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MADRAS IRRIGATION CESS (AMENDMENT) BILL, 1940.*

OBJECT AND SCOPE.—The Madras Irrigation Cess (Amendment) Bill, 1940, seeks to consummate the policy inaugurated in 1900 regarding unauthorised user of government water for purposes of irrigation, by nullifying the effect of two important decisions of the High Court.[1] The Bill proposes to enable government to levy a cess even where the user of government water is wholly involuntary on the part of a ryot and also where water though taken from an authorised source is yet taken contrary to the prescriptions of the revenue authorities as to the time, method and conditions of supply.

PREVIOUS POLICIES AND PROVISIONS.—The preamble to the Irrigation Cess Act, 1865, specifically recited that cess on unauthorised use of water was to be by way of a fit return for the large sums of money spent by government in the construction and improvement of works of irrigation and drainage. The preamble was however wider than the operative part and cess was held leviable irrespective of the question whether any construction or improve-

**A Bill further to amend the Madras Irrigation Cess Act, 1865, for certain purposes.*

WHEREAS it is expedient further to amend the Madras Irrigation Cess Act, 1865, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS IRRIGATION CESS (AMENDMENT) ACT, 1940.

Substitution of new section for section 1, Madras Act VII of 1865.

2. For section 1 of the Madras Irrigation Cess Act, 1865 (hereinafter referred to as the said Act), the following section shall be substituted, namely:—

1. *Secretary of State* v. *Veeranna*, (1937) 1 M.L.J. 732: I.L.R. (1937) Mad. 772 (F.B.); *Ratnammal* v. *Secretary of State*, (1939) 2 M.L.J. 380.

ment had been effected or not.[2] The Act of 1865 had made levy of cess dependent on supply or user of government water. Supply implied previous request and user freedom to refuse.[3] There was then no intention to penalise involuntary user by the cultivation of crops taking advantage of water getting into one's land accidentally or by overflow, percolation or drainage. The position was fully recognised by Board's Standing Order 4, para. 7 which was in force before 1900. It stated: "Wet cultivation on dry lands with water which percolates from a government work is not liable to water rate. The landholder should be given the option of taking a full supply of water for his crop and in the event of his accepting the offer, he should be charged water rate, but should he refuse to take a full supply, no charge should be made for water which reaches his holding by percolation". This principle was entirely in accordance with the rule obtaining in all systems of jurisprudence that government has no right to water flowing underground. The law as to rivers and flowing streams has been held inapplicable to springs and waters beneath the earth's surface.[4] In *Ballard* v. *Tomlinson*,[5] Brett, M.R., observed: "The percolating water

Power to levy water-cess in addition to assessment on land.

"1. (*a*) Whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank or work belonging to, or constructed by or on behalf of, the Crown, and

(*b*) whenever water from any such river, stream, channel, tank or work, by direct flow, or by indirect flow, percolation or drainage from or through adjoining land, irrigates any land under cultivation, or flows into a reservoir and thereafter, by direct flow, or by indirect flow, percolation or drainage from or through adjoining land, irrigates any land under cultivation, and in the opinion of the Revenue Officer empowered to charge water-cess, subject to the control of the Collector and the Board of Revenue, such irrigation is beneficial to, and sufficient for the requirements of, the crop on such land,

it shall be lawful for the Provincial Government before the end of the revenue year succeeding that in which the irrigation takes place to levy at pleasure on the land so irrigated a separate cess for such water, and the Provincial Government may prescribe the rules under which, and the rates at which, such water-cess shall be levied, and alter or amend the same from time to time:

Provided that where a zamindar or inamdar or any other description of landholder not holding under ryotwari settlement is by virtue of engagements with the Crown entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of this right and no more:

2. *Urlam case*, (1917) 33 M.L.J. 144 : L.R. 44 I.A. 166 : I.L.R. 40 Mad. 886 (P.C.).

3. *Venkatappayya* v. *The Collector of Kistna*, (1889) I.L.R. 12 Mad. 407; *Krishnayya* v. *Secretary of State*, (1895) I.L.R. 19 Mad. 24.

4. *Acton* v. *Blundell*, (1843) 12 M. & W. 324 : 152 E.R. 1223; *Chasemore* v. *Richards*, (1859) 7 H.L C. 349 : 11 E.R. 140.

5. (1885) L.R. 29 Ch.D. 115 at 121; see also *McNab* v. *Robertson*, (1897) A.C. 129.

below the surface of the earth is a common reservoir or source in which nobody has any property, but of which everybody has as far as he can, the right of appropriating the whole."

The Irrigation Cess (Amendment) Act, 1900, was designed to get rid of what was called the *paradox* that crops may be raised by means of government water without that water being either "supplied" or "used". Instead of merely penalising involuntary user of surface flow of water for purposes of irrigation the Act imposed the liability to pay cess even where advantage was taken of water percolating into one's land due to natural causes, for raising a crop. The Act made no provision whatever for damage likely to be caused to landowners from government sources of irrigation by percolation or overflow into their lands. In such cases the common law operated to negative compensation. If landowners are to pay for benefits received through involuntary flow from a government source, it is but fair and equitable that the correlative right should be given of receiving damages for loss sustained.

While the evil still stands unremedied the government proposes to take further power through the present Bill regarding the imposition of cess. The difference in the language employed between the second limb of the taxation section (S. 1) and the

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Provided also that no cess shall be leviable under this Act in respect of land held under ryotwari settlement which is classified and assessed as wet, unless the same be irrigated, whether voluntarily or involuntarily and whether wholly or in part—

(i) from any source hereinbefore mentioned, not being a source which has been assigned by the Revenue authorities or adjudged by a competent Civil Court as the source of irrigation of such land; or

(ii) from any source assigned or adjudged as aforesaid in respect of such land, otherwise than in accordance with any order of the Revenue authorities regulating the time, method and conditions of supply of water for the irrigation of such land from such source free of separate charge."

Indemnification for acts done before the commencement of this Act.

3 (1) No suit or other proceeding shall lie against the Provincial Government, or any officer or servant of the said Government, or any authority subordinate to them, or any person acting under the authority of or with the permission of the said Government, officer, servant or authority, in respect of any act done or purporting to be done before the commencement of this Act under section 1 of the said Act, if such act could have been done under the said section 1 as amended by this Act, and the Provincial Government and all officers, servants, authorities and persons aforesaid are hereby indemnified and discharged from all liability in respect of all such acts in so far as they could have been done under the said section 1 as amended by this Act.

(2) Any suit or other proceeding instituted before the commencement of this Act in respect of any act done or purporting to be done under section 1 of the said Act shall be disposed of as if the said section 1 as amended by this Act, had been in force at the time of the institution of the said suit or proceeding in the Court of first instance.

exemption clause (Proviso 2 to S. 1) had led the Courts to hold that unless there was irrigation by *using*,—*i.e.*, a voluntary user of water for purposes of irrigation, the liability to pay cess did not arise.[6] It was also further held on a construction of the language of the exemption clause that land held under ryotwari settlement and classified and assessed as wet will not be liable to pay cess in respect of voluntary user even, unless it was shown that such user was unauthorised and was of water from a source other than the one prescribed for the land.[7]

OBJECTIONS TO THE PRESENT BILL.—The present Bill is designed to change the law in regard to both these matters. There are however a number of considerations which it is hoped will be taken into account before the Bill becomes law.

It may be conceded that Government should possess power to distribute water fairly among all those entitled to it for purposes of cultivation, and therefore to punish people clandestinely abstracting water from a government source. But the Bill makes an altogether wrong approach to the problem. If owing to the negligence or default of the irrigation authorities or the acts of a ryot holding land on the upper reaches of a channel, water flows into the land

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STATEMENT OF OBJECTS AND REASONS.

