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THE MEASURE OF DAMAGES FOR CONVERSION.

The question of the proper measure of damages in cases of wrongful conversion has been the matter of some difference of opinion among Courts both in England and in America. The guiding principle of course is that the owner should be fully indemnified, but its application in practice is by no means easy, especially in cases where the market price of goods fluctuates subsequent to the date of conversion. Broadly speaking, three views have been enunciated. One is that the owner is entitled to the value of the goods as at the date of conversion. (Mayne on Damages, 10th Ed., p. 377.) It is conceded that interest might sometimes be allowed on the amount so ascertained. In certain cases the jury has been permitted in their discretion to adopt as the basis the market price prevailing on some date subsequent to the conversion. In this class of cases the price of the goods at the date of the commencement of the action or on the date of trial has in general been taken to be the criterion. A third view which appears to be more popular in America than in England is that damages should be awarded on the basis of the highest price which the goods had borne between the date of the conversion and the date of the verdict. Sometimes Courts have awarded special damage over and above the value of the goods, but the real difficulty arises in estimating the value of the goods themselves.

The last view mentioned above which Sedgwick describes as "the rule of higher intermediate value" (Sedgwick on Damages, 9th Ed., p. 991) is from all points of view the least satisfactory. The rule itself is sought to be applied in several other forms of action, in actions for detinue, for non-replacement of stock and for refusal to deliver goods paid for in

advance. Logically the rule means that after default once made, it would be in the plaintiff's power either by hastening or delaying his suit during the period prescribed by the Statute of Limitations to take advantage of a rise in the market without any risk in case of a fall. Damages founded on such an estimate, it is submitted, are either purely speculative or plainly vindictive. It is too much to assume that the owner would have sold the goods exactly on the day when the maximum price prevailed. As observed by Romer, J., in *Mansell* v. *British Linen Co.*,[1] "His difficulty is amply shown by the well-known fable of the man who had to go through a pathway in a field of corn, not being able to turn back, and his duty being to cut down the highest blade of corn he passed in his journey. He passed several high blades, but did not cut them, hoping to reach a higher blade later on and he came to the end of the path and he cut no blade at all." The rule is sometimes sought to be supported on the ground that everything must be presumed against a wrongdoer but that principle can hardly apply when there is nothing more than a bare possibility of the owner acting in that manner. The case will stand differently where the owner at a particular date in the interval calls upon the wrongdoer to return the value of the goods, but then it will not fall under the rule of higher intermediate value.

This rule was rejected by Mansfield, C. J., in the very early case of *M'Arthur* v. *Lord Seaforth*.[2] That was an action for failure to replace stocks on a particular date, but the principle is equally applicable to cases of conversion. Certain other cases are, quite erroneously, supposed to have approved of the rule. *Greening* v. *Wilkinson*[3] and *Johnson* v. *Hook*[4] were cases of wrongful conversion of goods warehoused, and *Elliot* v. *Hughes*[5] was an action for damages for the non-delivery of goods paid for in advance. In all these cases there was a continuous rise in the price of the goods up to the date of the trial and all that the learned Judges laid down was that the compensation need not be restricted to the value of the goods at the date of the conversion. The rule of higher intermediate value was neither canvassed nor adopted. The rule, however, was applied by Creswell, J., in *Archer* v. *Williams*,[6] an action

1. (1892) 3 Ch. 159 at 163.
2 (1810) 2 Taunt 257 : 127 E. R. 1076.
3. (1825) 1 Car. & P. 625 : 171 E.R. 1344. 4. (1883) 31 W.R. 812.
5. (1863) 3 F. & F. 387. 6. (1846) 2 Car. & P. 26.

in detinue for failure to re-deliver scrip certificates. But the jury refused to apply the rule and eventually the question of damages was settled by compromise. By the time the writ of error was heard, the scrip certificates had been re-delivered and the damages for detention were measured by the difference in their values at the time of demand and of re-delivery. (See *Williams* v. *Archer*[7].) The rule was expressly rejected in *Mansell* v. *British Linen Co.*[1] an action for damages for wrongful injunction restraining plaintiff from alienating shares. The decisions of American Courts, especially in New York, where the rule has found favour seem to proceed on *a priori* considerations rather than on well-established principles. (*See* Sedgwick on Damages, 9th Ed., p. 995.)

There is one exceptional class of cases in which the rule may justly be applied, that is, where the owner is kept in ignorance of the wrongful act up to a certain time and the value of the goods has fluctuated in the interval. The reason is that, the wrongdoer having failed to communicate his act to the owner, the latter was prevented from disaffirming the transaction and claiming damages on such date as he might choose. This is really an application of the maxim *Omnia praesumuntur contra spoliatorem*. The rule will apply under those circumstances whether it be the case of non-replacement of stocks or wrongful conversion of goods and it will make no difference whether they are ordinary articles of merchandise or not. The cases which declare that directors of a company guilty of misfeasance in holding shares against the articles of association should pay the highest value of the shares while in their possession are explicable on this footing. (*Mckay's case*[8] and *Eden* v. *Ridsdales Railway Lamp and Lighting Co., Ltd.*[9])

On the other hand it is a rule of doubtful justice to award damages in all such cases on the basis of the value of the goods at the date of the conversion. It may be proper to apply the standard in a case where the tort is committed under a *bona fide* mistake. Thus the agent may in a given case sell the goods under a mistaken belief as to his authority or by an improper exercise of the same. In such cases the state of mind of the wrongdoer is rather important. As Mr. Mayne observes:

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1. (1892) 3 Ch. 159.
7. (1847) 5 C.B. 318 : 136 E.R. 899. 8. (1875) 2 Ch. D 1.
9. (1889) 23 Q.B.D. 368.

