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RENEWAL OF WRITS IN NAMES OF DECEASED SUITORS.

It appears to us that the profession will be well advised if they act upon the presumption that the correctness of the decision of the Second Appellate Division of the Supreme Court of Ontario in the recent case of *Mahaffy* v. *Bastedo* is open to grave doubt. The question was whether an execution could be renewed after the death of a sole plaintiff without first obtaining an order to continue the proceedings as provided by Rule 300, or obtaining leave under Rule 566, and whether a sale under a writ renewed without such preliminary proceedings is valid. The Court decided these questions in the affirmative. Meredith, C.J.C.P., dissenting. We venture to question the view expressed by Mr. Justice Riddell as reported in the Weekly Notes (11 O.W.N. 150). If the writ were in the sheriff's hands in full force at the time of the plaintiff's death it undoubtedly might be executed notwithstanding his death and that is all the authorities cited by the learned Judge can possibly establish; but writs of execution have, as is well known, a limited duration, and if not kept renewed they expire. Now the renewal of a writ is a proceeding which must be taken by a suitor in esse who is before the Court, there is no authority cited by the learned Judge which establishes that proceedings can be taken in the name of a deceased person, or that a stranger to an action may intervene therein and take proceedings unless in some way authorized to to so by the Court, in which case he ceases to be a stranger. A man walking along Queen St. has no right to step into Osgoode Hall and take proceedings in any action he pleases, unless he is acting either in person as a litigant in the action, or is the duly authorized agent of some one who is a party. That is a proposition which, but for the decision in question, we should have thought to be so plain and indisputable as not to be even arguable.

If that be so, then it might be asked how can a writ be renewed by a dead man or by a stranger to the action? This is a proposition to which the majority of the Court do not appear to have seen fit to address themselves, as far as the note shows, and yet it is obviously at the very root of the question in issue. Two courses appear to have been open to the representatives of the deceased plaintiff (1) To apply, by analogy to the practice prescribed by Rule 566, for leave to renew the writ. (2) To obtain an order under Rule 300, continue the proceedings and then renew it in the name of the parties added by the order. The plaintiff's representatives adopted neither course, and yet it was held that the procedure was valid. It might be asked on whom would rest the responsibility for a writ renewed in such circumstances? Not on the deceased plaintiff obviously, nor his representatives, because even though they may have authorized the solicitors of the deceased plaintiff to proceed, it could be hardly intended that they authorized them to proceed otherwise than according to the course of the Court, and it may be that the solicitors by whom proceedings are taken in the name of a deceased person would incur a personal responsibility to a defendant whose property should be sold in such circumstances: see *Young* v. *Toynbee*, 1909, 1 K.B. 215. Therefore we say again it is perhaps advisable for the profession not to act upon the case in question, but rather follow the procedure pointed out in the Rules we have referred to, about which there can be no question. In the olden days so insistent was the Court that the suitor should appear in person, or by attorney, before it would proceed to exercise jurisdiction, that we find a defendant in one case actually brought into Court in his cradle, but we have travelled a long way from that, and now according to this lastest decision a person may take proceedings in an action to which he is not a party. The case we may observe appears to be opposed to the decisions in *Re Shephard, Atkins* v. *Shephard*, 43 ch. D. 131; and *Norburn* v. *Norburn*, 1894, 1 Q.B. 448 and *Chambers* v. *Kitchen*, 16 P.R. 219; 17 P.R. 3.

It is said by Riddell, J., that a writ is a judicial act, but though it is true that the writ itself is a judicial act, the issue of the writ

is not so, nor is the application for a renewal of a writ. Writs are not spontaneously issued or renewed by the Court, but only upon the application of the suitor, which because of its routine character is allowed to be made to the officers of the Court instead of to the Court itself. Theoretically they are heard by the Court itself. As Blackstone, J. remarked in *Sparrow* v. *Cooper*, 2 W.B. 1, 1314, the officer of the Court is supposed to be every day in Court sitting at the feet of the Chief Justice and affixing the seal of the Court to all judicial writs which are witnessed at Westminster in the name of the Lord Chief Justice. The suffering him to do this in a private chamber is a mere indulgence convenient to the Court, the suitor, and the officer, and therefore connived at, but the supposition of the law is otherwise; *mutatis mutandis*, this applies to all proceedings authorized to be taken in the offices of the Court.

We can hardly believe that any learned Judge who took part in this decision would knowingly grant an injunction, for instance, for, or against a dead person, and if he would not, how can the renewal, or issue of a writ, for or against a dead person be justified? On applications *ex parte* whether to the Court or its officers it is the duty of the applicant not to conceal any material fact. If the fact that the plaintiff was dead had been disclosed, we hardly think the application for renewal in his name, could, or ought, to have been successful. It is possible that the summary in the Weekly Notes does not accurately convey the language of the learned Judge.

ACTIONS TO ENFORCE MECHANICS' LIENS.

The Second Appellate Division of the same Court in *Barnes* v. *Curley*, 110 W.N. 271, reached the satisfactory conclusion that where an action to enforce a lien is brought, the rights of lien holders who are made parties to the action or served with notice of trial, are not affected by the fact that the plaintiff fails to establish his claim: any other decision would have made it necessary for every lien holder to institute an action on his own behalf in order to protect himself, which might have added enormously to the expense of this kind of action. In order,

however, that the action may be properly prosecuted after the plaintiff's claim has been dismissed, it would seem that an order to continue the proceedings in the name of some one competent to prosecute the action should be first obtained, but with this point the decision above referred to does not deal. We may observe that this decision establishes the correctness of the suggestion in Holmested's Jud. Act, p. 440, that this class of actions is an exception to the ordinary rule governing class actions, viz., that until judgment the plaintiff is *dominus litis*, and that a dismissal of the action or compromise of it before judgment prevents any other member of the class from prosecuting it.

THE LIABILITY OF A LANDLORD IN RESPECT OF A COMMON STAIRCASE.

It is curious to observe the numerous cases, of which *Groves* v. *Western Mansions* (*Times*, 22nd inst.) is the latest example, which are gathering round, but not yet finally deciding, the question of the liability of a landlord for defects in staircases and other parts required for common use of premises which are let out in flats or other separate tenements. Had the courts been content with the reasonable and, it would seem, sufficiently authoritative decision of the Court of Appeal—and a strong Court too, Lord Esher, M.R., and Bowen and Kay, L.JJ.—in *Miller* v. *Hancock* (1893, 2 Q.B. 177), the case would have been simple. There a business visitor to a tenant of offices was injured through the defective condition of the common staircase. The Court held that there was, by necessary implication, an agreement by the landlord with his tenants to keep the staircase in repair, and that from this sprang a duty towards visitors to the tenants to keep it in a reasonably safe condition. In *Huggett* v. *Miers* (1908, 2 K.B. 278) the Court of Appeal refused to extend the principle to the lighting of the staircase; but that is a matter depending on somewhat different considerations, and the case cannot be regarded as in conflict with *Miller* v. *Hancock* (*supra*). In other cases however, distinctions have been taken which have

had the result of largely nullifying that authority. In *Lucy* v. *Bawden* (1914, 2 K.B. 318), Atkin, J., limited the extent of the landlord's liability by holding that the defendant's knowledge of the defect was an essential element. The landlord was liable, indeed, for defects in the common staircase, but only when he was aware, or should have been aware, of them and the defendant was not—when, that is, the defect was in the nature of a trap. This, of course, deprives the doctrine of much of its utility. Premises have to be used, even though a defect is patent, and a landlord should not be able to escape liability by saying that the person injured was aware of the defect. In other words, the duty of the landlord should be, as in effect was held in *Miller* v. *Hancock* (*supra*), an absolute duty to keep the staircase in repair.

The attack on *Miller* v. *Hancock* was carried further in *Dobson* v. *Horsley* (1915, 1 K.B. 634), where a child of a tenant of a room had been injured through falling from a staircase, one of the rails of which was missing. It appeared that the railing was missing at the time of the letting of the room, and the fact that it was missing was obvious on inspection—at least to adults, if not to three-years-old playing with his toys. Hence Buckley, L.J., pointed out that there was no trap, and accordingly the child and his father, who were suing as co-plaintiffs, had no remedy. Here, as in other cases subsequent to *Miller* v. *Hancock*, it was observed that that was a decision upon the facts of the particular case—a remark which applies just as much, perhaps, to all decisions. It is a maxim of case-law that each decision is concerned only with particular facts, and when it purports to establish a principle wider than the facts require, the excess is liable to be treated as *obiter dictum*. In fact, the idea of *Miller* v. *Hancock* being based on the "trap doctrine" seems to have been invented by subsequent judges who did not care to place the landlord's liability as high as seemed proper to the Court of Appeal in that case, and *Dobson* v. *Horsley* and *Miller* v. *Hancock* must be regarded as being in conflict.

