickness—Amounts received by member—Liability to tax.

Sums payable by a mutual society to its members under their individual contracts with the mutual society are to be considered on the same basis as similar contracts with a proprietary company. If they result in annual payment or payments of annuities the recipients are taxable in respect of those annual payments or annuities. The fact of such payments or annuities being contingent on continuance of payment of premiums to the society will not prevent the sums from being annual payments.

ANDREWS *v.* ANDREWS, (1940) P. 184.

Divorce—Decree nisi—Petitioner's adultery before petition not disclosed—Intervention—Discretion of Court—Public policy.

A husband obtained a decree *nisi* on the ground of desertion without disclosing his own adulterous association with another woman through whom he had children. On the King's Proctor intervening,

Held, though the petitioner's conduct in deliberately deceiving the Court was most reprehensible and public policy demanded that such deception should be discouraged, whether the decree should be rescinded and the petition dismissed must depend on the circumstances of the individual case. The prospect of the association with the woman leading to a happy married home should not be frustrated and in this case the public policy was in favour of allowing the decree to stand and the discretion of the Court should be exercised accordingly.

HORTON *v.* HORTON, (1940) P. 187.

Divorce—Wife's legal cruelty—What constitutes.

The charge against the wife was one of perpetual nagging, and hurling accusations against the husband of associating with other women, complaints about his absence from home on Masonic business, charges of hypocrisy about his religion and so on. This course of conduct was carried on at night. The medical evidence showed that the husband's health was affected by this and when he stayed away from the wife his health improved. Also in addition to small acts of violence to the husband, the wife out of jealous spite,

from time to time, damaged various things (such as masonic clothing, hats, gold cigarette case, presentation silver salver and the lens of his spectacles) which all disclosed malevolence likely to bear fruit in acts of cruelty. On the evidence,

Held, there was legal cruelty entitling the husband to a decree for divorce.

JOTTINGS AND CUTTINGS.

In re Witnesses.—Countless are the stories that have been handed down from generation to generation regarding witnesses, their idiosyncracies in their mode of giving evidence, their endeavours to elude the little traps laid for them by the skilful cross-examiner, who has so often the witness at a disadvantage. Occasionally, it is true, the witness scores in the skirmish that takes place, but more often, unless he chances to be very astute, he is at a disadvantage. Some cynical person of a past generation, it will be remembered, classified witnesses into three catagories, witnesses *simpliciter*, blank witnesses, and experts. But this is, perhaps, too strong a way of putting it.—*L.T.*, *1940*, *p.* 32.

Jeffreys and the Witness.—It is traditionally reported that in the reign of Charles II. in badgering a witness, no barrister could surpass George Jeffreys, of sanguinary fame. Nevertheless, on more than one occasion he met his match in the witness-box. "You fellow in the leathern doublet," he is reported to have said to a countryman whom he was about to cross-examine, "pray what are you paid for swearing?" "God bless you, sir," was the reply, "and make you an honest man," answered the witness, looking counsel full in the face and speaking with a voice of hearty good-humour, "if you had no more for lying than I have for swearing, you would wear a leathern doublet as well as I."—*L.T.*, *1940*, *p.* 32.

Erskine's Methods.—It is said that Erskine's treatment of witnesses was sometimes unfair, but his jocoseness was generally distinct from mere flippancy and his unfairness was redeemed by such delicacy of wit that his most cutting observations seldom annoyed the witness. A story has come down which tells us that a religious enthusiast, on entering the witness-box, objected to take the oath in the customary manner, but stated that though he would not kiss the book he was quite ready to hold up his hand and swear. On being asked by Erskine to give his reason for this departure from the usual mode of testifying in the courts, he answered that "it is written in the Book of Revelation that the angel standing on the sea held up his hand."

"But that," interjected Erskine, "cannot apply to your case, for in the first place you are no angel, secondly, you cannot tell how the angel would have sworn if he had stood on dry land as you do." The witness declined to budge from the position he had taken up and was permitted to give his testimony in his own way, and so impressed apparently was the jury by his evidence that they found a verdict adverse to Erskine's client. Erskine might have remembered, but for the moment he chose to forget, that in Scotland, his native country, the method of taking the oath is for the witness to hold up his right hand and repeat the words after the judge. Erskine was usually very happy in his sayings; one that has often been recalled, but which will bear repetition, is the opinion which he gave on a case laid before him by his friend, the Duke of Queensberry, popularly known as "Old Q.," as to whether he could sue a certain tradesman for breach of contract about the painting of his house. The evidence available being in the view of Erskine totally insufficient to support the case, he wrote, "I am of opinion that this action will not lie, unless the witnesses lie too!" Not a few jokes that come down to us have a fairly long pedigree, and so it is in this case, for, as someone pointed out, the story is apparently a revival of the pun attributed to Lord Chancellor Hatton in Bacon's Apopthegmes.—*L.T., 1940, p. 32.*

Clergymen as witnesses.—The late Mr. Balfour Browne, K.C., who specialised at the Parliamentary Bar, in his work, Forty Years at the Bar, expressed the view that clergymen do not, as a rule, make good witnesses. Having been used to an autocratic pulpit, he said, they did not take kindly to the chair where the bladders of their pomposity—his own word—might be pricked by a sharp question. But despite this general view he had known both clergymen of the Church of England and of Rome to give excellent straightforward evidence. Quakers, as Lamb recalled in one of his essays, have always been remarkable for their self-watchfulness, a quality which never gave way to the winds of persecution or to the violence of judge or accuser under trials and racking examinations. "You will never be the wiser, if I sit here answering your questions till midnight," said one of the Friends. "Thereafter, as the answer may be," retorted his examiner.—*L.T., 1940, p. 33.*