"If malice can render an innocent act wrongful *a fortiori* it must render a wrongful act more wrongful and, therefore, be provable in aggravation of damages." (Mayne on Damages, 10th Ed., p. 40.) This distinction has been clearly kept in view in cases where minerals have been carried away by unauthorised mining. (See *Wood* v. *Morewood*[10].) The rule itself will logically mean that the agent may in a given case sell the goods at a time most unfavourable to the principal and yet the latter can only recover the actual sale price. By what principle of justice or equity, one may ask, is the owner to be deprived of the profits which every tradesman in such circumstances can reasonably hope to make? If the date of conversion should be departed from, it may also be asked, what is to happen, when there is a falling market subsequently? The answer is simple enough. The plaintiff gets the benefit of the sale price in such a case because of two well-established principles, namely that the wrongdoer cannot make a profit out of his wrong, and that "the owner may elect to waive the tort and sue the defendant for the sale price as money had and received for the use of the plaintiff." (Underhill's Law of Torts, 10th Ed., p. 288. See also *Bavins Junior and Sims* v. *London & S. W. Bank*.[11])

It cannot be said that to depart from the above standard will result in providing for speculative profits. In an action for conversion the damages are awarded to the plaintiff for the loss of his goods and in fact it has been held that property in the goods passes to the defendant only after the decree for damages is satisfied. (*Simman Chetti* v. *Alagiri Aiyar*[12].) It is but just that he should be compensated with such damages as will enable him to replace his goods at any particular time he may choose. (*Glasspoole* v. *Young*[13].) The rule is not so harsh as it appears, because it is all the time open to the tortfeasor to return the value of the goods he had realised and then the damages will be restricted as in cases of detention. It may be argued that the plaintiff can, after becoming aware of the conversion, go into the market and stock other similar goods and thus have the benefit of a rising market. But nothing is more dangerous than to adopt this rule. Even in cases of contracts, in which the duty of the plaintiff to mitigate the loss is well

10. (1841) 3 Q.B. 440 : 114 E.R. 875, *per* Parke, B.
11. (1900) 1 Q.B. 270 (C.A.).
12. (1923) I.L.R. 46 M. 852 : 45 M.L.J. 516 (F.B.).
13. (1829) 9 B. & C. 696 : 7 L.J. (O.S.) K.B. 305.

established, it is a matter of considerable doubt whether such an onerous obligation should be placed upon the plaintiff. (See *Smith* v. *McGuire*[14].) Assuming, however, that the rule is well established in the law of contracts, there is a fundamental difference between cases of contracts for delivery of goods and cases of conversion. In the former case the purchaser has the money in his hands and may go into the market and purchase similar goods; but in the latter, the wrongdoer has the money in his hands and prevents the owner from using it. An argument such as that mentioned above was rejected by Abbot, C. J., in *Greening* v. *Wilkinson*[3] in the following words: "It may be said that if he had wanted cotton he might have immediately bought more, at that day's price, as soon as he found that this cotton was detained from him, but then to do that he must have had the money which he might not have ready on the very day of the detention nor on any day after till the price had risen." It seems to be entirely unjust to ask the plaintiff to pay the price a second time in order to procure a similar article to that of which he has been deprived. Assuming that every new purchase becomes in turn the subject of a fresh act of conversion should the owner go on replacing the goods every time?

It is in this connection that the cases of non-replacement of stocks and non-delivery of goods paid for in advance bear some analogy. In the stock cases it has been consistently held that the plaintiff is entitled at his option to the value at the date of replacement or on the date of trial.* Mr. Mayne takes the view that the stock cases stand apart and that a higher value is adopted in such cases because "stock may be supposed to be purchased rather for investment than for re-sale while goods are bought to use or to sell again." (Mayne on Damages, 10th Ed., p. 179.) This distinction, however, seems to be too artificial. In modern times stocks are as much the subject-matter of sale and re-sale as any article of merchandise. Such a distinction was rejected by the Court of Appeal in a case of wrongful detention of stock. (*Williams* v. *The Peel River*

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3. (1825) 1 Car. & P. 625 : 171 E.R. 1344.

14. (1859) 3 H. & N. 554 at 567 : 157 E.R. 590, *per* Martin, B.

*See *Forrest* v. *Elwes*, (1799) 4 Ves. Jun. 492 : 31 E.R. 252; *Shepherd* v *Johnson*, (1802) 2 East 211 : 102 E.R. 349; *Downes* v. *Back*, (1816) 1 Start 318 : 171 E.R. 485; *Harrison* v. *Harrison*, (1824) 1 Car. & P. 412 : 171 E.R. 1253; *Owen* v. *Routh*, (1854) 14 C.B. 327 : 139 E.R. 134 and *Michael* v. *Hart*, (1902) 1 K.B. 482 (C.A.).

Land and Mineral Co., Ltd.[15]) In fact the stock cases proceed upon the larger ground that the wrongdoer had kept the plaintiff out of his money and thus had rendered it impossible for him to take the benefit of a rising market. Baron Parke pointed out in *Shaw* v. *Holland*[16] that this was the distinction between cases of not replacing stock and cases of non-delivery of goods. (See also *Gainsford* v. *Carroll*[17] and *Robertson* v. *Dumaresq*[18]).

Similarly in the case of goods paid for in advance the purchaser is deprived of the use of his money by an act of the seller and in such a case the value of the goods at the date of trial has been taken to be the measure of damages. *Elliot* v. *Hughes*[5] is a case of this kind. It was there decided on the analogy of the stock cases that the purchaser could recover the value of the goods as on the date of the verdict. The earlier case of *Startup* v. *Cortazzi*[19] is supposed to have laid down a contrary rule. But as a matter of fact in that case only a portion of the purchase money had been paid in advance and it was on the ground that the plaintiff was kept out of his money rather than his goods that the compensation was restricted to the re-payment of the money advanced with interest. In fact Alderson, B. points out in the course of the judgment that "another criterion in such cases for estimating damages is to consider the loss of the gain which the party would have made if the contract had been complied with." One other case may be usefully referred to in this connection and that is *Barrow* v. *Arnaud*.[20] That was a case of wrongful detention of goods by the customs authorities. In awarding damages on the larger scale Tindal, C. J., distinguished it from ordinary cases of contract on the ground that the owner was kept out of his money by the wrongful act of the defendant and that consequently the latter should answer for all the losses resulting from his act.