In *Hart* v. *Rogers* (1916, 1 K.B. 646), Scrutton, J., had to choose whether the duty of the landlord was an absolute duty to repair or only a duty not to set a trap. In that case the

question arose out of a defective roof through which water found its way into a flat. It is curious that *Dobson* v. *Horsley* (*supra*) does not seem to have been referred to, but the learned judge took a decided view as to the extent of the principle established in *Miller* v. *Hancock*, and he followed it in preference to the limitations imposed by later cases. "I have," he said, "carefully considered the language of *Miller* v. *Hancock*, and have come to the conclusion that, as reported, all the judges imposed an absolute duty to repair on the landlord. I think if the Court, and particularly Bowen, L.J., had meant merely to impose a liability for traps on the lines of *Indermaur* v. *Dames* (L.R. 2 C.P. 311), they were quite capable of expressing it in clear words, and would have done so."

But in the present case of *Groves* v. *Western Mansions* (*supra*) the Divisional Court (Lush and Bailhache, JJ.) had *Dobson* v. *Horsley* (*supra*) before them, and they held—though Bailhache, J., with hesitation—that the trap theory now holds the field. It may be so, but we have on numerous occasions expressed the view that *Miller* v. *Hancock* is the better authority, and, since leave to appeal has been given, we hope the matter may now be reconsidered, and the wide principle which the Court of Appeal first laid down confirmed.—*Solicitors' Journal.*

TERMINOLOGY OF COMPOUND NAMES.

A correspondent in a note published in our last volume (page 430) took exception to the expression "Lords Justices," which was used in 36 O.L.R. p. 205, thinking that grammar requires the expression "Lord Justices." Another correspondent now writes us taking strong ground against this criticism. He says that when the Court of Appeal in Chancery matters was instituted by 13 & 14 Vict. c. 83, it was expressly provided in sec. 3 that the Judges to be appointed should be called "Lords Justices," and they always were so called. Also that when the Judicature Act was passed in 1873 (36 & 37 Vict. c. 66), sec. 6 provided that the

"Judges of the Court of Appeal shall be styled Lords Justices o Appeal;" and our correspondent remarks, "no one with any sense of propriety would say anything else." It may be noted also that in M. & G. Reports the words "Lords Justices" are used as also the expression "Lords Chancellors." In the Law Reports the "Lords Justices" are named; and universally, apparently, this terminology is employed by English Judges. Murray's new English Dictionary moreover uses the same expression. Again it may be remarked that when the great seal was in commission it was handed to "Lords Commissioners." It appears therefore that the expression in 36 O.L.R. is amply justified by usage. But neither usage nor statute can alter grammar. Is it not correct to say as a general rule in reference to making a plural of compound words that one of them only should be pluralized, and not both, one of them being treated as an adjective? And if so it would be proper to say either "Lords Justice" or "Lord Justices," but not to put both words in the plural. We always say "Chief Justices" and not "Chiefs Justices" "Attorney-Generals" but not "Attorneys-Generals." So also "Masters of the Rolls" and "Barristers at law." Whether the expression "Lords Justices" ought to be regarded as an exception to, or a violation of, the general rule, we leave to the judgment of our readers.

The following words taken from a letter of one of the best of our profession in answer to words of sympathy on the death of his son at the front, is a brave and appropriate utterance :—

"When so many thousands of fathers are mourning the loss of their dear sons I cannot allow myself to feel this loss too selfishly. The men to be pitied are those who have sons who are unwilling to do their bit for king and country; for liberty and honor, at this period of our need."

REVIEW OF CURRENT ENGLISH CASES.

SALE OF GOODS—CONTRACT—"SUBJECT TO SAFE ARRIVAL"—SHIP NOT NAMED.

Barnett v. *Javeri* (1916) 2 K.B. 390. This was an action on a contract made between the parties whereby the defendants agreed to sell to the plaintiff goods "subject to safe arrival." The defendants had made a contract with another person for delivery to themselves of the goods in question which were expected to arrive from Alexandra. No ship was named in the contract between the plaintiff and defendants by which the goods were to arrive. The defendants' vendor was unable to obtain the goods or to supply them to the defendants, who, in consequence, was unable to deliver them to the plaintiff. The defendants claimed to be free from liability by reason of the words "subject to safe arrival," but Bailhache, J., who tried the action, held that those words, in the circumstances, afforded no defence, because there was an obligation on the defendants' part to ship the goods, or to get them so far under their control that they were placed on board some ship, and not having done so, they were not protected by the words relied on, which the learned Judge held merely meant that, provided the defendants shipped the goods, they were not to be liable for non-delivery consequent on any accident in their transit preventing their safe arrival. He therefore held the defendants were liable for breach of contract as claimed.

SUNDAY OBSERVANCE—SALE OF ICE CREAM ON SUNDAY—ICE CREAM IS NOT MEAT—SUNDAY OBSERVANCE ACT (29 CAR. 2, c. 7), ss. 1, 3.

Slater v. *Evans* (1916) 2 K.B. 403. In this case a Divisional Court (Darling, Avory and Horridge, JJ.) have decided that ice cream is not "meat" within sec. 3 of the Sunday Observance Act (29 Car. 2 c. 7) s. 3, and therefore that its sale by a restaurant-keeper on Sunday was a breach of the Act, and that both the vendor and vendee were liable to conviction, the latter on the ground that he had aided and abetted the vendor to commit an offence against the Act.

CONTRACT—LIGHTING OF STREETS—SUPPLY OF GAS AND LAMPS —INCLUSIVE FLAT RATE—GOVERNMENT ORDER RESTRAINING LIGHTING—CONTRACT IMPOSSIBLE OF PERFORMANCE—CONDITION PRECEDENT—DEFENCE OF REALM REGULATIONS.

Leiston Gas Co. v. *Leiston-cum-Sizewell* (1916) 2 K.B. 428. This is a case arising in consequence of the war. The plaintiffs were a gas company and had contracted with the defendants, a municipal authority, to supply all necessary lamps and gas for the lighting of the defendant's district. The lamps were supplied and the plaintiffs were ready and willing to furnish the necessary gas, but owing to a regulation issued by the Government the defendants were prohibited from lighting the street lamps. The plaintiffs nevertheless claimed to recover the quarterly payments due under the contract. Low, J., who tried the action, decided in favour of the plaintiffs (1916) 1 K.B. 912 (see ante vol. 52, p. 255), and the Court of Appeal (Lord Reading, C.J., Warrington, L.J., and Scrutton, J.) have now affirmed his decision, and have held that, as the rate of payment was a flat rate both for furnishing the lamps and supplying the gas, there could be no apportionment because it could not be determined how much of the contract price was attributable to the lamps, or how much to the gas to be furnished, and, moreover, that the furnishing of the gas was not a condition precedent to the plaintiff's right to recover.

CRIMINAL LAW—SENTENCE—EVIDENCE AS TO MOTIVE—AGGRAVATING CIRCUMSTANCES.

The King v. *Bright* (1916) 2 K.B. 441. The prisoner in this case was indicted for contravention of No. 18 of the Regulations made by Order-in-Council under the Defence of the Realm Act (5 Geo. V., c. 8) for having, without lawful authority, collected or attempted to collect information as to the manufacture of war material. It was not charged that he had done so for the purpose of assisting the enemy. The prisoner pleaded guilty, and Avory, J., who tried the case, heard evidence, and came to the conclusion therefrom that the accused had committed the act charged, and to which he pleaded guilty, for the purpose of assisting the enemy, and sentenced him to penal servitude for life. The Court of Criminal Appeal (Darling, Bray and Horridge, JJ.) reduced the sentence to ten years, being of the opinion that, although it was competent for the Judge who tried the person to inquire into the

motive of the prisoner, yet he could not properly as the result of such inquiry inflict a heavier sentence on the ground that it thereby appeared that the accused had committed a more serious offence than that for which he was indicted, and to which he had pleaded guilty.