The conservation and control of works of irrigation in India have from the earliest times been in the hands of the ruling power which has exercised its authority so as to secure a just and equitable distribution of the available supplies. For the purpose of such distribution it is generally recognized that the holders of registered wet lands have the first call on the supply available for irrigation and water is allowed to such wet lands for the irrigation of one crop or of two crops, according as they are registered as single crop wet or double crop wet. In order to make the best use of the supply in the interests of all holders of wet lands, it is often necessary to institute special turns during which the source of irrigation is open only for the use of specified portions of the ayacut and is closed to others. When available, water is also allowed on permits for the irrigation of dry lands and for raising a second crop on single crop wet lands. The taking of water for irrigation in cases other than those mentioned above or during periods when the irrigation work is closed is prohibited. It frequently happens, however, that ryots take water clandestinely to dry lands which are not entitled to water at all or to wet lands at periods during which such lands are not entitled to supply by making a breach in the channel bunds or by tampering with the sluices, etc. In order to prevent such unauthorized taking of water, it has hitherto been the practice to levy enhanced water-cess under the rules made in that behalf under the Madras Irrigation Cess Act, 1865 (Madras Act VII of 1865). Such enhanced water-cess has usually to be levied on all the lands actually irrigated by irregular means as it is seldom possible to identify the particular individual who is responsible for the irregularity. The High Court has however held in two recent cases—

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6. *Kanniappa Mudaliar* v. *Secretary of State*, (1935) 69 M.L.J. 728: I.L.R. 59 Mad. 107; *Secretary of State* v. *Veeranna*, (1937) 1 M.L.J. 732: I.L.R. (1937) Mad. 772 (F.B.).

7. *Ratnammal* v. *Secretary of State*, (1939) 2 M.L.J. 380.

of a ryot having land in its lower reaches without his knowledge one would reasonably expect the latter to make use of the water, if that can be done. Where is the sense then in mulcting him with a cess instead of appreciating his conduct, or in countenancing waste rather than allow the water to be used? What justification can there be for imposing cess in a case where a person's land has become waterlogged consequent on the action of some third person in tampering with a channel and the ryot is unable to get rid of the accumulation in spite of his best efforts and then to make the best of a bad situation he endeavours to raise a crop suitable to the then condition of his land and in fact does not make a profit out of it? *Venkatappayya* v. *The Collector of Kistna*,[8] was a similar case. In that case a ryot owned some lands in Zapudi village, which were originally cultivated with dry crops. The villages lying above Zapudi came to be irrigated with the waters of the Kistna canal. The excess water so flowing submerged the plaintiff's land and stagnating upon it rendered dry cultivation an impossibility. Nor could the plaintiff arrest the flow of the water except by putting up a dam at a high cost. In fasli 1294, the plaintiff sowed a kind of paddy called *tiruvarangam* and attempted to raise a crop which might not perish from the land getting periodically inundated. The crop in fact failed and yielded no profit. The revenue authorities levied a cess. The High Court held the

I.L R. (1937) Mad. 772 and I.L.R. 59 Mad. 107—that under the Madras Irrigation Cess Act as it now stands, water-cess can be levied only where the user of water is voluntary. It is, however, essential if Government are to discharge their responsibility for securing a just and equitable distribution of available supplies, that they should be armed with the power necessary to enforce the scheme of distribution laid down. It is therefore proposed to amend the wording of the Act so that the practice hitherto followed, as explained above, may be covered by express statutory provision.

2. The second proviso to section 1 of the Irrigation Cess Act runs as follows:—

"Provided also that no cess shall be leviable under this Act in respect of land held under ryotwari settlement which is classified and assessed as wet, unless the same be irrigated by using without due authority water from any source hereinbefore mentioned and such source is different from or in addition to that which has been assigned by the Revenue-authorities or adjudged by a competent Civil Court as the source of irrigation of such land."

Under this proviso, single crop wet lands are given water for one crop without any extra charge. The quantity of water available for irrigation is limited and it is not possible to supply water for a second crop to all *single* crop wet lands. The holders of registered double crop wet lands have a first call on water for the cultivation of a second crop and unauthorized use of such water by the holders of single crop wet lands will make it impossible for the Government to secure to the holders of registered double crop lands the supply to which they are entitled. Where therefore water is taken for irrigating a second crop on single crop wet lands without due authorization, the practice has always been to levy enhanced water-cess according to the

8. (1889) I.L.R. 12 Mad. 407.

imposition to be wholly illegal. In a case of that type under the present Bill the ryot will have to suffer.

In the statement of Objects and Reasons it is recited: "Such enhanced water cess has usually to be levied on all the lands actually irrigated by irregular means as it is seldom possible to identify the particular individual who is responsible for the irregularity." The Government has practically admitted that inability on its part to trace the culprits is responsible for the proposed punitive action against innocent persons as well. By what canon can such a course of action be justified in normal times?

The Bill gives power to Government to impose cess even where irrigation by involuntary user is only *partial*. This is a principle which appears now for the first time, and contains possibilities of easily becoming oppressive. Where the irrigation resulting from the involuntary user is not substantial there can be no justification whatever to impose any cess at all. Unless the involuntary user has resulted in the irrigation of lands completely or substantially he should not be made liable to any extent or at any rate to more than the cess lawfully leviable on the extent of the land benefited.

S 3 seeks to give a retrospective effect to the amendments. There is little warrant for providing any indemnity for acts done before the commencement of the amended Act. Where the prior law had been beset with doubt and had lent itself to more than one interpretation and the revenue authorities had followed a course of action which subsequently turned out to be mistaken, there may be some justification for an indemnity clause. Where however the acts of the revenue authorities were not due to any ambiguity in the law and to any doubt legitimately engendered or

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rules framed under the Madras Irrigation Cess Act. In a recent judgment delivered in May last [(1939) 2 M.L J. 380] however, the High Court has held that the above proviso does not permit of the levy of water-cess for the irrigation of a second crop on single crop wet land, unless the water is taken from a source *physically different* from that allotted to the land. This ruling would invalidate the immemorial practice and enable any holder of single crop wet land to take water for a second crop from the source assigned to such land, without liability to any charge under the Madras Irrigation Cess Act. It is therefore essential to amend the wording of the proviso so that the existing practice may be covered by it.

3. As the High Court has held that the rules framed under section 1 of the Act are *ultra vires* in so far as they permit of the levy of enhanced water-cess in the cases mentioned above, it is proposed to give retrospective effect to the amendments made by the Bill and also specifically to indemnify the Government and their officers from liability in respect of acts done on the basis of the interpretation of section 1 which has been accepted and acted upon by the Government all these years.

It may be stated that the late Ministry shortly before its resignation approved of legislation on the lines proposed in the Bill.

where the language of the existing law is wholly clear and affords scanty shelter for the Courts adopted by the revenue authorities (as for instance, in collecting cess where water was not taken from an unauthorised source) there is no reason to give retrospective effect to the taxation and penal provisions and thereby relieve Government from the liability to refund cesses illegally levied in the past.

SUMMARY OF ENGLISH CASES.

MARSLAND, *In re* : LLOYDS BANK, LTD. *v.* MARSLAND, (1939) 1 Ch. 820.

Wills—Deed of separation—Covenant not to revoke a will—If extends to revocation of will by virtue of Wills Act, 1837, S. 18.

On 30th May, 1902, the testator and his first wife entered into a deed of separation. At that time the two children of the marriage were a son and daughter aged 12 and 7 years respectively. Immediately before the deed of separation the testator had made a will, whereby certain dispositions in favour of (1) the wife and (2) the children were made. The separation deed contained among others, a covenant "not to revoke or alter the will" so far as regards the gift to the wife and children. The first wife died on 14th November, 1908, and on some date before 19th February, 1935, the testator married a second wife and by virtue of the Wills Act, 1837, S. 18 the first will was revoked. On 19th February, 1935, he executed a fresh will. The question arose whether the covenant not to revoke was broken by the second marriage. Farwell, J., *held* that even assuming that the covenant was broken by the marriage of the testator, the covenant, if it restricted a subsequent marriage was void as being against public policy. The Court of Appeal *held* that when the testator covenanted not to revoke his will his words are to be confined to acts of revocation as such, and do not extend to the case under S. 18, Wills Act, 1837, where revocation follows as a matter of law whether or not the testator wishes it. It cannot be taken as an intention to impose a tacit restriction on remarriage.

GATTI *v.* SHOOSMITH, (1939) 1 Ch. 841.