It will thus appear that it is hardly satisfactory to adopt the value of the goods at the date of the conversion as the basis

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5. (1863) 3 F. & F. 387.
15. (1887) 55 L.T. (N.S.) 689, *per* Bowen, L.J.
16. (1846) 15 M. & W. 136 : 153 E.R. 784.
17. (1824) 2 B. & C. 624 : 107 E.R. 516.
18. (1864) 10 L.T. (N.S.) 110 at 113, *per* Lord Chelmsford.
19. (1835) 2 C.M. & R. 165 : 41 E.R. 710.
20. (1846) 8 Q.B. 604 : 115 E.R. 1004.

of damages where there is a rising market subsequent to that date. Any compensation allowed by the Court by way of interest on such an amount may in many cases prove totally inadequate. Such a view of damages seems to place too high a premium on the act of the wrongdoer. The action under those circumstances becomes merely one for money had and received. As Clerk and Lindsell point out, in none of the numerous cases in which the value at the date of conversion has been adopted as the basis of damages was the question of fluctuation in value ever raised. (Clerk and Lindsell on Torts, 7th Ed., p. 272. See also *Folk* v. *Fletcher*,[21] *Johnson* v. *Lancashire, Yorkshire Railway Co.*,[22] *Henderson* v. *Williams*[23] and *Rhodes* v. *Moules*.[24]) The real controversy in *Read* v. *Fairbanks*[25] and *France* v. *Gaudet*[26] was whether the plaintiff was entitled to recover the freight or the estimated profits by way of special damage. In this connection it may be pointed out that the rule laid down in *Mercer* v. *Jones*,[27] that in trover for bill of exchange the damages should be calculated according to the face value of the bill together with interest is unobjectionable because in such a case there is no fluctuation in the value of the article. In fact Abbot, C. J., who is responsible for laying down a more liberal rule in the case of goods and merchandise held in *Paine* v. *Pritchard*[28] that that was the proper rule in cases of bills of exchange.

If the date of conversion is departed from the question arises, where exactly should the line be drawn. It has been suggested that the value of the goods on the date on which the plaintiff had notice of the conversion may be taken as a guide; but how can the mere communication of the wrong place the owner in a better position? On the other hand, how can such a notice unaccompanied by any payment of the money actually realised give any rights to the wrongdoer? (See the observations of Stephen, J., in *Johnson* v. *Hook*.[4]) There is no case in which the date of notice has been recognised to be the material

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4. (1883) 31 W.R. 812.
21. (1865) 18 C.B.N.S. 403.
22. (1878) 3 C.P.D. 499.
23. (1895) 1 Q.B. 521.
24. (1895) 1 Ch. 254.
25. (1853) 13 C.B. 692 : 138 E.R. 1371.
26. (1871) L.R. 6 Q.B. 199 (C.A.).
27. (1813) 3 Camp. 477 : 170 E.R. 1452.
28. (1827) 2 Car. & P. 558.

point of time in assessing damages. In *Greening* v. *Wilkinson*[3] and *Johnson* v. *Hook*[4] the jury fixed the value on a particular day between the conversion and the date of the trial. The contention in such cases has generally been that the value should be taken as on the date of the commencement of the action or at the trial. It must be admitted, however, that the latter alternative introduces a good deal of uncertainty. After all there is no reason why the rights of the parties should be affected by the law's delay. If it is said that it is on that date that the plaintiff is enabled to purchase other similar goods, it may not be true; because the money may in fact be realised at a subsequent date. It is submitted that the proper way of assessing damages in such cases is to fix them with reference to the value of the goods on the date when the owner, after becoming aware of the conversion, calls upon the wrongdoer to make good the loss of his goods. This reduces the element of uncertainty to a minimum while affording every chance to the owner for being adequately compensated. It is only as expressing such a demand that the commencement of the action can be taken to be the material point of time.

While it must be confessed that any theory as to the measure of damages in such cases has necessarily to be complicated, the result of the foregoing discussion may be briefly stated as follows:—(1) Where there is no fluctuation in the price of the article converted the value at the date of conversion together with interest is the proper measure of damages. (2) Where the fluctuation takes the shape of a falling market subsequent to the conversion the owner is entitled to recover the amount actually realised by the wrongdoer together with interest. (3) Where the fluctuation shows a rising market but the conversion is proved to be the result of a *bona fide* mistake on the part of the tortfeasor the value of the goods at the date of conversion can be adopted as the basis of damages. (4) Where the conversion takes place under aggravating circumstances, and the wrongdoer does not communicate the same to the owner, the latter can claim damages on the basis of the highest value of the goods during the period when the owner did not have knowledge of the wrongful act. (5) Where the conversion takes place under aggravating circumstances and the owner does not adopt the option under the

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3. (1825) 1 Car. & P. 625 : 171 E.R. 1344.
4. (1883) 31 W.R. 812.

preceding rule he may, at any time after the conversion but before the period prescribed by the Statute of Limitations, call upon the wrongdoer to make good the loss of his goods. In such a case damages are to be assessed according to the value of the goods on the date of the demand. (6) Where at any time subsequent to the date of conversion the wrongdoer pays the owner the value of the goods actually realised by him the damages will be restricted, as in cases of detinue, to the difference between the amount so paid and the value of the goods estimated on the basis of the market price prevailing on that date.

Some comment is appropriate upon the way in which the Indian Courts have viewed the question. In the large majority of cases the value of the goods at the date of conversion has been adopted as the measure of damages. But no argument seems to have been advanced in any of those cases on the basis of the fluctuation in prices. The recent case of *Alliance Bank of Simla* v. *Firm of Ghamandi Lal Jaini Lal*[29] may be taken as typical. That was a case of unauthorised sales by a bailee and the Court awarded damages on the basis of the market value at the date of conversion. The decision of the Court of Appeal in *Henderson* v. *Williams*[23] was followed. But a perusal of the judgments will show that neither in the English case referred to nor in the Indian case which followed it, was any point sought to be made on the ground of fluctuation in prices. In a decision of the Sind Judicial Commissioner's Court there is a discussion as to how damages should be assessed in a case of fluctuation in prices. (*Louis Dreyfus & Co.* v. *Firm of Ghandamal & Co.*[30]) The Court held that damages need not be restricted to the value of the goods at the time of conversion. This case is closely analogous to *Johnson* v. *Hook*[4] both on the facts and on the measure of damages that was adopted.