ALIEN—SON BORN ABROAD OF NATURALIZED PARENT—RESIDENCE OF INFANT SON WITH WIDOWED MOTHER IN ENGLAND—NO GRANT OF CERTIFICATE OF NATURALIZATION TO MOTHER—NATURALIZATION ACT 1870 (33 VICT., C. 14) S. 10.

Jaffé v. *Keel* (1916) 2 K.B. 476. This was a case stated by Justices. Jaffé was charged with not having registered, being an alien enemy. The facts being that his father, who was a German, became naturalized under the Aliens Act 1844; he was married at that time to a German woman. In 1856 the father was sent from England to Germany as a missionary to Jews, and died in Germany in 1887. His widow in 1875 returned to England with the appellant, who was born in Germany, and had remained in England ever since and claimed to be a British subject. A Divisional Court (Darling, Avory & Horridge, JJ.) held that even assuming the appellant's father had, by his naturalization in 1844, become entitled to the privileges of the Naturalization Act of 1870, the appellant did not obtain the status of a British subject under s. 10, sub. s. 5 of the Act of 1870, which provides that "where the father or the mother being a widow has obtained a certificate of naturalization in the United Kingdom every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom shall be deemed to be a naturalized British subject," because his mother, although entitled to the privileges of a British subject by virtue of her husband's naturalization, did not herself obtain a certificate of naturalization in the United Kingdom.

INSURANCE, LIFE—POLICY ON LIFE OF ANOTHER—ABSENCE OF INSURABLE INTEREST—CONTRACT INDUCED BY FRAUD—RECOVERY OF PREMIUMS PAID—LIFE INSURANCE ACT 1774 (14 Geo. III. c. 48) s 1—(R.S.O. c. 183 s. 169).

Hughes v. *Liverpool Victoria Legal Friendly Society* (1916) 2 K.B. 482. This was an action to recover premiums paid on a void policy in the following circumstances. In 1908 and 1909 one Thomas effected with the defendants five policies of insurance

on the lives of others in one of whom he had an insurable interest, but as to the others it was doubtful. After a short time Thomas decided not to keep up the policies and stopped paying the premiums and burnt the policies. In 1910 Evans, an agent of the defendant society, persuaded the plaintiff to assume and keep up the policies of which he procured duplicates to be issued, and on Lloyd, another agent of the defendants, assuring her that if she paid the arrears and the future premiums it would be all right, she paid the arrears, and received the five duplicate policies. Thomas did not assign the policies nor ask for duplicates. The plaintiff had no insurable interest in any of the lives insured, and having discovered that the policies were illegal and void, brought the action to recover the premiums paid by her. The defendants contended that the parties were in *pari delicto* and, therefore, that the plaintiff could not succeed, because the defendants were by statute prohibited from issuing policies to insurers having no insurable interest. Scrutton, J., gave effect to their contention, but the Court of Appeal (Eady, Phillimore and Bankes, L.JJ.) held that the plaintiff having been induced to assume the policies and pay the premiums on the false and fraudulent representation of the defendants' agents that it would be all right to do so, she was not in *pari delicto* with the defendants, but entitled to recover what she had paid.

CINEMATOGRAPH—LICENSE—CONDITIONS OF LICENCE—REASONABLE CONDITIONS—VALIDITY OF LICENCE—(R.S.O. c. 236 s. 3)

Stott v. *Gamble* (1916) 2 K.B. 504. This was an action brought by the plaintiffs, dealers in cinematograph films, against justices of the peace to have it declared that certain conditions imposed by them in a licence granted for the exhibition of cinematograph films, were unreasonable and void, and an undue interference with the contractual rights of the plaintiffs. The plaintiffs were proprietors of a film known as "Five Nights," and entered into a contract to let to the Hippodrome Company a copy of their film to be exhibited during the week ending October 9th, 1915, at their theatre. On the 4th October, 1915, the defendants attended at the Hippodrome and viewed the film, and prohibited its exhibition. This they did under the provisions contained in the licence to the Hippodrome, whereby it was provided: "That no film shall be shown that is objectionable or indecent, or anything likely, or tending, to educate the young in the wrong direction, or likely to produce riot, tumult, or breach of the peace,

and no offensive representations of living persons shall be shown." Provided also "That no film shall be exhibited if notice that the justices (*i. e.* the licensing authority) object to such film has been given to the licensee."

In consequence of the notice, the Hippodrome gave notice to the plaintiffs that the film in question could not be, and it was not exhibited. Horridge, J., who tried the action, held that the meaning of the condition was that the licensing authority might give notice of objection to any film where they had *bonâ fide*, in the judicial exercise of their discretion, come to the conclusion that the film was objectionable on some one or more of the grounds mentioned therein, and that, so interpreted, the condition was reasonable and valid. And that even if the condition were unreasonable, the plaintiffs had no cause of action because there was no evidence that the defendants had knowingly, or for their own ends, induced the Hippodrome to commit any actionable wrong. The action therefore failed, and was dismissed with costs as between solicitor and client.

CONTRACT—IMPOSSIBILITY OF PERFORMANCE—PART PERFORMANCE—SUPERVENING ILLEGALITY—QUANTUM MERUIT.

St. Enoch Shipping Co. v. *Phosphate Mining Co.* (1916) 2 K.B. 624. This strikes us as a somewhat hard case, which, though it may be law, does not appear to be justice. The facts were that the owners of a British ship agreed to carry goods from Florida to Hamburg. On August 3, 1914, the ship sighted the Lizard and was warned by the British Admiralty to take the goods to an English port. On the following day war was declared between Great Britain and Germany and the further prosecution of the voyage to Hamburg became illegal and impossible. The cargo was thereupon discharged at Runcorn and deposited with warehousemen, subject to a lien claimed by the shipowners for freight. The owners of the cargo discharged the lien under protest and took the goods, never having assented to any alteration in the terms of the contract of carriage. The action was brought by the shipowners claiming a declaration that they were entitled to the freight in whole, or at all events for a proportionate part thereof, in respect of the part of the voyage actually completed. Rowlatt, J., however, who tried the action, held that the plaintiffs were entitled neither to the whole freight, nor to any proportionate part thereof by way of *quantum meruit*, and the action was therefore dismissed.

INSURANCE, LIFE — DEATH "DIRECTLY OR INDIRECTLY" CAUSED BY WAR—DEATH OF ASSURED BY ACCIDENT WHILE ENGAGED IN MILITARY DUTIES.

Coxe v. *Employers' Liability Assurance Co.* (1916) 2 K.B. 629. In this case the construction of a policy of life insurance was in question whereby the assured was insured against death except it be "directly or indirectly" caused by war. The insured was a military officer, and, in the discharge of his military duties, was accidentally killed by a train whilst walking alongside the rails of a railway for the purpose of visiting sentries posted along the line. An arbitrator to whom the claim was referred found as a fact that the death of the insured occurred while in the discharge of his military duty, and was within the exception, and this conclusion was affirmed by Scrutton, J., on a case stated by the arbitrator.

HUSBAND AND WIFE—ACTION BY WIFE AGAINST HUSBAND—TORT—ACTION FOR RESCISSION OF DOCUMENT FOR FRAUD—MARRIED WOMAN'S PROPERTY ACT, 1882 (45-46 VICT. C. 75) S. 12—(R.S.O. c. 149 s. 16).

Hulton v. *Hulton* (1916) 2 K.B. 642. This was an action by a wife against her husband to recover damages for deceit, alleging that by his fraudulent representations she was induced to execute a separation deed. The plaintiff also claimed to have the deed rescinded and declared void. As to the claim for damages Lush, J., held that the action was for tort, and could not be maintained; See the Married Women's Property Act, s. 12 (R.S.O. c. 149, s. 16) and could not be supported as an action for the protection of her separate property. But as to the second branch for rescission, although it was based on an alleged wrongful act of the husband, it was not an action for tort within the meaning of the section above referred to, and was maintainable, and judgment was given in favour of the plaintiff on that part of her case.

CRIMINAL LAW—EVIDENCE OF ACCOMPLICE—CORROBORATION.