Practice—Appeal not filed in time owing to mistake of legal adviser—Discretion of Court to extend time—R.S.C., O. 58, R. 15 *and O. 64,* R. 7.

The discretion to extend time for filing appeal, is a perfectly free one. The Court is not concerned with the merits of the case or probability of success or otherwise. Where the reason for the failure to institute his appeal in due time, was a mere misunderstanding (which to any one who was reading the rule without having the

authorities in mind, might very well have arisen) on the part of the legal advisers who had within time informed the respondents' solicitors by letter, of their client's intention to appeal and the delay is a matter of a few days, the discretion ought to be exercised and leave to appeal though out of time ought to be given.

BOND *v.* NORMAN. SAME *v.* NOTTINGHAM CORPORATION, (1939) 1 Ch. 847.

Easements—Collateral support—Corporation demolishing servient tenement in pursuance of clearance order—Duty to provide equivalent support.

The owner of a servient tenement adjoining plaintiff's premises having failed to demolish his premises as provided in a clearance order under Housing Act, 1936, it became the duty of the corporation to enter and demolish the premises.

Held, the corporation must be restrained from demolishing the premises without providing an equivalent support to the adjoining premises.

MCEACHARN'S SETTLEMENT TRUSTS, *In re*: HOBSON *v.* MCEACHARN, (1939) 1 Ch. 858.

Settlement—Power to invest in stocks—If gives power to invest in shares of a limited company.

A power to "invest in stocks" in a settlement includes the power to invest in fully paid shares of a company.

LOCK *v.* ABERCESTER, Ltd., (1939) 1 Ch. 861.

Easements—Right of way—Proof of user with carriages drawn by horses—If extends right to use of the way with mechanically propelled vehicles.

Where proof is given of a user over the required period by carriages drawn by horses, so as to establish a carriage way as an appurtenance, the right which is acquired is one which enables the owner of the property to which the road is an appurtenance to use the way with mechanically propelled vehicles.

DARBY, *In re* : RUSSELL *v.* MACGREGOR, (1939) 1 Ch. 905.

Wills—Residuary estate charged with payment of annuity under another will—Applicability of rule in Allhusen *v.* Whittell—*If payment to be made out of capital and income to the annuitant.*

The testatrix was in possession of her father's residuary estate subject to and charged with, the payment by her to the testator's widow an annual sum necessary to make the widow's income up to £3,000 per annum. She disposed of her whole estate including her father's residuary estate and added to her mother's income which

was to come out of the income of her estate. The testatrix settled her residuary estate. The question is whether or not, as between the life tenant and those interested in the capital of her estate, there ought to be, so far as regards the father's residuary estate, an adjustment as between capital and income as to the annuity in favour of the mother.

Held, the testatrix cannot be treated to have entered into a personal covenant to pay the annuity under her father's will. The rule in *Allhusen* v. *Whittell*, L.R. 4 Eq. 295 (that each instalment as it becomes payable is to be paid by means of a piece of capital together with the income on that piece of capital as from the date of testator's death to the date of payment) applies only to a liability to pay an annuity in respect of which the testator had entered into a personal covenant and not to a mere charge created by the original testator's will. In this case the payment, out of capital and income, cannot be made without the consent of the annuitant herself. The rule cannot be applied even after the annuitant's death as the rule has to be applied at the time of the payment.

DELGOFFE *v.* FADER, (1939) Ch. 922.

Gifts—Donatio mortis causa—*Delivery of Bank deposit book with other chattels—Effect.*

During her last illness the deceased on one occasion asked the donee to replace her black bag in her own wardrobe saying " If I should die, then you are to get everything in this bag—the jewellery and also what is in the envelope " (the envelope contained a deposit book of the Midland Bank with £ 933-8-0 to her credit). On a second occasion the deceased had the bag brought out and said " Put this bag in your wardrobe so that I can keep my eye on it ; should I die, I wish you to have the bag and everything that is in it."

Held, on a second occasion, the handing of the bag with the direction to place it in the donee's wardrobe was a sufficient delivery and the bag with all the articles except the pass book passed under a valid *donatio mortis causa*. As to the pass book and the £ 933-8-0 standing to the credit of that account there is no valid *donatio mortis causa* by mere delivery of the pass book.

DE CHASSIRON, *In re* : LLOYDS BANK LTD. *v.* SHARPE, (1939) 1 Ch. 934.

Wills—Annuities to be paid out of income of residuary estate—Direction to resort to capital if income insufficient to pay the annuities—Annuities if to abate.

The testatrix after certain dispositions and legacies provided for annuities payable out of the income of the residue. The testatrix

directed that on the death of each and every one of the annuitants, trustees should pay the annuity of the person so dying equally between the surviving annuitants. She directed also that if at any time the income of the trust fund should be insufficient to answer the annuities, recourse may be had to the capital thereof. Any surplus of income was to be paid equally to certain charities. After the death of last of the annuitants, the capital and future income of the trust fund was to be distributed absolutely between some charities. The estate amounted to £ 23,000 and would provide annually £ 750 from authorised investments. The total of the annuities payable was £ 1650 per annum.

Held, as in the present case the testator's intention can be carried out exactly and fully there should be no valuation of the annuities and the directions given in the will should be carried out.

DAPONTE *v.* SCHUBERT AND ROY NOMINEES, LTD., (1939) 1 Ch. 958.

Practice—Charging order in favour of judgment-creditors—Enforceability if to be by foreclosure or sale.

In a summons for an order for foreclosure pursuant to a charging order on certain shares,

Held, following *Attwood* v. *Gibbons*, (1927) unreported and *D'Auvergone* v. *Cooper*, (1889) W.N. 256 that the remedy was sale and not foreclosure.

EVES : *In re* MIDLAND BANK *v.* EVES, (1939) 1 Ch. 969.

Will—Annuity free of all duties and free of income-tax at the current rate for the time being—Income-tax recovered by annuitant—Person entitled to.

An annuity " free of all duties and free of income-tax at the current rate for the time being " does not entitle the annuitant to retain the income-tax recovered on the annuity.

WALKER, *In re* : PUBLIC TRUSTEE *v.* WALKER, (1939) 1 Ch. 974.

Will—Annuity subject to forfeiture on bankruptcy—Bankruptcy of annuitant in lifetime of testator and discharge after death of testator but before instalment of annuity become payable—Effect on vesting of annuity.

Testator directed his executor and trustee under the will (dated December 28, 1931) to pay out of the income of his estate £ 250 per annum to his brother during life till *inter alia* he shall become bankrupt and on such event to the brother's children. Testator died on November 16, 1938 and will was proved on March 14, 1939. Testator's brother was adjudicated bankrupt on September 29, 1937 and obtained

an order on November 15, 1938 suspending his discharge for one month and that he be discharged as from December 15, 1938.

Held, the annuity would have vested on the death of the testator but for the forfeiture clause. On the true construction of the will and in the events that have happened the annuity has failed and determined by reason of his bankruptcy subsisting at the death of the testator and the operation of the forfeiture clause transferred the annuity to the children of the annuitant.

GUNTHER'S WILL TRUSTS : *In re* ALEXANDER *v.* GUNTHER, (1939) 1 Ch. 985.

Will—Residuary estate—Date for valuation for adjustment of rights inter se *in the final distribution.*

Where there is nothing in a will which indicates that the testator contemplated any particular date for the valuation of the estate for adjustment of rights in the final distribution, the date of the death of the testator must be taken as the most convenient date for such valuation.

BROOKS SETTLEMENT TRUSTS : *In re* LLOYDS BANK LTD. *v.* TILLARD, (1939) 1 Ch. 993.

Assignment by son of an expectancy under powers under Marriage settlement of parents—Assignment voluntary and not for value—If enforceable in equity.

By a voluntary settlement of 8th May, 1929 A.J.T. assigned to the plaintiff bank all his interest to which he may thereafter become entitled under a special power of appointment under the marriage settlement of the parents of 14th November 1904. On 15th May, 1939 the mother in the exercise of the power under 1904 settlement irrevocably appointed a sum of £ 3517 to A.J.T. and also released her life interest in it. A.J.T. claimed this sum notwithstanding the settlement of 1929.