In this connection the recent decision of the Madras High Court in *Tadi Sara Reddi* v. *Chelamcherla Brahmayya*[31] calls for more than a passing notice. The commission agent sold the goods without any reason whatever and in spite of stringent instructions from his principal not to do so. In an action to recover damages their Lordships held that the principal could recover the

4. (1883) 31 W.R. 812. 23. (1895) 1 Q.B. 521.
29. (1927) I.L.R. 8 Lah. 373. 30. (1918) 52 I.C. 878.
31. (1928) 55 M.L.J. 586.

value of the goods prevailing on a particular date shortly after the conversion. It was held that the plaintiff should be given some reasonable time after becoming aware of the sale to go into the market once again and stock similar goods. Before testing the correctness of the decision reference may be made to certain observations made by Srinivasa Aiyangar, J., in delivering judgment. His Lordship held that the rule of higher intermediate value was inapplicable to the particular case, but at the same time pointed out that it could be invoked in a case of conversion of articles of special value such as precious jems. It is extremely doubtful if the rule will apply even to such a case. A wrong does not become the greater because the goods in respect of which it was committed are not available in the market, nor will the owner be entitled, apart from special damage, to recover the value on the basis of what *could* have been the price. Apparently His Lordship had the case of *Armory* v. *Delamirie*[32] in view but that case simply held that the value of the best diamond should be given, it did not say that the highest value it could have sold for at any time should have been awarded. His Lordship again observed in the course of his judgment that the mere fact that the wrongdoer stands in a fiduciary relationship to the owner is of no consequence except perhaps to raise certain presumptions on facts. But it is settled law that the relationship of the parties is material in deciding whether the conduct of the wrongdoer is *bona fide* and that is a circumstance which is provable in aggravation or mitigation of damages. In fact in a case such as the one under discussion there are two wrongs, one the conversion of the goods and the other the failure to abide by the contract arising from the fiduciary relationship.

The way in which His Lordship assessed damages in the case is even more novel. It proceeds on the assumption that it was the duty of the owner to go into the market within a reasonable time after he came to know of the conversion and purchase other similar goods. The unsoundness of this position has already been indicated. Suppose the tradesman had invested all his fortune on a single venture and the goods had been converted and he had no money, should he borrow on the credit of his claim against the tortfeasor in order to stock other goods? Assuming he could do that, is it just that such an onerous obligation

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32. (1722) 1 Str. 504.

should be placed on him? His Lordship relied on two cases which on examination, however, do not support the conclusion arrived at. The case of *Burma Trading Corporation, Ltd.* v. *Mirza Mohomed Ally*[33] was an action for conversion but all that was held therein was that the value should be ascertained according to the price of the goods at the place where the principal market existed for them. This is perfectly correct and is in accordance with English cases. It was also laid down in that case following *Morgan* v. *Powell*[34] that the wrongdoer should be indemnified for expenses he had incurred on account of the sale. The case itself is no authority on the question as to how damages should be ascertained in a case where the market price fluctuates after the conversion. The other decision which is adverted to is *Manchubhai Navalchand* v. *John H. Tod.*[35] In that case Farran, J., laid down a threefold rule. First that in cases where the article is unique such as a picture the cost of re-purchase will be the criterion. Secondly, in the case of intermediate articles, such as pearls, the owner is entitled *wherever there is no rise in the market* to recover the expenses of sale and re-purchase by way of damages. Lastly, it was stated that "in the case of articles of common merchandise the state of the market subsequent to the sale would afford the criterion by which to fix the loss. If the market rose, the principal would sustain, and could prove a loss; if it fell he could not, as he could without loss put himself in his original position by purchasing merchandise of the same quality." It is rather unfortunate that this decision was not correctly understood in the case under discussion. As a matter of fact in that case the money realised at the sale had been paid to the principal long before and yet the Court held that the principal could recover damages with reference to the state of the market subsequent to the conversion, because obviously only by such a process can the owner purchase other similar goods and that is the only manner in which he can be fully indemnified.

To say the least, the rule adopted in the Madras case seems to be arbitrary. His Lordship rightly observed that "after all, a Court can only do its best by way of fixing the amount by the grant of which it will seek to place the plaintiff, as far as money can do it, in the same position in which he would have

33. (1878) L.R. 5 I.A. 130. 34. (1842) 3 Q.B. 278.
35. (1894) I.L.R. 20 B. 633.

been, had not the wrong been committed." But how is that to be achieved? It can only be achieved by enabling the owner to purchase other similar goods by going into the market. The value of the goods at the date of conversion if inadequate for this purpose must be supplemented by way of damages. Applying this test, which is also the one approved in the Bombay case, a decree should have been passed in the case under discussion in favour of the plaintiff for the difference between the amount that was accepted by the principal under protest and the value of the goods ascertained on the basis of the market price prevailing on that date. This will also be in accordance with the scientific rule as to the measure of damages enunciated above.

B. V. VISWANATHA AIYAR.

SUMMARY OF ENGLISH CASES.

MARSHALL, *In re* GRAHAM *v.* MARSHALL, (1928) 1 Ch. 661.

Will—Construction—Absolute gift—Subsequent gift over Failure of the gift over—Validity of the original gift.

A testator by his will appointed executors and trustees and after making various pecuniary and specific bequests he devised and bequeathed all his real and personal estate to the use of his trustees upon trust for conversion as therein mentioned and he directed that his trustees should make such payments as in his will mentioned and should invest the residue of the monies in the manner therein mentioned and pay the income thereof to his wife during her life and after her death the trustees should stand possessed of the trust fund and the income thereof in trust to pay 2|7th parts thereof to his son M. M. and another 2|7th to his son A.J.M. and one-seventh to each of his three daughters provided that the share expressed to be given to his son M. M. and to his daughters shall not vest absolutely in them but shall be retained by his trustees and in the event of the death of M. M. without leaving any children surviving him his share shall sink into and form part of his residuary estate, and he directed that his trustees should divide his residuary estate among charitable or benevolent objects. After the death of the testator, his son M. M. died as a bachelor intestate. Letters of Administration of his estate were granted to his widow. The gift of the

residue was held by the Court to be invalid. The question arose whether the share of M. M. passed as upon the intestacy of the testator or belonged to the testator's widow as his legal personal representative.

Held, that the interest of M. M. passed to his father's widow.

A DEBTOR, *In re* LAWRENCE, *Ex parte*, (1928) 1 Ch. 665.