The King v. *Baskerville* (1916) 2 K.B. 658. This was an appeal to the Court of Criminal Appeal from a conviction, on the ground that the evidence of an accomplice had not been sufficiently corroborated. The appellant was found guilty of

the commission of a criminal offence with two boys, who were called as witnesses and were accomplices in the crime. The only corroborative evidence offered was a letter in the prisoner's handwriting addressed to one of the boys arranging for a meeting with the two boys and enclosing money. The prisoner admitted the letter, and that the boys had come to his flat by his invitation, and alleged that they did so in order to confer with him about getting them employment. The Judge warned the jury not to convict unless in their opinion the evidence of the boys was corroborated in some material particular affecting the accused, but told them that they would be entitled to regard the above mentioned letter as sufficient corroboration. The jury found the prisoner guilty; and the Court (Lord Reading, C.J., Scrutton, Avory Rowlatt and Atkin, JJ.) affirmed the conviction.

WILL OF SOLDIER—WILL OF NURSE ON LEAVE AFTER RECEIVING ORDERS TO REJOIN ARMY—WILLS ACT 1837 (1 VICT. C. 26) S. 11—(R.S.O. C. 120 S. 14).

In re Stanley, 1916, P. 192. An army hospital nurse while on leave, but after she had received orders to return to duty, wrote a letter giving the addressee full liberty to deal with her affairs, and giving directions as to the disposal of her property. The letter was unattested and the question was whether or not it was a valid soldier's will under the Wills Act 1837. (1 Vict. c. 26) s. 11 (R.S.O. c. 120 s. 14). Deane, J., decided that it was, and that the addressee was executrix according to the tenor, and entitled to probate.

PRIZE COURT—ENEMY PLEDGOR OF CARGO—DEFAULT IN RESPECT OF ADVANCES—SALE BY PLEDGEE—LOSS OF RIGHT TO REDEEM—RELEASE TO PURCHASER.

The Ningchow (1916) P. 221. This was an application on behalf of the Crown to condemn a cargo which had been seized as prize. It appeared that the cargo was owned by Germans who had pledged it to a Japanese bank for advances. Default having been made in payment, the bank has sold the cargo to British subjects, and the purchasers claimed that the cargo should be released to them. Evans, P.P.D., held that the right of the pledgors to redeem had been lost by the sale, and they had ceased to be owners, and he ordered the cargo to be released to the purchasers, as claimed.

PRIZE COURT—ENEMY (GERMAN) SHIP—ENEMY (AUSTRIAN) CARGO—CARGO SEIZED BEFORE DECLARATION OF WAR—CONTINUOUS SEIZURE—HAGUE CONVENTION NO. VI. ARTS. 3, 4.

The Schlesein (1916) P. 225. In this case a German ship had been seized after war, and taken with her cargo, owned by Austrian subjects, to Plymouth. A writ was issued against the cargo some hours before war was declared with Austria, and a second writ was subsequently issued after war was declared with that country, which remained in the custody of the officer of the Court, until by consent it was sold by the officer, and the proceeds paid into Court. On an application by the Crown claiming the proceeds as prize, Evans, P.P.D., held that although the cargo might have been claimed in the interval between the seizure of the vessel and the declaration of the war with Austria, yet as that claim was not made, and the hand of the Crown remained on the goods, they became the subject of prize as soon as war was declared, and the proceeds therefore belonged to the Crown and that the goods were not protected under the Hague No. Convention VI. arts. 3 and 4.

PRIZE COURT—CARGO—INSURANCE AGAINST WAR RISKS—NEUTRAL PROPERTY AT DATE OF SEIZURE—PROPERTY IN ENEMY UNDERWRITERS AT DATE OF CLAIM.

The Palm Branch (1916) P. 230. This is another prize case. The facts being, that the goods in question were insured against war risks by enemy underwriters. At the time of seizure the property in the goods was in the shippers, who were neutrals. After the seizure the shippers' German agents claimed against the underwriters for a total loss. The underwriters paid in full and thereupon became owners of the goods, and the claim filed by the shippers in the Prize Court proceedings was, in fact, made by them on behalf of the underwriters. Evans, P.P.D., held that in these circumstances the enemy underwriters were really the beneficial claimants and that therefore the claim must be disallowed.

COMPANY—WINDING-UP—MANAGING DIRECTOR—SALARY AND COMMISSION—LOSS OF SALARY—LOSS OF PROSPECTIVE COMMISSION—LOSS OF OPTION TO TAKE SHARES—IMPLIED CONDITION AS TO EXERCISE OF OPTION.

In re Newman, Raphael's claim (1916), 2 Ch. 309. This was a winding-up proceeding in which the extent and amount of a

claim against the company was in question. The claimant was appointed managing director for one year from July 1, 1915, at a salary of £5 per week and a commission of £5 per cent. on all sales of the company's goods. By the agreement the claimant was, on applying to the company, entitled to an option to purchase one-third of the share capital of the company, and, when he acquired such shares, it was provided that his commission should cease but his employment should continue for ten years from July 1, 1915, at £5 per week. He was not to part with the shares without the written consent of the directors. On November 16, 1915, a compulsory winding-up order was made before the claimant had exercised his option. On December 3, 1915, he was employed by one of the directors, who carried on a similar business to that of the company, at £5 a week without commission and subject to a week's notice. In January, 1916, he sent in proof as a creditor of the company, claiming—

(a) Arrears of salary and commission up to the winding-up.

(b) Damages for loss of salary from the winding-up to 30 June, 1916.

(c) Damages for loss of commission during the same period.

(d) Damages for loss of option to take up shares, and of right to ten years' appointment.

The liquidator allowed the claim (a) and (b) up to the date the claimant obtained his new appointment, but rejected the rest of the claim.

On the hearing the claimant admitted that his present appointment, though precarious, would probably continue up to 30 June, 1916 but contended that damages ought to be assessed as at the date of the breach of contract, having regard to the probability of his obtaining full employment for the term. Astbury, J., held that in the circumstances, the claimant had not proved any damages under head (b) beyond what the liquidator had allowed. He also held that the claim of loss of commission under head (c) and for loss of option under (d) were not maintainable, and that as to (d) there was an implied condition that the option should be exercised while the company was in active existence, and this condition precedent not having been complied with, the claimant had no ground of claim under that head. The Court of Appeal (Lord Cozens-Hardy, M.R., Pickford and Warrington, L.JJ.) agreed with Astbury, J., in disallowing the claims under head (c), and the other grounds of claim do not appear to have been considered in appeal.

Correspondence.

APPEALS IN CERTIORARI MATTERS.

To the Editor, CANADA LAW JOURNAL:

DEAR SIR:—Several points of interest to the profession arose in connection with the endeavour to quash a conviction in *Rex* v. *Sinclair*, 7 O.W.N. 131.

Sinclair was convicted before the Police Magistrate for Toronto of stealing $5.00 from the Grand Trunk Railway Company, for whom he was working as a conductor. The evidence for the Crown showed that $5.00 had been quietly "slipped" to Sinclair to induce him not to collect the regular fare for three persons, the fare being $8.25. A motion to quash the conviction (made under Rule 1279) was refused by Mr. Justice Clute (36 O.L.R. 510). Leave to appeal to the Court of Appeal from Mr. Justice Clute's decision was given by Mr. Justice Kelly, under Rule 1287.

Upon the appeal coming on to be heard before the Court of Appeal, counsel for the accused was called upon to shew by what right an appeal could be taken to that Court from the decision of Mr. Justice Clute, the Court intimating its opinion that no such appeal lay. The following memorandum was thereupon submitted to the Court:

"Sec. 576 of the Criminal Code gives power to the Court to make rules

> (3) For regulating in criminal matters the pleading, practice and procedure of the Court, including the subjects of . . certiorari. . . ."

By virtue of such authority Rules 1279 to 1288 were passed on 27th March, 1908. (See Holmested, p. 143.)

Rule 1279 provides "In all cases in which it is desired to move to quash a conviction . . . the proceeding shall be by notice of motion," etc.

Rule 1284 makes the motion returnable before a Judge in Chambers; and

Rule 1287 says: "An appeal shall lie from the order of the Judge to a Divisional Court" (now the Court of Appeal) "if leave be granted by a Judge of the High Court."

That leave was granted by Hon. Mr. Justice Kelly.

The above rules are still in force and applicable to criminal proceedings in the Supreme Court of Ontario as at present constituted:

Rex v. *Titchmarsh*, 24 Can. Cr. Cas. 38, 22 D.L.R. 272, 6 O.W.N. 317.