Held the assignment of 1929 was of something which he may become entitled to in future—not a contingent interest, but a mere expectancy. The trustees must hand over to A.J.T. the sum of £3517 on the footing that the voluntary settlement did not operate as a valid assignment or declaration of trust in respect thereof.

EAVES *v.* EAVES, (1939) 1 Ch. 1000.

Will—Gift to wife during widowhood—Remarriage of widow decreed a nullity—Effect.

The testator gave his wife a legacy and gave to her during her widowhood the use of a certain house and an annuity of £ 600 during her life or widowhood to be paid by the trustees. The testator died

in 1919 and his widow remarried in 1925. A decree *nisi* of nullity of that marriage was made on 24th May, 1937, and that decree was made absolute on 15th November, 1937, on the ground of incapacity of the husband to consummate the marriage. She then claimed the life interest as widow.

Held, as the second marriage was null and void *ab initio* her widowhood never determined. But she could not after such long delay claim the benefits of any life interest from the trustees who had disbursed them.

[Affirmed by Court of Appeal in (1939) 4 All. E. R. 260 on the ground of acquiescence].

BATCHELOR *v.* EVANS, (1939) 1 Ch. 1007.

Executors—Judgment by default against—Presumption of devastavit *—If open to executors to prove there was no* devastavit *and assets of deceased no longer in their hands.*

In the King's Bench in an action by the plaintiffs on a mortgage by the deceased, a judgment by default was passed against the executors in their representative capacity. The result was that the defendants admitted by not putting in an appearance that they had in their hands assets of the deceased sufficient to satisfy the claim. Shortly after the judgment proceedings in Chancery Division was commenced by two beneficiaries for administration of the estate of the deceased with the executors as defendants and in that action a receiver of the estate was appointed and an order for administration was made, on default of appearance by defendants. Some months later, the plaintiff issued a *writ of fieri facias* to enforce the judgment and a return of *nulla bona* was made. In the present action, plaintiff claimed payment by defendants personally of about £ 2,000 under the mortgage.

Held, though there is no doubt that the King's Bench judgment is conclusive against the defendants so far as it goes, as an admission of assets, and the return of *nulla bona* by the sheriff raises a presumption that a *devastavit* has been committed by the defendants, it is open to the defendants, if they can, to show why at the date of the return of *nulla bona* the assets admittedly in their hands at the date of the judgment, are no longer in their hands and to show, that that is not due to any *devastavit* by them. The appointment of receiver and order for administration is conclusive proof of that.

SMITHERS : *In re* WATTS *v.* SMITHERS AND OTHERS, (1939) 1 Ch. 1015.

Will—Construction—" My securities " and remainder of the money.

A will contained the bequest " I give and bequeath to my son *B* when *my securities* have been converted into cash, two-thirds of the

proceeds. To my son *H* £500. To my son *B* the *remainder* of the money.

Held, the expression " my securities " in the absence of sufficient contest cannot have a wider meaning than a debt or claim the payment of which is in some way secured, and does not include shares or stock in a company. The gift of the remainder of the money is a gift of the residuary personal estate.

KLEINWORT SONS & CO. *v.* UNGARISHE BAUMWOLLE INDUSTRIE ACTIENGESELLSCHAFT, (1939) 2 K.B. 678 (C.A.)

Contract—Supervenient foreign legislation—Effect on enforceability.

Where there is an offer by letter from Hungary accepted in London of bills payable in London and it obliges the defendant to provide pounds sterling in London, London is both the *locus contractus* and the *locus solutionis*. Two elements must co-exist if an English contract rendered unenforceable in the English Court by supervenient foreign legislation—(1) there must be an act which the contract requires to be performed in the foreign country, and (2) the act must have been rendered unlawful there. In the present contract nothing is said as to whence the pounds sterling for payment in London are to come and there is no impossibility of performance. The plaintiff is entitled to succeed. (Decision of Branson, J. affirmed by the Court of Appeal.)

EGERTON *v.* JONES, (1939) 2 K.B. 702.

Lease—Relief against forfeiture—Grant to mortgagees of lease—Terms on which relief granted—Right of lessor to full indemnity for all costs and expenses.

The mortgagees of a lease applied for relief against forfeiture against the lessee which the lessor himself had applied and failed to obtain relief even in the Court of appeal. The mortgagees contended that they ought to have been made parties or notice given to them of the earlier proceedings both by lessor and lessee.

Held, the mortgagees need not have been made parties to earlier proceedings and there was no obligation to give them notice. The mortgagees ought to have relief against forfeiture on terms of fully indemnifying the plaintiffs against all costs incurred by them as between solicitor and client subject to the lessors transferring to them any decree for costs they may have against the lessees.

GAUMONT BRITISH DISTRIBUTORS *v.* HENRY, (1939) 2 K.B. 711.

Dramatic and Musical Performers Protection Act, 1925 (c. 46), S. 1 (a)—" Knowingly making any record without the consent in writing of the performers "—Gist of offence.

The respondent was a member who was playing in a band in a dance hall. The appellants having obtained the permission of the proprietors of the dance hall and the producer of the dance made a "talkie" which was afterwards shown in a newsreel. It was found that the appellants were free from knowledge of the absence of consent of the individual performers and it could not be said that the appellants knowingly made the record without the consent of the respondent.

Held, construing S. 1 (*a*) of the Act of 1925, it was only when what was done was done knowingly and also without consent that an offence was committed.

LONDON AND PROVINCIAL LEATHER PROCESSES LTD. *v.* HUDSON, (1939) 2 K.B. 724.

Insurance of Goods against "All risks"—Inability to recover skins handed over for dressing owing to bankruptcy of the person employed—If "fortuitous or accidental loss or" casualty, covered by the insurance.

Plaintiffs had insured their goods (skins) against all and every risk, whatsoever, however arising. Popper, a firm of Berlin employed by plaintiffs to dress their skins, had entrusted the work to sub-contractors who claimed to exercise a lien on them for obtaining payment from the firm of Popper and later Popper became bankrupt. The skins were not recovered by plaintiffs who intimated to the under-writers who made no attempt to take proceedings in Germany. On the claim on the insurance,

Held, there has been loss due to a "fortuitous circumstance accident or casualty" under the policy and plaintiffs are entitled to judgment.

INLAND REVENUE COMMISSIONERS *v.* FRED'S SECURITIES CO., (1939) 2 K.B. 734.

Income-tax—Finance Act, (1937), S. 14 (3)—Investment Company—Apportionment of undistributed income among the share-holders.

The capital of an investment company was divided into 18 *A* ordinary shares of £ 100 each, 400 *B* ordinary shares of 10 sh. each and 980 half per cent. preference shares of £ 100 each. *A* and *B* ordinary sharers were entitled to share equally in any dividend after a small dividend paid upon the preference shares. *A*, *B* ordinary sharers were entitled to be repaid the nominal value of their shares *pari passu* on a winding up. Thereafter the *B* ordinary shares were to be paid £ 400 per share. Then the preference share-holders were entitled to be repaid the nominal amount of their shares and thereafter the *B* ordinary shares were entitled to any surplus assets remaining.

In 1936—37 the income from investments of the company was £ 1284 and the value of the assets was assumed to be £71322 . It was found that *A* shares would have got on a winding up £ 900 and *B* shares would have got the remainder and preference shareholders nothing as the assets were insufficient.

Held, a proportion of $\frac{900}{71322}$ of £ 1284 should be apportioned to *A* shareholders and the balance to *B* shareholders.

BURFITT *v.* A. & E. KILLE, (1939) 2 K.B. 743.

Negligence—Sale of pistol dangerous in itself to boy under 12—Injury to plaintiff, another infant—Liability for damages.

The sale of a pistol and ammunition to a boy under 12 years constituted something dangerous in themselves and which as to the ammunition was a sale forbidden by law. Where another child injures itself while playing with a pistol, the defendants who sold the pistol are liable for the damages.

KING *v.* MICHAEL FARADAY AND PARTNERS, LTD., (1939) 2 K.B. 753.