Bankruptcy—Debt payable by instalments—Total amount more than £ 50—Judgment for two instalments for less than £ 50—Tender of the third instalment by the debtor—Refusal of tender—Bankruptcy notice on judgment debt—Subsequent petition on the entire debt—Sufficient cause—Bankruptcy Act, S. 5, sub-section (3).

Two instalments of a debt payable in three instalments having fallen due, the creditor instituted an action for the recovery of the overdue instalments and obtained judgment on the 3rd January, 1928. The third instalment became due between the date of the writ and the date of the judgment. On the 4th January the debtor sent a cheque for the third instalment, but the creditor's solicitors wrote saying that the cheque was not cleared but will be held until satisfaction was received in respect of the amount for which judgment had been obtained. On the 9th January the debtor wrote to the creditor saying that in lieu of the cheque he was sending cash for the third instalment but this was refused on the ground that the creditor was not prepared to accept any payment less than the full amount of the debt. On the 27th January the creditor filed a Bankruptcy notice in respect of the judgment debt. This notice contained a clerical error. On 16th February the creditor presented a petition for a receiving order alleging that the debtor owed him about £ 71 made up of the judgment debt and the final instalment and that he had failed to comply with the bankruptcy notice of the 27th January.

Held, that though at the date of the petition there were two debts amounting to over £ 50, the debtor had on the petitioner's invitation offered him cash for the third instalment debt and if that had been accepted the total debt would have been under £ 50 and that the refusal by the creditor of this amount amounted to "sufficient cause" within the meaning of Section 5 (3) of the Bankruptcy Act for not ordering the petition.

BATES, *In re.* MOUNTAIN *v.* BATES, (1928) 1 Ch. 682.

Company—Sale of machines for sums exceeding their values as stated in the balance sheet—Distribution of proceeds as bonuses—Bonuses whether capital or income.

A company owned certain steam fishing vessels, some of which were sold at prices considerably in excess of the values attributed to them in the books and balance sheets with the result that the company with its capital still in tact, became possessed of a surplus in cash which was invested in war stocks and other securities. This surplus was afterwards distributed among the share-holders as bonuses. On the dissolution of the company the assets were more than sufficient to repay all the capital.

Held, that this amount must be treated as income and not as capital.

WAY *v.* BISHOP, 97 L. J. Ch. 267.

Solicitor—Covenant not to practise within a given area—Acting as managing clerk to another solicitor—If amounts to breach of covenant.

Where the deed of partnership of solicitors contained a clause that one of them should not practise within a given area after the expiration of the partnership and that solicitor after the expiration of the partnership acted as the managing clerk to another solicitor within that given area,

Held, that his action did not amount to a breach of the covenant.

ATTORNEY-GENERAL *v.* PRITCHARD, 97 L.J.K.B. 561.

Sale of goods—Purchase money to be paid in instalments—Property to pass after payment of instalments—Non-payment of instalments—Death of purchaser—Abandonment of goods by executor—Vendor taking possession—Action against purchaser for purchase price—Maintainability.

A clause in a lease-deed provided that the lessee was to pay the cost of furniture and effects on the leasehold premises in six yearly instalments and the property in these goods should pass to the lessee after payment of all the instalments. None of the instalments was paid. The lessee died and his executors and beneficiaries remained in possession of the leasehold premises for

some time and subsequently vacated it. The vendor resumed possession of the furniture and effects and brought the present action against the executors and beneficiaries for the recovery of the unpaid instalment of the purchase money.

Held that, as the vendor had resumed possession of the goods and dealt with them in such a way as to put it out of his power to return it to the purchaser, his proper remedy was to sue for damages for breach of contract and not for recovery of purchase price.

GENERAL MEDICAL COUNCIL *v.* INLAND REVENUE COMMISSIONERS, 97 L.J.K.B. 578.

Income-tax Act, S. 37—General Medical Council—Council established mainly for the benefit of medical profession—Council incidentally beneficial to community—Exemption from income-tax.

The General Medical Council was established mainly for the purpose of distinguishing qualified from unqualified practitioners and the principal duties imposed by the Medical Act upon the Council were to keep and publish a register of qualified medical practitioners, to exercise oversight upon medical studies and examinations and to publish the British pharmacopoeia. The Council's income consisted of registration fees in connection with colonial and foreign qualifications, interest on investments, and profits on the sale of publications. There were also contributions from the English, Scottish and Irish branch Councils which collected the registration fees from the practitioners of those places. The expenditure of the Council consisted mainly of fees and expenses paid to members of the Council and its committees, the cost of inspecting medical examinations, printing, including the cost of printing the medical register and office expenses and sundries. The Council contended that it was a body of persons established for charitable purposes only, that the income of the Council was applicable and had been applied to charitable purposes only and that therefore it was exempt from income-tax. The Crown contended that the Council was a professional institution whose objects, aims and activities were directed mainly to the interests of medical profession and that therefore its income was taxable.

Held, that this Medical Council was not a charity within the meaning of S. 37 of the Income-tax Act and its income was not money which was applied for charitable purposes only.

WATSON *v.* GOVERNMENT INSTRUCTIONAL CENTRE, BIRMINGHAM, 97 L.J.K.B. 596.

Workmen's Compensation Act, S. 3—Workman—Unemployed youth admitted to Government Instructional Centre for training.

The expression "workman" in S. 3 of the Workmen's Compensation Act means any person who has entered into a contract of service or apprenticeship. Consequently, a young person who had been unemployed and who was admitted to a Government Instructional Centre for being trained at the workshop is not a workman, as the relationship between him and the Minister of Labour is not one of master and servant but that of pupil and teacher.

LLOYDS BANK *v.* CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA, 97 L.J.K.B. 609.

Banker and Customer—Cheque drawn upon another Bank —Cheque paid into private account—Collecting Bank not making any enquiry—Claim for conversion—Indian Negotiable Instruments Act, S. 131.