"The provision allowing an appeal is a matter of practice and procedure:

Rex v. *Thornton*, 26 Can. Cr. Cas. 120. The Alberta Rule is:—

"20. When the motion (*i.e.* for . . . certiorari) is made to a Judge, an appeal shall lie to the Appellate Division but subject to such right of appeal his decision shall be final.

Beck, J., there says (26 Can. Cr. Cas. at page 137):—

"To me the principle is clear. It is that a single Judge is the delegate, committee, representative or mouthpiece of the Court and that being so, his decision is always open to review and revision by the Court . . . The Rule in question is merely one of procedure to obtain such a review or revision. Such power is inherent in this Court as having all the jurisdiction of the former English Superior Courts of common law and equity."

The law is exhaustively reviewed by the whole Court, and the conclusion reached that the right of appeal is a matter of practice and not of substantive law, as it would be if an appeal were given to another Court altogether—say to the Supreme Court of Canada. Accordingly the Rule was upheld.

Ontario Rule 1287 is, therefore, sufficient authority for the appeal in the *Sinclair* case"

The judgment of the Court (Sir Wm. Meredith, C.J.O., Maclaren, J.A., Magee, J.A., Hodgins, J.A., Riddell, J.) was delivered (11 O.W.N. 131) by the learned Chief Justice who said that: "The motion before Clute, J., and the appeal were misconceived as the summary convictions provisions of the Code do not apply to a prosecution under subsection 777 (5). It is only where the trial has taken place before two magistrates that an appeal lies in the same manner as from a summary conviction under Part XV. (s. 797). The only appeal which lies in a case such as this is that given by section 1013 of the Code, which provides that an appeal from the verdict or judgment of any Court or Judge having jurisdiction in criminal cases, or of a magistrate proceeding under section 777, on the trial of any person for an indictable offence, shall lie, upon the application of such person, if convicted, to the Court of Appeal, in the cases thereinafter provided for, and in no others. The appeal must therefore be quashed.

The same conclusion was reached in *Reg.* v. *Racine*, 3 Can. Cr. Cas. 447 (1900) Que. R. 9 Q.B. 134"

It is respectfully submitted that the Court entirely misapprehended the point before it. The appeal was not an appeal from a conviction, but an appeal in a *certiorari* proceeding, from a decision of Mr. Justice Clute refusing to quash a conviction. The case of *Reg.* v. *Racine* was one where an appeal was sought to be taken from a conviction and was not a motion to quash by way of *certiorari*.

It is also submitted that the right to move to quash a conviction still exists, and that, under the rules above referred to, an appeal may be had, on leave, to the Court of Appeal.

The merits of *Sinclair's* case were, of course, not determined by the Court.

Could a conviction for theft, under the circumstances, be upheld? The $5 received was evidently a bribe offered to Sinclair not to do his duty, which was, to collect $8.25 cash fares from the three passengers. The property in the $5 never was in the company; it was not received for them or on their behalf; in fact, the intention in paying it was, not that the company should receive it, but that the conductor, Sinclair, should retain it for his breach of duty.

The point came up squarely for decision in Alberta in the case of *Rex* v. *Thomson*, 21 Can. Cr. Cas. 80 (1911), and the decision was that the receipt and retention of the money did not constitute theft.

J. G. O'DONOGHUE.

TORONTO, Dec. 13, 1916.

[We shall refer to this at length in our next issue.—ED. C.L.J.]

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Ont.] [Dec. 11, 1916.

GLEN FALLS INSURANCE CO. v. ADAMS.

Appeal—Amount in Controversy—Joinder of Defendants—Separate Contracts.

A., by order of a master, was allowed to bring action against three insurance companies on three separate policies and obtained from the Appellate Division judgment against each for an amount less than $1,000 though the amounts in the aggregate exceeded that sum.

Held, following *Bennett* v. *Havelock Electric Light Co.* (46 S.C.R. 640), that the defendants were in the same position as if a separate action had been brought against each and, as none of them was made liable for a sum exceeding $1,000, no appeal would lie to the Supreme Court of Canada.

Appeal quashed with costs.

W. L. Scott, for motion to quash. *Leighton McCarthy*, K.C., contra.

Ont.] Dec. 11, 1916.

SHARKEY v. YORKSHIRE INSURANCE CO.

Insurance—Stallion—Conditions—Attachment of risk.

S. applied for insurance on a stallion "for the season," the application stating "term 3 mos." and that the insurers would not be liable until the premium was paid and the policy delivered. The policy eventually issued stated that the insurance would expire at noon on 7th September, and insured against the death of the stallion, after premium paid and policy delivered, from accident or disease "occurring or contracted after the commencement of the company's liability." The policy was delivered and premium paid before four o'clock p.m. of the 8th of June; the horse had become sick early that morning and died before six o'clock p.m.

Held, affirming the judgment of the Appellate Division (37 Ont. L.R. 344), that the statement in the application "date of expiry 7th Sept." did not override the express provision as to commencement of liability and make the risk attach from noon of 7th June; that there was no liability until the policy was delivered on the 8th of June; and, as the horse died of an illness contracted before such delivery, S. could not recover.

Appeal dismissed with costs.

Sir George C. Gibbons, K.C., for appellant. *G. F. Macdonnell*, for defendants.

B. C.] [Oct. 18, 1916.

TAIT v. BRITISH COLUMBIA ELECTRIC RY. CO.

Appeal—Jurisdiction—Action in County Court—Concurrent jurisdiction with Superior Court—Construction of statute—Supreme Court Act — B.C. Court of Appeal Act — B.C. "County Courts Act"—New trial—Re-hearing.

An action in the County Court in British Columbia to recover $578, damages for injuries sustained, alleged to have been caused through negligence, was dismissed by the County Court Judge after the evidence for the plaintiff had been put in, the defendants offering no evidence. The plaintiff appealed to have judgment entered in his favour or, alternatively, to have the case remitted to the County Court to have damages assessed, or for such further order as might be deemed proper by the Court of Appeal. The appeal was dismissed and the judgment appealed from affirmed. The British Columbia Court of Appeal Act, R.S.B.C., ch. 51, s. 15, s-s. 3, provides that every appeal shall include a motion for a new trial unless otherwise stated in the notice of appeal. On motion to quash an appeal to the Supreme Court of Canada on the grounds that the notice prescribed by sec. 70 of the Supreme Court Act had not been given within 20 days from the date of the judgment appealed from and that the action was not of the class in which a County Court had concurrent jurisdiction with a superior Court, under sec. 37*b* of the Supreme Court Act limiting appeals to the Supreme Court of Canada.

Held, Duff, J., dissenting, that no appeal could lie to the Supreme Court of Canada.

Per Fitzpatrick, C.J.:—As the case was not one in which a County Court is given concurrent jurisdiction with a superior Court, under section 40 of the County Courts Act, R.S.B.C. 1911, ch. 53, the Supreme Court of Canada had no jurisdiction

to entertain the appeal. *Champion* v. *World Building Co.* (50 Can. S.C.R. 382) referred to.

Idington, J., adhered to the opinion expressed by him in the case of *Champion* v. *World Building Co.*, 50 S.C.R. 382.

Per Anglin, J.:—In the circumstances of the case the judgment of the Court of Appeal should be regarded as a judgment upon a motion for a new trial within the meaning of sec. 70 of the Supreme Court Act, R.S.C. 1906, ch. 139, and, notice not having been given as thereby provided, there could be no appeal to the Supreme Court of Canada. *Sedgwick* v. *Montreal Light, Heat and Power Co.*, 41 S.C.R. 639, and *Jones* v. *Toronto and York Radial Ry. Co.*, S.C. Pr. 432 referred to. *Champion* v. *World Building Co.*, 50 S.C.R. 382, adhered to.

Per Duff, J., dissenting:—The judgment from which the appeal is asserted was not a judgment upon a motion for a new trial but a decision on the merits of the case upon an appeal by way of re-hearing by the Court of Appeal for B.C. which had before it all the evidence necessary for that purpose. Consequently, section 70 of the Supreme Court Act had no application to the appeal to the Supreme Court of Canada. Further, the County Court derived its jurisdiction from section 30, s-s. 1, of the County Courts Act, R.S.B.C. 1911, ch. 53, and its powers to exercise that jurisdiction under sec. 22 of that Act; consequently, the County Court possessed "concurrent jurisdiction" with the Supreme Court within the meaning of sec. 37*b* of the Supreme Court Act R.S.C. 1906, ch. 139, notwithstanding that the word "concurrent" is not employed in either of those sections of the County Courts Act.