Contract—Frustration—Contract to pay £1000 yearly charged on salary —Reduction of salary to £1000 yearly—Effect—Contract if contrary to public policy.

In satisfaction of a decree the debtor who was earning a salary of £ 1000 per annum absolutely assigned an insurance policy which had a surrender value and also agreed to pay yearly £ 1000 in equal monthly instalments for ten years (out of which the decree-holder was to pay the premiums on the policy) and charged the amount on his then pay and remuneration of £ 3,000 per annum. In case of default in carrying out any of the provisions, the decree was to be executable for the balance after giving credit to the surrender value of the policy on the date of the assignment less the sums owing for loans thereon. An irrevocable authority was given by the debtor to his employers (the company) authorising them to pay the assignee out of his salary the £ 1000 yearly for ten years. The payments were made until February 14, 1938, for five years and on default the action was commenced for payments due under the agreement. The salary was reduced to £ 1,000 per annum since May 6, 1938 and a receiving order was made on March 18, 1938, on an act of bankruptcy committed on February 1938. The decree-holder proved in the bankruptcy without valuing the security. The debtor claimed his salary as personal earnings necessary for the maintenance of himself, his wife and family.

Held, an assignment of after-acquired property is effective, not merely against the debtor but also against his trustee in bankruptcy. The debtor can before bankruptcy charge his personal earnings over and above what is required for the maintenance of himself and his family so as to give a good title against his trustee. The reduction in salary was a change in an essential condition, the continuation of which must have been contemplated as the basis of the obligation. The obligation, in the circumstances had become one which would be contrary to public policy to enforce. And by proving in the bankruptcy the security must be deemed to have been surrendered.

SUNLEY & CO. *v.* CUNARD WHITE STAR LTD., (1939) 2 K.B. 791.

Damages—Contract—Agreement to transport plaintiffs' tractor and scraper to workspot by a named steamship and for some portion by land—Delay in the transport by the ship owing to difficulty in land transport to reach ship—Measure of damages for loss to plaintiff of use of machinery—Tests.

Where defendants undertook to transport certain tractors and scrapers to the workspot of the plaintiffs —(contractors)—by a named ship and owing to difficulty in transporting the machinery by land to the ship, the machinery were transported only by the next ship, and the plaintiffs claimed damages for the loss of the use of the machinery by the delay.

(After discussing the rules for assessment of damages in torts and contracts and examining the case law) : *Held*, the plaintiffs can recover the true value to them, as best as the Court as a jury can ascertain, of the use of the machinery as it would have been used in the workspot during the period of delay in question. The fact of the rarity of such machinery and impossibility of mitigating damages by hiring other machinery has also a bearing as also the knowledge of the defendants of the purpose for which the machinery were required.

LUCAS *v.* POSTMASTER-GENERAL, (1939) 2 K.B. 808.

Workmen's Compensation—Employee sustaining injury while attending a gymnasium class as required by the conditions of employment—If accident arising out of and in the course of employment.

The appellant who was employed to repair telephone apparatus, while attending a gymnasium class after office hours in pursuance of the conditions of employment, fell down and sustained injuries. In a claim for compensation,

Held, the accident did not arise out of and in the course of his employment.

WHITE *v.* J. & F. STONE LTD., (1939) 2 K.B. 827.

Tort—Defamation—Slander—Statement to plaintiff overheard by co-employees—If privileged.

The whole essence of liability for libel or slander is the publication of the defamatory statement to some third person, not the use of language of a defamatory kind to a person complaining of it. The privileged occasion must arise because the publication of the statement in question is made to a person to whom the speaker has a duty or interest to receive it. So where the publication complained of is overhearing of statement to plaintiff by his co-employees there is no privileged occasion.

WILSON *v.* MITCHELL, (1939) 2 K.B. 869.

Guarantee—Joint sureties—Claim for contribution—Counter-claim for damages available to principal —If a defence against claim for contribution.

B & Co. supplied a Fordson tractor to the M.F.I. who hired it to Mitchell & Co. The plaintiff and defendant jointly guaranteed payment and performance by the hirer of his obligations under the hire purchase agreement. The M.F.I. assigned the contract to B & Co. who sued purely on the hire purchase agreement. A defence was put in by the present defendant in which in effect he set up a counter-claim for breach of warranty, etc. But the present plaintiff submitted to a judgment and paid the money. The present suit was for contribution to which the defence set up was that there was a counter-claim or a cross-claim which was available to the principal.

Held, the only cross-claim was a claim for damages and it could not be prayed in aid by a surety as against the claim on the guarantee. Even if it could be prayed in aid by the surety it could not be prayed in aid without bringing in the principal whose claim it really was.

INLAND REVENUE COMMISSIONERS *v.* MARBOB, LTD., (1939) 2 K.B. 872.

Income-tax—Companies—Dividend paid to a share-holder by cheque (when no funds in company to meet it) repaid as loan to company—If undistributed income of the company.

Two companies were formed for the sole purpose of reducing the liability for surtax of one Lucas. The capital of one company was £ 100 in £ 1 shares of which 2 shares were held by Lucas and 98 shares by the other company. The only asset of the company was an annuity of £ 12,000 per annum which Lucas covenanted to pay for 7 years or for the rest of his life in consideration of the issued debentures to him of the value of £ 57,300. With the 1st instalment of the annuity of £9,300 the company redeemed some of the debentures held by Lucas for £ 9,300 so that the company had no funds available,

When the 2nd instalment of the annuity was paid, a dividend of £.166 per share free of tax was declared and a cheque was issued in favour of the company holding the 98 shares. In pursuance of a resolution by that company the same day the cheque was re-endorsed to the company which issued it.

Held, the condition as to repayment as a loan of the amount of the dividend negatives the idea of a genuine distribution of income. Alternatively if the condition attached to the drawing and handing over of the cheque, it was not distribution in such manner as to render the amount distributed liable to be included for the purposes of surtax of the members but was in reality a capitalisation of the sum alleged to have been distributed.

GIBBONS *v.* WESTMINSTER BANK, LTD., (1939) 2 K.B. 882.

Banker and customer—Dishonour of cheque owing to mistake—If "non-trader" customer entitled to anything more than nominal damages without pleading and proof of special damages.

In an action against her bank for dishonouring a cheque of hers when her account was in funds, the plaintiff, a non-trader, did not plead any special damage but proved that after the dishonouring of her cheque, her landlord insisted on her paying the rent in cash.

Held, a person who is not a trader is not entitled to recover substantial damages unless the damages are alleged and proved as special damages and pleadings should not be allowed to be amended at a late stage.

MOSS' EMPIRES, LTD. *v.* OLYMPIA (LIVERPOOL), LTD. AND ANOTHER, 1939 A.C. 544.

Landlord and Tenant—Covenant by lessee to spend £ 500 per annum on repairs or pay difference between £500 and actual expenses of repairs—Failure to pay—Right of landlord.

Lessees covenanted to spend £ 500 per annum on repairs or to pay the lessors the difference between the sum and the actual expense. The lessee did not spend. In a claim by the lessor for the amount.

Held (1) the amount was payable as a debt and not as damages for breach of covenant to repair. (2) The covenant ran with the land and was binding upon the assignees. (3) The amount payable was not a penalty.

REARDON SMITH LINE, LTD. *v.* BLACK SEA AND BALTIC GENERAL INSURANCE CO., LTD., 1939 A.C. 562.

Insurance—Shipping—Charter of ship to proceed with all convenient speed to a certain port—Ship taking usual route—If "deviation"—Evidence as to usual route—Admissibility.

The respondent an insurance company was sued under the guarantee which it gave to the appellant at the request of the charterer to pay any contribution in general average, salvage or special charges due in respect of the cargo and to admit a loss of freight in general average so far as the same might be held to be properly due and payable by the charterer. The appellants contended that their calling for bunkers at certain port was not a deviation or departure from the contract voyage because the vessel was pursuing a usual and reasonable commercial route.

Held, it was permissible to adduce evidence to establish what was the usual route and on the facts there was no deviation from the contract voyage.