The plaintiff Bank banked with the Imperial Bank of India and their cheques must be signed by two of their officials. One of their officials was one *L*, their accountant who had over him in the Bank three superior officials. *L* had an account in the joint names of himself and his wife at the defendant Bank. *L* carried on a complicated system of fraud involving some 19 fraudulent cheques. He signed and by fraud procured another authorised official to sign 19 cheques on the Imperial Bank of India made payable to the defendant Bank. He sent them to the defendant Bank for collection on his behalf, the instructions to collect in that way being contained in a paying-in slip or more generally in an accompanying letter requesting the defendant Bank to place the accompanying cheque to the credit of his joint account and signed by *L* only. The letter was on the Bank's letter paper with printed heading. The defendant Bank collected the cheque which was duly honoured by the Bank of India and placed it to *L.'s* account. The account showed that it was

generally in small credit till the arrival of each fraudulent cheque, the funds collected from which were promptly drawn out. These fraudulent cheques were not discovered for a long time by reason of a complicated series of fraudulent entries, partly also by the neglect by the plaintiff bank of a series of elementary precautions. The plaintiff bank sued the defendant bank for conversion of the cheques.

Held, (1) that each cheque taken by itself was "issued," being signed and dealt with by persons having ostensible authority to sign and issue it, but the accompanying memorandum signed by *L* alone and its directions gave notice of irregularity which destroyed the "holding in due course";

(2) that, as the defendant bank had a title as a holder under the Indian Act, defective through notice, they were "true owners" within the meaning of S. 131 of the Indian Act;

(3) that the defendant Bank had not proved that they collected without negligence, as an examination of *L.'s* account would have put the defendant Bank on enquiry as to the source from which the payments were made; and

(4) that the plaintiff Bank was therefore entitled to succeed.

LEVENE *v.* INLAND REVENUE COMMISSIONERS, (1928) A.C. 217.

Income-tax—Residence—Ordinary residence—Assessee leaving United Kingdom and living abroad on medical advice—Stay for some months in each year in the United Kingdom—Income-tax Act, S. 46 (1),

A British subject after selling his furniture and surrendering the lease of his house went abroad to live there on medical advice. He lived abroad from 1919 to 1925. But in each of these years he used to return to England and spend some months there. While abroad and while in England he lived in hotels. He was assessed to income-tax for the fiscal years 1920-1921 to 1924-1925 in respect of his income from securities of British possessions and British war loans.

The assessee contended that he was neither resident nor ordinarily resident in the United Kingdom during the years in question and therefore exempt from payment of tax. The Special Commissioners of Income-tax held that he was resident

and ordinarily resident in the United Kingdom during these years and dismissed his claim.

Held, that the assessee was liable to pay tax as he was both resident and ordinarily resident in the United Kingdom having left it only for the purpose of occasional residence and that the findings of the Commissioners were findings of fact which could not be disturbed.

INLAND REVENUE COMMISSIONERS *v.* LYSAGHT, (1928) A.C. 234.

Income-tax—Residence—Ordinary residence—Assessee having a permanent house in Ireland—Assessee visiting and staying in United Kingdom for business purposes—Question of fact —Income-tax Act, S. 46 (1).

The assessee was born in England of Irish parents and was the managing director of an English Company. He resided in England with his family till 1919 when he partially retired from the business and having been appointed as an advisory director he sold his property in England and went to live on a family property in Ireland. As the Advisory Director of the English Company, he came to England to attend the meetings every month and when in England he generally stayed in hotels. His visits to England were solely for business purposes and his wife never accompanied him in these visits. He had no business activities in Ireland except the management of his estate in Ireland. He was assessed to income-tax by the General Commissioners for the years 1922-1923 and 1923-1924 in respect of income from foreign and colonial Government securities and war loan. The assessee claimed exemption on the ground that he was neither resident nor ordinarily resident in the United Kingdom. The claim was disallowed and on appeal to the Special Commissioners the same was confirmed.

Held, (by Viscount Sumner, Lord Atkinson, Lord Buckmaster and Lord Warrington of Clyffe, Viscount Cave, L.C. dissenting) that the conclusion of the Special Commissioners was a finding of fact and could not be disturbed as there was evidence to support it.

Held, (by Viscount Cave, L.C.) that the conclusion of the Special Commissioners was a mixed finding of fact and law and even on the assumption that it was a finding of fact it was a finding based upon no evidence.

OTTOMAN BANK *v.* JEBARA, (1928) A.C. 269.

Contract—Sale of goods—Delivery of goods to Syrian customers after outbreak of war with Turkey—Effect of war—"Value cheque on London"—Payment by customer in piastres—Depreciation in value of piastres after war—Suit for sterling value of the goods consigned—Effect of war on executory contract.

The plaintiff, residing at Manchester, was in the habit of buying Manchester goods and transmitting them to correspondents in Syria. The plaintiff used to take a bill of lading making the goods deliverable to the defendant Bank which had branch offices at Manchester and Beyrout in Syria. He also drew a bill upon his particular correspondent for whom the goods were destined and endorsed it to the Bank and on handing over the bills of lading, invoices, etc., to the Manchester branch, the latter would make advance to him on the bill, and would send the shipping documents to their Beyrout branch, who used to collect the price from the customer in exchange for the goods. On the Manchester Branch being advised by the Beyrout Branch that the price had been paid, a cheque for the sterling value of the goods, less any advance made, would be handed to the plaintiff. Accordingly, the plaintiff consigned to Beyrout goods which arrived there shortly before the outbreak of war, on 5th November, 1914, between England and Turkey and on that date the defendant Bank held the bills and documents representing the goods. The form of the bill was "Please pay to our order value cheque on London the sum of £.... sterling." After the outbreak of war, the defendant Bank at Beyrout delivered the goods to the customer on receiving the due amount in piastres which at the moment was equivalent to sterling in London. When the war ended, the value of the piastres greatly depreciated. The defendant Bank offered to pay the plaintiff an equal number of piastres to those which the Bank had received when they handed over the several parcels of goods, *i.e.*, the sterling value of the depreciated piastres.

In an action by the plaintiff for recovery of the sterling value of the several consignments or alternatively damages for conversion,

Held, (1) that the words "value cheque on London" meant that the payment which obviously would not be made in Beyrout in actual English currency must be so calculated as to represent what a cheque in London for the amount would cost.

(2) that the defendant was a debtor for the sterling amount on the face of the bill, and

(3) that the war had not abrogated the contract.