Appeal quashed with costs.

Tilley, K.C., for the motion to quash. *R. M. Macdonald*, contra.

Province of Ontario

SUPREME COURT.

Middleton, J.] ANSELL v. BRADLEY. [13 D.L.R. 207.

Mortgage—Notice of sale—Signature of mortgagee.

The absence of a mortgagee's signature to a written notice of sale served upon the mortgagor under the power of sale con-

tained in the mortgage is fatal to the validity of any sale thereunder.

S. H. Bradford, K.C., for plaintiff.
T. P. Galt, K.C., for defendant Bradley.
G. H. Watson, K.C., for defendant Eckhardt.

ANNOTATION ON THE ABOVE CASE FROM D.L.R.

Clause 14, of the Statutory form of Mortgages (R.S.O. 1914, ch. 117) conferring the power of sale and providing for application of moneys is one which varies much from the modern approved forms.* It conflicts apparently as regards right to possession with clauses 7 and 17. It does not extend to breach of covenants as do those clauses. The power is given to the personal, as well as the real, representatives, although by the Devolution of Estates Act, R.S.O. c. 119, s. 7, it is enacted that in the interpretation of any Act, or any instrument to which a deceased person was a party, his personal representatives, while the estate remains in them, shall be deemed his heirs, unless a contrary intention appears. And though the administrator might sell under the power while the estate is vested in him, yet if it should shift into the heirs, the administrator might still sell. It should not, however, be dependent on notice, but the provision as to notice should be by a covenant by the mortgagee that notice shall be given; and the purchaser should be expressly relieved from any necessity as to seeing that notice was given. There is no power to the mortgagee to buy in an auction and re-sell without being responsible for loss or deficiency on re-sale; or to rescind or vary any contract of sale that may have been entered into; or to sell under special conditions of sale (though the latter may be permissible when the conditions are not of a depreciatory character). The application of insurance moneys is provided for. The surplus of sale moneys is to be held in trust to pay to the mortgagor. There is no clause relieving a purchaser from seeing that default was made, or notice given, or otherwise as to the validity of the sale; the importance and benefit of which to the mortgagee, and even to the mortgagor, will be presently alluded to. The provision that the giving of the power of sale shall not prejudice the right to foreclose is unnecessary, as it is an independent contractual right.

For the transfer of the legal estate of the mortgagee at law no power of sale is requisite, and the assignee or vendee will take subject to such rights as may be subsisting in the mortgagor, or those who claim under him, of possession, redemption, or otherwise; in other words, the mortgagee may always assign the mortgage debt and convey the land; and thus a sale and conveyance of the estate by the mortgagee to a vendee, though made professedly as in exercise of a power of sale in the mortgage, is valid to pass the legal estate of the mortgagee, even though no power of sale existed, or were improperly exercised, and when the mortgagor's right to possession is gone, the vendee can maintain ejectment; he occupies, in fact, the position of assignee of the mortgage, see *Nesbitt* v. *Rice*, 14 C.P. 409. The chief object of the power is to enable the mortgagee or other party claiming through him to sell

and convey the land free from the right of redemption of the mortgagor, and of all claiming through him subsequent to the mortgage, whether by express charge or by execution, or otherwise, and thus avoid the time and expense of proceedings required to foreclose or sell under the order of the Court.

The power of sale is now commonly resorted to, and although at first sight its insertion may appear prejudicial to the interests of the mortgagor, yet in truth it is not so, if it is only to be exercised on reasonable notice after default and the sale take place at public auction. The absence of such a power may be very prejudicial to the interests of both mortgagor and mortgagee, where the equity of redemption becomes incumbered by executions or otherwise, as on a suit of foreclosure or sale the incumbrancers have to be made parties, sometimes at great expense. As regards any objections on the ground of possibility of improper exercise of the power by an individual, which could not happen on sale under direction of the Court, a Court of equity will closely scrutinize the mortgagee's conduct, and, if improper, afford relief.

The word "assigns," as referable to the mortgagee, should never be omitted, for in its absence it has been said that an assignee of the mortgage could not exercise the power of sale, Davidson Conv., 3 ed., vol. 2, 621; *Bradford* v. *Belfield*, 2 Sim. 264, and it may be doubtful whether a devisee could, *Cook* v. *Crawford*, 13 Sim. 91; *Wilson* v. *Bennett*, 5 DeG. & Sm. 475; *Stevens* v. *Austen*, 7 Jur. N.S. 873; *Macdonald* v. *Walker*, 14 Beav. 556, see also *Ridout* v. *Howland*, 10 Gr. 547.

The power in the statutory form is made conditional on notice being given. It is preferable that notice should be provided for by a separate covenant by the mortgagee not to sell till after the specified notice, *Forster* v. *Hoggard*, 15 Q.B. 155. But where the statutory form is used the mortgagee cannot sell without notice. As it has been held that the statutory form cannot be modified by changing the provision for notice to one without notice, *Re Gilchrist & Island*, 11 Ont. R. 537; *Clark* v. *Harvey*, 16 Ont. R. 159. See also R.S.O. c. 112, s. 27, it is incumbent on the conveyancer to make an additional stipulation that after default for a longer period than that mentioned in the power, the mortgagee may sell without notice.

As regards the clause or covenant providing that notice be given before sale under the power, if assigns are to receive notice, ample scope should be given as to the mode of giving it, and it might be provided that the notice need not be personal, but may be left on the premises, and need not be addressed to any person by name or designation, or may be sent by post addressed to the party at the post office next his residence. Where the power required the notice to be served on the mortgagor, "his heirs, executors, or administrators;" it was held that a notice given after a mortgagor's death should have been served upon both the heir and administrator, *Bartlett* v. *Jull*, 28 Gr. 142. And where the notice is to be served on the mortgagor, his heirs, or assigns, and the mortgagor has made a second mortgage, the notice must be served upon both the mortgagor and his assign, the second mortgagee, *Hoole* v. *Smith*, 17 Ch. D. 434. This may be provided against by stipulating that the notice may be served on all the persons named, "or some or one of them," *Bartlett* v. *Jull*, *supra*.

Although personal service on the mortgagor is requisite, yet, where a notice of sale was served on an agent of the mortgagor who subsequently transmitted it to the mortgagor, who received it in time, it was held to be sufficient. *Fenwick* v. *Whitwam*, 1 O.L.R. 4.

It is most inadvisable to omit a private power for sale without notice; because if the mortgagor should die intestate and no letters of administration should be applied for the mortgagee cannot proceed as there is no one upon whom notice could be served.

An execution creditor whose writ is in the sheriff's hands at the time of giving the notice of sale has been said to be an "assign" entitled to notice, *Re Abbott & Metcalfe*, 20 O.R. 299, although the interest of the mortgagor is such that it could not be sold under the writ, *Glover* v. *Southern Loan Co.*, 1 O.L.R. 590. But see *Ashburton (Lord)* v. *Norton*, [1914] 2 Ch. 211.

It is important, also, to provide that any sale purporting to be made by the mortgagee shall be valid as regards the purchaser in all events of impropriety in the sale, leaving the former personally liable for improper conduct, if any; and that the purchaser shall not be bound to enquire as to whether notice has been given, or default made, or otherwise as to the validity of the sale. In the absence of such a clause the mortgagee selling may sometimes have difficulty in enforcing the sale against an unwilling purchaser, see *Hobson* v. *Bell*, 2 Beav. 17; *Ford* v. *Heely*, 3 Jur. N.S. 1116; *Forster* v. *Hoggart*, 15 Q.B. 155; *Dicker* v. *Angerstein*, 3 Ch.D. 600. But such a clause will not protect a purchaser who has express notice that the notice of sale stipulated for has not been given. *Parkinson* v. *Hanbury*, 2 D.J. & S. at p. 452; *Selwyn* v. *Garfit*, 38 Ch.D. 273.

Where the mortgagee proceeds under the statutory power given by the Mortgage Act, R.S.O. ch. 112, sec. 19, and has made a conveyance to the purchaser, the latter's title cannot be impeached on the ground that no case had arisen for exercising the power of sale, or that the power had been improperly or irregularly exercised, or that notice had not been given, but the person damnified is to have his remedy against the person exercising the power, R.S.O. ch. 112, sec. 22.