MONTREAL TRUST CO. *v.* CANADIAN NATIONAL RAILWAY CO., 1939 A.C. 613.

Contract—Railway Company—Prohibition of contract in which director was directly or indirectly interested—Director's nominee leasing to company and director indemnifying lessor who was to account to director—Lease if void.

The Railway Act, S. 121, provided that "No person who is a director of the company shall enter into, or be directly or indirectly, for his own use and benefit, interested in any contract with the company other than a contract which relates to the purchase of land necessary for the railways, nor shall any such person be or become a partner of or surety of any contractor of the company. Where *S* (the lessor) was admittedly and to the knowledge of the Railway Company (the lessee) merely the nominee of *D*, a director of the company who indemnified *S* in respect of all liability as lessor, and *S* was to account for all the receipts to *D*,

Held, *D* was indirectly interested in the lease and the contract was void and the rent irrecoverable.

WILLIAMS *v.* WILLAIMS, 1939 P. 365.

Divorce—Desertion—Insanity of deserting spouse—Effect on desertion.

In May, 1933, the respondent deserted his wife. On 26th June, 1934, the respondent was certified under the Lunacy Act and put under restraint. The present proceeding for divorce based on desertion was started on 21st January, 1938.

Held, the Act of desertion requires two elements on the side of the deserting spouse, *viz.*, factum of separation and the *animus deserendi*; and on the side of the deserted spouse the absence of consent. In the case of a person of unsound mind there is no capacity to have the necessary *animus* to give it the quality of volition required to produce a legal result.

ETTENFIELD *v.* ETTENFIELD, 1939 P. 377.

Husband and Wife—Separation without deed—Evidence of non-access—Admissibility.

As it is right to allow evidence of non-access in cases where the parties are living apart under a deed of separation it is also right to admit such evidence though that agreement has not taken the form of a deed.

CHIPCHASE *v.* CHIPCHASE, 1939 P. 391.

Husband and Wife—Second marriage of woman in her maiden name (with banns published in that name) when first husband not heard of for more than 7 years—Presumption of death of first husband—Effect on validity of such marriage.

A woman whose previous husband had not been heard of for more than 7 years having married a second husband, started proceedings against him for adultery, desertion and failure to maintain her. The second marriage took place in her maiden name and the banns were published in that name.

Held, (1) Law presumes a person who has not been heard of for over 7 years to be dead. Once it is shown that the wife has not heard of her husband for 7 years that presumption arises though it is rebuttable. The person relying on such presumption must prove reasonable inquiries. (2) There must be an element of intentional concealment of identity in having the banns published in the maiden name before it can be said that the marriage is void for undue publication of banns and the wife must be given an opportunity of establishing that the name in which she was married was the name by which for years she had been commonly known and that there was no intention to conceal her identity.

MILBANK *v.* MILBANK, 1939 P. 401.

Divorce—Desertion—Pendency of a collusive petition by respondent for dissolution—If petitioner can assert that wife was deserting without cause during such pendency.

A wife's previous petition for dissolution on the ground of the husband's adultery was dismissed as collusive. The present petition was by the husband for divorce on the ground of his wife's desertion for 3 years immediately preceding the presentation of the petition.

Held, it is impossible in law to allow the husband to say that the 12 months during which the collusive petition was being actively prosecuted, was a period during which his wife was deserting him without cause.

KELNER *v.* KELNER, 1939 P. 411.

Divorce—Gift of money in contemplation of marriage by wife's father to husband and wife jointly—Dissolution of marriage—Rights of the spouses to the money.

The wife's father provided a dowry of £ 1000. The money was placed in an account in the joint names of the father, the daughter and the prospective son-in-law and the arrangement was that it should become the property of the daughter and son-in-law on the marriage taking place. The marriage took place and the father withdrew his name. After 5 years there was a decree for dissolution and the wife claimed the whole of the balance of the fund on the authority of *Joseph* v. *Joseph*, (1909) P. 217.

Held, (1909) P. 217 is a case of annulment of marriage where the purpose for which the money was provided had failed *ab initio*. Here the gift was to husband and wife jointly and each is entitled to half the amount.

ASTLE *v.* ASTLE, 1939 P. 415.

Divorce—Cruelty—Unsound mind of respondent—How far a defence—Test for responsibility for acts of cruelty.

Whether the cruelty sought to be made a ground of divorce is sufficient to entitle the wife to a decree or not depends on whether or not by reason of his mental state the husband appreciated the nature and quality of such acts of cruelty.

JOTTINGS AND CUTTINGS.

The New Despotism.—Lord Hewart has made us familiar with the New Despotism which attempts to substitute Administrative Justice for the more familiar and more welcome justice of the Courts. But that fades into insignificance when compared with the New Despotism of the Bureaucracy which has sprung up since the war. It appears that the Government are still oblivious of the widespread damage which has been caused by the wholesale requisitioning of hotels and schools, and in a reply given on behalf of the Chancellor of the Exchequer in the House of Commons last week, it was stated that no action will be taken until the working of the Compensation Act has been tested. But the working of that Act will be limited by its terms, and these do not allow of the compensation for loss to be assessed by a jury, which was the subject's right before the recent hurried Emergency Legislation. In other directions the regulations devised to meet war requirements show a singular lack of appreciation of the real

situation. The lightning regulations are quite impossible of observance for any length of time. In their present stringency they should never have been drafted, and to meet a risk which, though no doubt substantial, has not materialised, and actual and probably still greater danger has been created in the largely increased slaughter on the roads. There has been similar lack of proportion in the wholesale taking of doctors, both general practitioners and specialists, from their proper work. Actual needs are left unattended to while doctors are waiting at hospitals which are empty, and which, if there is any wisdom and prudence in statesmanship, will remain so. Nor does bureaucratic control stop here.—*L.J., 1939, p. 245.*

Masters in Chancery.—At the outset of these notes it should be made so clear that even he who runneth may read, that the Masters in Chancery, to whose history reference will be made, are not to be confused with the officials now attached to the Chancery Division whom we know as Chancery Masters, but who, till some years ago, bore the less imposing title of Chief Clerks. The old Masters in Chancery dated from a very early period of our legal history, and were abolished in 1852 by the statute 15 and 16 vict. c. 80. Though they were in existence considerably earlier than the reign of Queen Elizabeth they seemed to have then attained great prominence during the Chancellorship of Sir Christopher Hatton, of whom it was said that he was very cautious, "not venturing to wade beyond the shallow margin of equity where he could distinctly see the bottom. He always took time to consider his judgments and it was said that he was guided by Sir Richard Swale one of the Masters in Chancery, and so got on fairly satisfactorily." At that date the Masters were described as "grave and wise men, though many of them are of another profession and are not employed in framing of writs as at the first, yet they do sit upon the bench with the Chancellor; and taking advantage of their opportunities and leisure, refer matters which have depended in that court ready for hearing, unto their examinations, which upon their certificates, are decreed accordingly .....but the people do much complain of the new employment of them."—*L.T., 1939, p. 276.*

Induction of a Master.—Richard Swale, referred to in the preceding paragraph was formally inducted into his office in 1587, the ceremony being thus described in a contemporary record: "This present day Richard Swale, Gentleman, Doctor of the Civil Law, was placed as a Master of the Chancery in ordinary in the room of Doctor Barkely deceased, by the Right Honourable Sir Christopher Hatton, Knight, Lord Chancellor of England; and his Lordship did put on the said Mr. Swale's cap." It is curious to find that this formality of con-

ferring the office by the use of a hat or cap continued down to Lord Brougham's Chancellorship, so persistent are old customs many of which have lost all their original significance.—*L.T., 1939, p. 276.*

Sale of the Office.—In the early days a pernicious system prevailed whereby prospective Masters were expected, nay forced, to pay large sums for their appointment; a system upon which a lurid light was cast during the trial of Lord Chancellor Macclesfield for corruption. As the learned Foss said, Macclesfield had not been content with what had been the accustomed honorarium but had increased the price so enormously that it became next to impossible for the appointees to refund themselves without either extorting unnecessary fees by delaying causes before them, or using the money deposited with them to defray the sum demanded. At that time, however, the price paid for the Master's places was considered a legitimate part of the profit of the Chancellor, and this received a singular confirmation in the grant to Lord Macclesfield's successor, Lord King of a considerable addition to his salary as compensation for the loss occasioned by the annihilation of the practice consequent upon Lord Macclesfield's trial.—*L.T., 1939, p. 276.*