Per *Viscount Dunedin.*—"It is not every contract that is abrogated by the war: it is only a contract which is still executory and which for its execution requires intercourse between the English subject and the enemy that is so abrogated."

SOUTH BRITISH INSURANCE CO., LTD. *v.* GAUCI BROS. & CO., (1928) A.C. 352.

Arbitration—Action on contract—Plea that award is condition precedent to action—Dismissal of action—Subsequent arbitration—Jurisdiction of arbitrators to construe contract.

The defendant upon an action of contract raised the plea that an award was condition precedent to the right to sue according to the contract and, the plea being upheld, the action was dismissed. The claim was then submitted to arbitration and an action was brought to enforce the terms of the award. The defendant raised the plea that the arbitrators had no power to construe the contract and therefore the award was bad.

Held, that the defendants by their plea in the former action were precluded from raising this contention.

JOTTINGS AND CUTTINGS.

The New Judge at the Hague.—The vacancy on the bench of the Permanent Court of International Justice has been appropriately filled by the election of Mr. Charles E. Hughes, a former Secretary of State of the United States. A political post would not be a title to election, but Mr. Hughes was a member of the Supreme Court of the United States from 1910 to 1916, when he resigned in order to stand for the Presidency against Dr. Woodrow Wilson. The comparison of the Permanent Court with the Supreme Court of the United States and the Judicial Committee of the Privy Council is obvious. In time no doubt the Permanent Court will overshadow the other two; for wide and varied as are their jurisdictions—the Supreme Court over the numerous semi-sovereign communities which form the United States, the Judicial Committee (with the House of Lords) over the world-spread dominions of the British Crown—no limit

can be prescribed for the Permanent Court when, as must inevitably happen, all States submit to it as the guardian of law and order in the world. Mr. Hughes' seat in the Hague Court is a fitting sequel to his earlier position as a Justice of the Supreme Court of the United States.—*L.J.*, 1928, p. 157.

The Death Penalty.—In a letter to *The Times* (18th inst.) which we print elsewhere, Lord Buckmaster says that recent events—notably the result of the Slater appeal and the Home Secretary's eleventh-hour reprieve, because of an "element of doubt," of the three men convicted of the Brighton murder—have raised the capital punishment issue in an acute form, but that the abolition of the death penalty by Parliament without the assurance of popular support would be premature. The difficulty in a matter which is not a party question is to find where public opinion stands, and to get over this the National Council for the Abolition of the Death Penalty is launching a national petition for presentation to Parliament. Such a petition Lord Buckmaster regards as the only effective alternative to a referendum which, under our present constitution, is not available. Our own references to these same events have shown that we regard the question as ripe for discussion and determination, but we are not sure that the proposed method is suitable. In effect, Lord Buckmaster and his friends wish to place the National Petition on the footing of a referendum. Into the arguments for and against that method of submitting proposed legislation to popular approval we need not enter. It is a method to be used only on rare occasions, and its chief use, as Professor Dicey pointed out, is "to curb the absolutism of a party possessed of a Parliamentary majority" (Introduction to *The Law of the Constitution*, 8th Ed.). For questions not of political character it is less suited; and it does not seem to be suited to a matter such as capital punishment, in which sentiment, rather than reasoned consideration of results, is likely to prove a predominating influence. Hence, while we are in sympathy with Lord Buckmaster's desire to bring the subject before the public, we are not satisfied that the proposed petition is the wisest means of doing so.—*L.J.*, 1928, p. 170.

The Lawyers' Duty.—This last is, perhaps, the most unkindest cut of all. If there is one thing on which we pride ourselves, it is the recent reform of the Law of Property, which,

by the congenial process of "evolution, not revolution," has banished the archaisms of past centuries, and, in a series of some half-dozen statutes, has gone far to abolishing the lawyer and teaching every man to be his own conveyancer. Could self-denial go further? But putting this aside as an oversight on the part of Sir Maurice—and, indeed, we doubt whether anyone who ranks as a jurist would confess to knowledge of the New Conveyancing—what about the rest of the law? Equity he does not touch, but the Common Law he regards as hopelessly insular; or, if it has spread to America, this is only because Englishmen have taken it there. "The Common Law reigns only where English-speaking conquerors or colonists have carried it." As Sir Maurice also says, there is no example of any foreign country freely deciding that English Law is worthy of imitation. But this, surely, is in itself no reflection on English Law. Legal systems are a matter of historical development, and are not to be transported wholesale from one country to another, save where, as in the case of America, a void has to be filled. But the point Sir Maurice Amos reaches is that the amendment of the law really lies with the legal profession, save only where some powerful lay interest is touched. To quote again from Cicero's fancied report : "The legal profession must itself be vigilant and fresh-minded in the searching out of defects, and must have the power and duty to amend them—that was what de did in Rome." And that is what the legal profession, when it really wakes up, will do in England.—*L.J.*, 1928, p. 170.

Lord Astor's Bill.—The Wills and Intestacies (Family Maintenance) Bill, which was introduced by Lord Astor in the House of Lords at the close of the Session, was not immediately available, but it has now been published. In this country there has been so far no readiness to interfere with the freedom of testamentary disposition; in other words, society, as represented by Parliament, has been willing for a man, in making his will, to ignore the claims of those who are dependent on him. In general, no doubt, he does not do so. We have been told that when the new Rules of Distribution under the Administration of Estates Act, 1925, were being drafted, a large number of wills were compared, and an endeavour was made to arrive at rules which should represent the average distribution of property. The normal distribution is to give a life interest to the widow, and then equal division between children, but this is subject to many

variations. The new Rules of Distribution vary it by giving all chattels and 1,000*l.* to the wife, and a life interest in half the remainder. But this is confined to cases of intestacy. In cases of testacy, the law is only concerned to discover what the testator meant, often a difficult enough task. What he ought to have meant, or what he probably would have meant if his attention had been directed to particular doubts or omissions, does not concern the Court as the interpreter of the will. It may be possible sometimes to avoid an absurd construction, and impossible words have to be wrestled with. "This will," a Judge has been known to say—it was Astbury, J.—"has no meaning, but I have got to give it one." But there the function of the Court stops. It cannot alter an "inofficious" will.—*L.J.*, 1928, p. 181.