The power usually authorizes a sale by private contract or at public auction, for cash or on credit, in one parcel or in lots, from time to time, under any special conditions of sale as to title or otherwise, with power at any sale at auction to buy in and re-sell, without being responsible for any loss or diminution of price occasioned thereby, and to rescind or vary any contract of sale that may have been entered into, *Dudley* v. *Simpson*, 2 Ch. App. 102.

On any sale under the power, the vendor must be careful so to act that the interests of the mortgagor be not prejudiced by any negligence or misconduct. The duty of a mortgagee on a sale by him resembles that of a trustee for sale, *Richmond* v. *Evans*, 8 Gr. 508; *Latch* v. *Furlong*, 12 Gr. 306, though he is not a trustee but has a beneficial interest in realizing so as to recover his money, see *Kennedy* v. *De Trafford*, [1897] A.C. 180, as to his duties. A greater latitude may be allowed to a mortgagee than to a bare trustee not interested in the proceeds, and the Court might restrain a sale by a trustee under circumstances in which they would not restrain a mortgagee, (as to cases wherein the Court declined to interfere: *Matthie* v. *Edwards*,

11 Jur. 761; *Kershaw* v. *Kalow*, 1 Jur. N.S. 974; see also *Falkner* v. *Equitable Society*, 4 Drew. 352. It is more advisable, of course, in order to avoid any ground of complaint of insufficiency of price or of unfair sale, that the property should be sold at public auction, instead of by private contract, even though the power authorize the latter. In one case where the mortgagee expressed a desire to get his debt only, and made no effort to sell, and never having advertised, sold at private sale at a great undervalue, the sale was set aside, though it did not appear that the purchaser was aware of the negligence of the mortgagee, *Latch* v. *Furlong*, 12 Gr. 303. Due notice by advertisement of the intended sale should be given, and perhaps as to this the practice which governs on sales by the direction of the Court would be the safest guide. Unnecessary and too stringent conditions of sale as to title and production of title deeds or otherwise should be avoided as likely to prejudice the sale; and if in this or other respects the conduct of the mortgagee be improper, not only will he be held responsible, but under circumstances the sale may be set aside. *Richmond* v. *Evans*, 8 Gr. 508; *Jenkins* v. *Jones*, 2 L.T.N.S. 128; *Latch* v. *Furlong*, 12 Gr. 303; *McAlpine* v. *Young*, 2 Ch. Ch. 171. As to depreciatory conditions, see *Falkner* v. *Equitable Ben. Society*, 4 Drew. at p. 355; but the circumstances must be very strong to induce the Court to set aside a sale as against a purchaser acting *bonâ fide*, and if the sale were set aside as against such purchaser, he might be allowed for his improvements, *Carroll* v. *Robertson*, 15 Gr. 173.

A mortgagee cannot purchase at a sale under his power, and, notwithstanding any such purchase, he will still continue mortgagee, and liable to redemption. His duty as vendor is to obtain as much as possible for the property, his interest as purchaser is the reverse of this, viz., that the property shall sell for as low a price as possible. Courts of equity forbid a man placing himself in this position, wherein his interest may conflict with his duty. Neither can an agent of the mortgagee buy for him, nor his solicitor's clerk, *Ellis* v. *Dellabough*, 15 Gr. 583; *Nelthorpe* v. *Pennyman*, 14 Ves. 517; *Howard* v. *Harding*, 18 Gr. 181, nor his solicitor, either for himself or the mortgagee, *Downs* v. *Grazebrook*, 3 Mer. 200; *Whitcomb* v. *Minchin*, 5 Madd. 91. Nor can the secretary or manager of a company (mortgagees) buy at a sale by the company *Martinson* v. *Clowes*, 21 Ch.D. 857. But a second mortgagee buying on a sale by the first mortgagee, under a power of sale in his mortgage, takes the estate as any stranger, free from the equity of redemption, *Shaw* v. *Bunny*, 2 D.J. & S. 468; *Parkinson* v. *Hanbury*, 2 D.J. & S. 450; *Watkins* v. *McKellar*, 7 Gr. 584; *Brown* v. *Woodhouse*, 14 Gr. 684. And if the mortgage of the second mortgagee be *in trust* for sale on default, instead of with the usual power of sale, so that the mortgagee stands more in the position of a trustee, it is said, *Kirkwood* v. *Thompson*, 2 D.J. & S. 613; but see *Parkinson* v. *Hanbury*, 2 D.J. & S. 450, even then he can purchase from a prior mortgagee.

Whoever is entitled to the right to redeem is the person who is entitled to the residue of the property left unsold after satisfaction of the mortgage debt, and the surplus proceeds if all be sold. Before the Devolution of Estates Act, if the mortgagor of a freehold did not intend this, but intended a conversion in the event of a sale, and that the proceeds shall go as personal estate, then that should have been clearly expressed; for when there was a

mere power and not an absolute trust for sale, and a sale took place *after* the death of the mortgagor, the surplus proceeds went to the heir, even though the trust of them should have been declared in favour of the personal representatives. *Wright* v. *Rose*, 2 Sim. & Stu. 323; *Bourne* v. *Bourne*, 2 Ha. 35 But since that Act, if the sale be made before the land shifts unto the heirs the surplus must go to the personal representative. But if the sale takes place after the land vests in the heirs, the former law will prevail. On a badly drawn mortgage, by inattention to the above, the mortgagee may frequently be misled into payment to the wrong party. Where a sale is had in the lifetime of the mortgagor, the surplus proceeds will go to personal representatives on his death before payment. The general principle is, that the property or its proceeds will, where there is a mere power of sale, go to real or personal representatives, according to the state in which it was on the death of the mortgagor.

The mortgagee, in distributing the surplus purchase-money, is under an obligation to see that it is properly applied, and that collateral securities held by subsequent incumbrancers are saved for those entitled to them. *Glover* v. *Southern Loan Co.*, 1 O.L.R. 59; so held by the majority of the Court.

The effect of giving notice of exercising the power of sale is to stay all proceedings for the time (if any) mentioned in the notice for payment, even the proceedings under the notice itself, R.S.O. ch. 112, sec. 29. The original statute providing for this declared that no further proceedings "at law or in equity" should be taken, and no suit or action should be brought, the purpose being to prevent the making of unnecessary costs. After the Judicature Act was passed, and the distinction between Courts of law and equity was abolished, the words, "at law or in equity," were dropped out of the Act in the next revision of the statutes. The Act in that condition simply declares that no further proceedings and no action shall be taken, after a notice given, until the expiration of the time mentioned in the notice. Hence it was held that further proceedings for sale under the power itself were included in the enactment, and notice to sell has therefore the effect of staying proceedings to sell, *Smith* v. *Brown*, 20 O.R. 165; *Lyon* v. *Ryerson*, 17 P.R. (Ont.) 516. It is not necessary to demand the money in a notice of sale, or to fix or mention any time in the notice for doing anything required to be done, although the amounts claimed for principal, interest and costs, respectively, must be stated in the notice, R.S.O. ch. 112, sec. 28. But if any time is mentioned, it should be forthwith, in order to prevent the notice from operating as a stay. The enactment in question authorizes an application to the Court for leave to bring an action, notwithstanding the stay, and the motion may be made *ex parte*, and is never refused when the desire is to recover possession in anticipation of being obliged to deliver the land to a purchaser. But this section does not apply to proceedings to stay waste or other injury to the mortgaged property. The notice operates as a stay, whether the action is commenced before or after the notice is given, *Perry* v. *Perry*, 10 P.R. (Ont.) 275; *Lyon* v. *Ryerson*, 19 P.R. (Ont.) 516.

Where a deed is absolute in form, but is, in reality, a security for money lent, no power of sale is implied in it, and the grantee cannot sell without the concurrence of the *cestui que trust*, *Hetherington* v. *Sinclair*, 34 O.L.R. 61; 23 D.L.R. 630.

Boyd, C.] RE CUTTER. [13 D.L.R. 382.

Wills—Life estate—Remainder over—"Revert."

Where a testator leaves all the residue of his estate to a named person, and then says that on the decease of such person "the unused or unexpended balance shall revert," an apparently absolute gift is cut down to a life estate; if the life tenant be one for whose maintenance the testator was evidently providing, the whole residue may be employed for that purpose, in specie, and if necessary the capital may be encroached upon.