Jekyll as Master.—Joseph Jekyll, a descendant of Sir Joseph Jekyll, who had been Master of the Rolls in the early years of the eighteenth century, was a prime favourite with the Prince of Wales, afterwards King George IV, and being envious of a comfortable post like that of Master in Chancery, secured the influence of his royal friend to back his claims with Lord Eldon, the then Lord Chancellor. Eldon himself told the story of how at first he refused to make the appointment, on account, as he said of Jekyll being totally unqualified for the duties of the office. The Prince was, however, insistent and at last threw himself back in his chair at the Chancellor's house, and exclaimed, " How I do pity Lady Eldon." " Good God," said Eldon " what is the matter?" " Oh, nothing" replied the Prince, "except that she never will see you again, for here I remain until you promise to make Jekyll a Master in Chancery." Upon this Eldon capitulated and the appointment was duly made, and apparently the new Master discharged the duty quite efficiently. Some one asked Jekyll how in the world he came to be picked out for the office, to be told by the happy office-holder, that it was because he was the most unfit man for the post! Jekyll continued in office for a considerable time, till indisposition and age compelled him to relinquish the work. Happening to meet the Chancellor the day after his retirement he accosted him thus in his jocular way : " Yesterday, Lord Chancellor, I was your Master, to-day I am my own master!" *L.T., 1939, p. 276.*

Another Master of Humour.—Of a later Master in Chancery an amusing story has come down to us, demonstrating once again that the daily round and common task in their office could not quench their sense of humour. It appears that a dispute had arisen between two adjoining landed proprietors regarding *inter alia*, rights of fishing in a stream. One of the proprietors was a wealthy man, his neighbour a poor man. The dispute they agreed should be determined by arbitration and a certain Master in Chancery was selected to act as arbitrator. It was further agreed that the Master should give two days to the task, and, further, that on the first day he should walk over the relatively poor man's estate, hear his uncontradicted version, and should dine with the two proprietors at his, the poor man's table, and thereafter should do the like at the other proprietor's table. At the close of the first day the dinner was modest, but sufficient consisting of three fried soles, a roast leg of mutton, three pancakes, three pieces of cheese, three pieces of bread, ale, and a bottle of sherry, this menu being followed by three fine apples. At the close of the second day's perambulation the trio dined at the rich man's table, and it appeared, being struck by the simplicity of the previous day's dinner, resolved to provide an exact replica of the dishes then served ; that is the three soles, roast leg of mutton, three pancakes, three pieces of cheese, three pieces of bread, ale, and a bottle of sherry, followed by three apples. The second dinner finished, the Master in Chancery introduced his award in these words : " Gentleman, I have with all proper attention considered your *sole* reasons ; I have taken due notice of your *joint* reasons ; and I have come to the conclusion that your *des* (*s*) *erts* are about *equal*!"—*L.T., 1939, p. 276.*

Knight Bruce before a Master in Chancery.—The late Augustine Birrell, whose charm as an essayist is firmly established, had, for members of the legal profession, a special interest by reason of the frequency of his illustrations drawn from their studies and practice. Sometimes these are introduced with much humour and in curious collocations. Readers of his essay on Milton may recall how in discussing the poet's effort to " justify the ways of God to man " he said that while it might be well and pious enough, to represent God as doing so by argumentative process was not so well, and was to expose the Almighty to possible rebuff. Following this comes an interesting anecdote about Knight Bruce, later a distinguished Lord Justice, who, when at the very head of the profession, was taken in before a Master in Chancery and found himself pitted against a little slip of an attorney's clerk, scarce bigger than the table, who, nothing daunted, and by the aid of authorities cited from a bundle of books as big as himself, succeeded in worsting Knight Bruce, whom he persisted in calling " my learned friend." Knight Bruce, we are told, treated

the imp with that courtesy which is always an opponent's due, " but he never went before the Masters any more."—*L.T., 1939, p. 277.*

Lay Judges in Court.—Quite apart from the courts of quarter sessions in which lay justices exercise judicial functions, there have been instances in which a layman has had to " assist " in the hearing of appeals in the most august tribunal of the land, to wit, the House of Lords. Before the reconstitution of the House as a judicial body by the appointment of Lords of Appeal in Ordinary, it was not uncommon for the Lord Chancellor to be the sole judge, but, of course, it was essential that a quorum of peers should be present, and now and again a lay peer would be commandeered to enact this role. Comparatively late in the nineteenth century, the then Duke of Buccleuch was in this capacity brought into the House to " assist " in the hearing of an appeal which lasted three days, at the end of which his Grace was intensely bored and said as much to the Lord Chancellor; but the only consolation he received was the assurance that the litigants would much rather have their disputes settled by a Great Scottish nobleman than by mere lawyers, and with this he had perforce to be content. Now, of course, with the number of Law Lords available, there is no difficulty in constituting a quorum without the necessity of impressing the attendance of a lay peer.—*L.T., 1939, p. 306.*

Dr. Edward Jenks.—Dr. Edward Jenks, Emeritus Professor of English Law, and late Dean of the Faculty of Laws in the University of London, died at Bishops Tawton, Devon, on Friday, 10th November at the age of seventy-eight. He was educated at Dulwich and King's College, Cambridge, and was called to the Bar by the Middle Temple in 1887. He wrote numerous books on law and politics, and perhaps the best known are his "Short History of English Law," and " Law and Politics in the Middle Ages." He will also be remembered for the success he achieved in inaugurating a new system of legal education for The Law Society, of which he was Director of legal studies from 1903 to 1924.—*S.J., 1939, p. 872.*

The Great Seal.—Readers of that veracious history which tells of the adventures and misadventures of the late Mr. Samuel Pickwick may recall that Mr. Solomon Pell, when in a reminiscent mood, regaled his hearers with many interesting anecdotes of the Lord Chancellor with whom he professed to be on close terms of friendship, and in particular he recalled how on one memorable occasion he was dining with that exalted functionary, they two alone, where everything was as splendid as if twenty people had been expected, and " the great seal was on a dumb waiter at his right hand, and a man in a bagwig and suit of armour

guarding the mace with a drawn sword and silk stockings—which is perpetually done, gentlemen, night and day." This description, which undoubtedly showed that Mr. Pell with his many other gifts, possessed that of imaginative powers of no mean order, cannot however, it has to be admitted, be regarded as in accordance with literal accuracy; but on the other hand it is a remarkable instance of the precocity of the youthful Dickens who could so effectively make delightful play with such an august emblem of authority. —*L.T., 1939 p. 321.*

The Damasked Seal.—In early days it seems that when the Great Seal was discarded on a new Seal being brought into use it was what was technically termed "damasked," that is, gently tapped with a hammer and thus was supposed to be deprived of its virtue. Apparently for long it has been the rule or custom that when the Seal has thus been treated it becomes the private perquisite of the holder of the office of Lord Chancellor, and there are stories how the better half of the holder of that high judicial post has, with wifelike economy, had the august symbol turned into something more practical, such as a tray or something similar. Occasionally it has happened that a dispute, amicable it is true, has arisen as to the rightful possession of the discarded Seal. Thus there was a keen contest between Lord Lyndhurst and Lord Brougham as to their respective rights to the Great Seal in use in the reign of George IV. It happened on this wise: On William IV's accession a new Seal was ordered to be made, Lyndhurst being then Lord Chancellor, but before the new Seal had been made, Brougham succeeded to the office of Lord Chancellor, and the question then arose to which of these two eminent lawyers the old Seal, then damasked, was to fall. Lyndhurst advanced his claim to it, on the ground that, as the order for the new Seal was made during his tenure of office, the Seal was actually discarded during his Chancellorship, and therefore it fell to him. Brougham, on the other hand, maintained that the order for the new Seal was but a step prudently taken in anticipation of the act by which George IV's Seal was destroyed, and that while the order was being executed by the engraver the Seal of his late Majesty George IV, was in fact as well as in theory the Seal of William IV, till he damasked it, at which time he, Lord Brougham, was its holder. A vigorous examination of precedents and a keen discussion followed and was still waging when William IV, terminated it by a decision which, as someone said, was directly in defiance of principle, precedent and law, namely, by adjudging the one half of the Seal to each of the contestants, and in order probably to make the decision still more acceptable to each, the King directed that each part should at his own royal cost be set in a rich silver salver.—*L.T., 1939, p. 321.*