The Widow and Children's Portions.—Fortunately there are few countries so backward as our own in this respect, yet even here long resisted changes in the law sometimes come with surprising suddenness. The law of primogeniture had been regarded as a bulwark of society, but when its abolition was incorporated in Lord Birkenhead's scheme for the reform of the Law of Property, the change was accepted, so far as we remember, without a solitary protest. *Leges Angliae nolumus mutari,* said the Barons centuries ago, and so the rule of *Legitimatio per subsequens matrimonium* failed to gain entrance here, although it was recognised in the rest of the civilised world. That also has come, though not so silently as the abolition of primogeniture. "Among all forms of mistake, prophecy is the most gratuitous", said George Eliot in *Middlemarch.* But it is a reasonably safe forecast that interference with testamentary disposition will come like other seemingly stubborn reforms. Whether it will come on the lines of Lord Astor's Bill is a more difficult question. The Continental and Scottish mode is to secure a definite share for widow and children—*jus relictae* and *legitim.* In some of the Dominions the plan has been adopted of allowing the Court to interfere where inadequate provision has been made for the widow and children. There is a somewhat similar jurisdiction under S. 171 of the Law of Property Act, 1925, in relation to the settlement of a lunatic's property. On this several decisions have already been given by the Court of Appeal exercising jurisdiction in lunacy. Lord Astor's Bill combines the two methods. It lays down tests for a proper provision for widow and children, and allows the Court to intervene and award maintenance if

these tests are not complied with. At present it is not necessary to specify the provisions of the Bill in detail, but they should be capable of simplification.—*L.J.*, 1928, p. 182.

The Functions of the Director of Public Prosecutions.—The scope of the duties of the Director of Public Prosecutions—the term "Public Prosecutor", though sanctioned, perhaps, by long usage, is really misleading—was defined in 1886 by regulations framed by the then Attorney-General, Sir Richard Webster, which still remain in force. It is well that members of the legal profession should know the limits of the Director's duties, and we therefore quote the relevant regulation :

The cases in which it shall be the duty of the Director of Public Prosecutions to institute, undertake, or carry on a criminal proceeding in respect of an offence are the following:—

(*a*) Where the offence is punishable with death;

(*b*) Where the offence is of a class the prosecution of which has hitherto (*i.e.*, before 1886) been undertaken by the Solicitor to the Treasury;

(*c*) Where an order in that behalf is given to the Director by the Secretary of State or the Attorney-General;

(*d*) Where it appears to the Director that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest, and that, owing to the importance or difficulty of the case or to other circumstances, the action of the Director of Public Prosecutions is necessary to secure the due prosecution of the offender.

The great majority of the cases now undertaken by the Director of Public Prosecutions come, of course, under the last head, and it is no doubt as well that he takes, as Sir Archibald says, a fairly liberal view of the scope of his duties; in 1925 2,222 matters were reported to him, and 649 prosecutions undertaken, whilst 100 cases of appeal to the Court of Criminal Appeal were considered. The Director is also charged with the important duty of advising Chief Constables and Clerks to Justices on points of criminal law and practice. When the intricacy and difficulty of many of the cases undertaken, and the fact that delay, are borne in mind, it will be realised that the Director's Department is one, not merely of great importance but of great activity.—*L.J.*, 1928, p. 183.

BOOK REVIEWS.

THE TRIAL OF CHARLES I. Edited by J. G. Muddiman. Notable British Trials Series. Published by Messrs. Butterworth & Co., Ltd. Price Rs. 6-8-0.

Coming, as this volume does, from the pen of Mr. J. G. Muddiman, whom the Earl of Birkenhead describes as "bearing a name famous to historians" we need hardly hesitate in appreciating the motive which has inspired him to bring out "The Trial of Charles I., King of England." The whole trial when read in the contemporary memoirs, and Bradshaw's journal preserved in the Parliamentary records, may not adequately convey to us the enormous moment of the question whether the court which conducted the trial had been clothed with any authority to try him and pass the sentence of execution. Much information contained in some of the weekly journals, at the date of the trial edited by men like Walker, Dillingham, Mabbot, etc., which have been brought to light with indefatigable energy by this author, go much to prove, how high-handed had been the tribunal in its dealing of Charles I. when he was hauled up before it as a common prisoner. Rather, a feeling of horror seizes us towards the close when the sentence was pronounced by the Judge to the satisfaction of an angry army crying for his "execution" and "justice". There is not much of profit to be derived by the lawyer in going through the speech of the Counsel, Mr. Cook, charging the King as a traitor who betrayed the nation. The trial itself is short. For the King instead of defending himself had questioned the authority of those sitting as a Court. The book completely impresses us with its great value to the readers of English History. The tragedy of Charles I., with the history leading up to the pathetic end, is told in these pages, with much precision and penmanship. Indeed, this is worthy of the Trial Series which has already given us the historic trials of Mary Queen of Scots and Duchess of Kingston.—*K. C.*

THE INDIAN CONTRACT ACT, by Trikamlal R. Desai, B.A., LL.B. Edited by Sunderlal Trikamlal Desai, B.A., LL.B., Bar.-at-Law. 11th edition, 1928. Price Rs. 5-8-0.

This is a handy commentary on the Indian Contract Act with notes based upon the English and Indian cases, which has already run through ten editions. The editor has in the present edition carefully revised the book and the citations of cases are

brought down to July, 1928. The book is mainly intended for students and the analytical mode of treatment will be found very useful by them. At the same time, the practitioner will find in it the leading cases on the various points without being overburdened with the entire case-law. The printing and the get up of the book are attractive and we believe the present edition will enjoy the popularity of the previous ones.

DESAI'S ALL-INDIA COMPARATIVE TABLES, 1809 to 1927, by B. R. Desai, Vakil, High Court, Baroda. 1928. Price Rs. 15.

It is well known that there are a multitude of legal journals in this country reporting the decisions of the various superior courts and it is very common that the same decision is reported in a large number of journals. It is not possible for any but very few practitioners to have all the reports in their library. The present publication is under the circumstances almost a necessity in finding out where any case which is reported in some other journal is to be found reported in the journal which finds a place in the lawyer's library. It is therefore impossible to exaggerate the usefulness of this publication which will in most instances save the practising lawyer going in for an unnecessary multitude of legal periodicals.