Eldon and Brougham.—When Eldon, who held the office of Lord Chancellor for so many years, looked out upon the World, behold only those belonging to the Tory fold were good, and this attitude manifested itself conspicuously in his refusal, on account of their political faith, to give either Brougham or Denman the silk gowns which professionally they had so well earned. "In nothing," said one writer who touched on this subject "did the spitefulness of Lord Eldon's essentially ungenerous nature display itself more offensively than in the determination which he showed to injure the professional status and prospects of lawyers who ventured to oppose his political views," and so long as Eldon held the Seal neither Brougham nor Denman, who had worn silk gowns as Queen Caroline's Attorney-General and Solicitor-General, but had been reduced to stuff on that lady's death, was raised to the status of King's Counsel, although in the very front rank of the Bar. As was said, Eldon, could not control his hatred for those who had been true to their client and to Whig principles. "No young lady," wrote Eldon, "was ever so unforgiving for being refused a silk gown, when silk gowns adorned female forms, as Brougham is with me, because having insulted my master, the insulted don't like to clothe him with distinction, and honour and silk." Some few years later, it is good to remember, both Brougham and Denman received the desired promotion in professional rank.—*L.T., 1939, p. 321.*

Vicissitudes of the Great Seal.—Like less august symbols, the Great Seal has in the course of history experienced not a few vicissitudes imperilling for a time at least the orthodox order of business of the State. We read, for example, that to prevent it reaching the Prince of Orange, later King William III, it was thrown into the Thames, but later was found in the net of a fisherman near Lambeth and delivered to the Lords of the Council. In March, 1784, the Seal being then in the custody of Thurlow, the Lord Chancellor, it was stolen from his house in Great Ormond Street, along with some other valuables. On discovering what had happened, Thurlow saw Pitt and the two saw the King and communicated to him the theft of the Seal. A Council was at once called at which an order was made that "his Chief Engraver of Seals do immediately prepare a Great Seal of Great Britain," which was to show certain alterations, including "that on the reverse, where His Majesty is sitting in state, the palm branch and the cornucopia be omitted on the sides of the arms at the top, and over and above arms the number of the present year 1784 in figures be inserted, and at the bottom also the present year MDCCLXXXIIII in Roman figures." Another curious alteration directed to be made was stated thus: "The herbage under the horse's hind legs be omitted." This new Seal was prepared with

extraordinary expedition and was actually finished in a rough fashion on the following date.—*L.T. 1939., p. 322.*

BOOK REVIEWS.

THE LAW AND PRACTICE OF INCOME-TAX IN INDIA by Messrs. S. C. Manchanda, M.A. (Cantab.), Advocate, High Court, Lahore and S. K. Aiyar, B.A., B.L., Advocate, High Court, Madras. Published by The University Book Agency, Kacheri Road, Lahore. Price Rs. 10.

It is with pleasure that we welcome the publication of this commentary on the Indian Income-tax Act as amended recently. The enactment is one of exceptional difficulty and neither the assessee nor even the ordinary legal practitioner is familiar with the intricacies of the subject. The provisions of the original enactment of 1922 and the amended sections are given side by side to facilitate comparison and a correct appreciation of the changes effected by the recent enactment. No decision of any importance in this country or England has been omitted and the decisions have been referred to in their appropriate places and the law has been stated by the authors in the words of the eminent Judges themselves. The appendices give the rules framed under the Act and all other useful information bearing on the subject. There can be no greater tribute to the excellence of the work than the fact that it has the approval of Mr. Justice Patanjali Sastri whose knowledge of Income-tax Law and Practice is unsurpassed in this part of the country. We hope that the book will receive the wide popularity among lawyers and judges and the officials of the Income-tax Department which it richly deserves.

THE INDIAN INCOME-TAX ACT by Sudhir Mohan Das Gupta, M.A., B.L., Pleader, Judge's Court, Khulna, 3rd Edition. Published by Eastern Law House, Law Publishers, 15, College Square, Calcutta. Price Rs. 6.

This is another commentary on the Income-tax Act as amended by the recent enactment of 1939. It is the third edition of the commentaries, but the first after the amendment. The book is divided into three parts. The first part gives the Act with its commentaries and the schedule and the Indian Finance Act of 1939. The second part gives the rules framed by the Central

Board of Revenue with the forms. In the third part we have all the miscellaneous information, such as the rules for the interpretation of statutes, mathematical calculations, stamps and court-fees, etc. Consequent on the far-reaching amendments of the main Act, the matter contained in the previous edition has been thoroughly revised and recast and the law has been brought up-to-date. The decisions have been referred to in their proper places. We have every hope that the book will be found useful by all those having to deal with the subject.

EASEMENTS AND LICENSES by Mr K. N. Joshi, B.A., LL.B., 1st Edition. Published by the Eastern Law House, 15, College Square, Calcutta. Price Rs. 14.

We have great pleasure in acknowledging the receipt of the book on the Law of Easements and Licenses by Mr. K. N. Joshi. It is a scholarly treatise on the subject and is the result of careful study and research by the learned author. His treatment of the subject is by way of commentaries on the Indian Easements Act in Part I of his work where the learned author discusses also the law in the Provinces where the Indian Easements Act is not in force. The commentaries do not stop with giving references to the cases and stating their effect but are by way of discussion of the principles illustrating them by reference to the cases decided in England and in India. Part II of the work deals with the rights to light, rights in respect to water, air, right of support, projections and other rights in distinct chapters. In the last chapter, he deals with the question whether an easement can originate in a grant and compares the English and the Indian conceptions on the question. The book is a valuable addition to the library of every lawyer and judge and a reference to it will be found useful on the topics touched by the learned author.

THE MUSLIM DIVORCE LAW by Mr. Jehangir Cursetji Forbes, B.A., LL.B., Advocate (Original Side), High Court, Bombay. Published by New Book Company, Hornby Road, Fort, Bombay.

This is a commentary by an experienced lawyer on the dissolution of Muslim Marriages Act (VIII of 1939). This enactment has remedied the defects in the Muhammadan Law by giving a Muhammadan wife the power to divorce her husband in the circumstances specified in the Act. The law on the subject before it was very inadequate and the enactment has enlarged the grounds for divorce by the wife. To give completeness to the subject, the learned author has also added a chapter on the subject of Divorce by Husband.

CRIME AND CRIMINAL JUSTICE by Mr. Abdul Hasanat, I.P., Superintendent of Police, Noakhali, Bengal. Published by The Standard Library, Dacca, Bengal, India. Price Rs 5-8-0. (8*s*. 6*d*.).

In this book the learned author who is a high police official deals with the subject of Criminal Sociology, Criminology, Penology, Criminal Jurisprudence and Law and Criminal Investigation. Coming from the pen of a writer who has had practical experience in daily life of the subject that he deals with, the book is of special value. The subjects are dealt with clearness and there is a great deal of information drawn from sources not easily available to the ordinary reader. The appendices give valuable information on allied topics. We have every hope that the book will be found interesting and instructive reading by police officials, lawyers and judges.

THE REVISED INCOME-TAX RULES, 1922 AND THE INCOME-TAX AND SUPER-TAX CALCULATOR by Mr. D. G. Khandekar, Law Publisher, Poona City. Price Rs. 1-4-0.

It is with pleasure that we acknowledge the receipt of a copy of the Revised Income-tax Rules and the Income-tax and Super-tax Calculator. The rules are corrected up to the 15th August, 1939. We are sure that the book will be found useful in the practical working of the income-tax officials and the assessees.