R. G. Smythe, for appellants.

D. Inglis Grant, for Rose A. Cutter.

ANNOTATION ON THE ABOVE CASE FROM D.L.R.

Before the enactments presently referred to, words of limitation were necessary in a will to pass the fee. But the intention to pass the fee might appear from other clear expressions of the will. Thus, a devise to J. D. "for his children" passed a life estate only. *Hamilton* v. *Dennis*, 12 Gr. 325.

After devises in tail to children, and a residuary devise of all property "not herein mentioned," there followed a devise of lands specifically to J. K. and J. S., without words of inheritance. Held, that J. K. and J. S. took estates for life only, and that the reversion passed to the residuary devisees. *Doe dem. Ford* v. *Bell*, 6 U.C.Q.B. 527.

A devise of all the lands that might belong to the testator at the time of his death did not indicate an intention to pass the fee. Nor did a devise to J., provided that if he died before the testator, then to B., give J. more than a life estate on his surviving the testator. *Doe dem. Peddock* v. *Green*, 7 N.B.R. 314.

A reference to "estate" might have indicated that the fee passed; but it must clearly have referred to the testator's interest in the land, and have been directly connected with the devise in question. So, on a devise to a widow of the income of "all my real estate" during her life, and after her death the same lands to go to children to be divided equally amongst them, it was held that even if the word "estate," as used in the devise to the widow, were sufficient to indicate an intention to pass the fee, the word had no relation to the devise to the children, and that they took life estates only. *Doe dem. Whitney* v. *Stanton*, 7 N.B.R. 632.

But a charge imposed upon a devisee of land gave him the fee, no words of limitation being used. *Chisholm* v. *Macdonnell*, 7 N.B.R. 137.

In Ontario, after March 6, 1834, on a devise of lands, "it shall be considered that the devisor intended to devise all such estate as she was seised of in the same land, whether in fee simple or otherwise, unless it appears upon the face of such will that he intended to devise only an estate for life, or other estate less than he was seised of at the time of making the will containing such devise." R.S.O. 1914 ch. 120, sec. 4.

And by the Wills Act, "where any real estate is devised to any person without any words of limitation, such devise shall [subject to the *Devolution of Estates Act*], be construed to pass the fee simple, or other the whole estate or interest, which the testator had power to dispose of by will, unless a contrary intention appears by the will." R.S.O. ch. 120, sec. 31.

In British Columbia the same enactment except the words in brackets, is in force. R.S.B.C. ch. 241, sec. 25.

In Manitoba, on and after May 30, 1882; in New Brunswick, on and after January 1, 1839; and in Nova Scotia, on and after October 30, 1840, the same enactment, except the words in brackets came into force.

Since these enactments, restrictive words are necessary in order to cut down an indefinite devise to a life estate.

"My wife shall be allowed to live on the said property during the term of her natural life," gives a life estate. *Fulton* v. *Cummings*, 34 U.C.Q.B. 331.

A similar devise to a daughter as long as she remained unmarried gives an estate during the residence on the land unmarried. *Judge* v. *Splann*, 22 O.R. 409.

A devise to A. in fee, subject to the condition that daughters should "have at all times a privilege of living on the homestead and of being maintained out of the proceeds of the said estate during their natural lives," gives a life estate to the daughters. *Bartels* v. *Bartels*, 42 U.C.Q.B. 22.

A devise in fee, with a direction that the testator's daughters and their mother should have "a lien on said lands for a home during their natural lives" gives a life estate to the daughters. *Scouler* v. *Scouler*, 8 C.P. 9.

A devise to a widow of "her life in the said lot" gives her a life estate. *Smith* v. *Smith*, 18 O.R. 205.

A devise to children, "reserving to my wife, as long as she remains my widow, the revenues and incomes therefrom," gives an estate to the widow *durante viduitate*. *King* v. *Murray*, 22 N.B.R. 382.

A devise to a wife "to be at her will and disposal during her natural life," with a devise over, gives a life estate only to the wife. *Doe dem. Keller* v. *Collins*, 7 U.C.R. 519.

But a devise to a wife for life, with a general power of disposal by will, gives a fee simple. *Re Bethune*, 7 O.L.R. 417.

Semble, that a devise to H. for her own use, with power to sell or dispose of the same as she may see fit, followed by a devise that after her death "the remainder of my estate, if any, be equally divided between, etc.," gives A., a life estate only. *Roman Catholic Episcopal Corpn.* v. *O'Connor*, 14 O.L.R. 666.

A vested remainder in fee, after a life estate with power of sale in the life tenant, is not affected if the power is not exercised. *Doe dem. Savoy* v. *McEachren*, 26 N.B.R. 391.

As to whether a devise for life, with a power of appointment amongst sons of the devisee creates a power or a trust, *quare*. *McMaster* v. *Morrison*, 14 Gr. 138; *Pettypiece* v. *Turley*, 13 O.L.R. 1.

A devise to D. for life, "and to her children, if any, at her death, if no children," then over, gives a life estate to D., with remainder to children. *Grant* v. *Fuller*, 35 Can. S.C.R. 34; *Young* v. *Denike*, 2 O.L.R. 723; *Sweet* v. *Platt*, 12 O.R. 229.

A devise to A. "and his heirs and executors forever," proviso, "that he neither mortgage nor sell the place, but that it shall be to his children after his decease," was said to indicate an intention that A. should not have such an interest as would enable him to defeat his children, and therefore that he took an estate for life only, remainder to his children. *Dickson* v. *Dickson*, 6 O.R. 278. *Sed quære*, an estate in fee having been given by technical words.

A devise to a widow for life, followed by a devise of "everything real and personal within and without, and it is hereby understood that the property above described shall be under the control of my said wife. After the decease of my wife . . . to my nephew and his heirs," gives a life estate to the widow; the estate not being enlarged by the expression "everything real and personal," because the remainder was clearly given to the nephew. *Clow* v. *Clow*, 4 O.R. 355.

A devise to a widow for life, remainder to two sons "during the full term of their natural lives . . . and if either . . . should die not leaving heirs the issue of his own body, his surviving brother shall inherit his share . . . and after the decease of both of my said sons" sale and division of the proceeds amongst their heirs "then surviving." Held, a life estate for the joint lives of the two sons, remainder in fee to the persons answering the description of the heirs of the two sons at the death of the survivor of them. *Haight* v. *Dangerfield*, 5 O.L.R. 274.

A devise to a husband and wife "and to their children and children's children forever . . . " provided that the husband and wife should not be at liberty to convey, "as it is my will that the same may be entailed for the benefit of their children," gives a life estate to the husband and wife. The explanation that the "children" were to have a fee tail indicates that the words "children and children's children" are not words of limitation of the estate of the husband and wife. *Peterborough R. E. Co.* v. *Patterson*, 15 A.R. (Ont.) 571.

A devise to A. for life and at his decease to the "second male heir of him and his present wife and his heirs male forever, and in default of a second male heir to the eldest surviving female heir or child and her male heirs forever" gives A. an estate for life, remainder to a daughter (there being only one son) in fee tail male. *Re Brown & Slater*, 5 O.L.R. 386.

A devise to S. H. G. of "the use of my farm . . . also to his lawful children, and in case of his death without children, then to . . . daughters and their heirs forever," gives S. H. G. a life estate only. S. H. G. having the use, it was held that the children (of whom the only one at the date of the will was *en ventre*) could not share with him; nor could that child exclude after-born children who might be alive at the death of S. H. G. In order, therefore, to give both S. H. G. and all his children an interest, it was held that S. H. G. took a life estate, remainder to his children living at his death; and in default of such children, then over. *Gourley* v. *Gilbert*, 12 N.B.R. 80.

A devise to G. for life and if he marries to his wife for life, and on the death of both to his children and their heirs, gives G. a life estate, remainder to his wife for life, remainder in fee to children. *Re Sharon & Stuart*, 12 O.L.R. 605.

A devise of all real and personal property to the testator's widow, followed by a declaration that "my wish and desire is that she divide" in certain proportions amongst the testator's children, held to give a life estate to the widow, in order to prevent a complete exclusion of the widow who was evidently intended to be benefitted. *Wilson* v. *Graham*, 12 O.R. 469.

Similarly, a devise to A. generally, with a restraint on alienation and against waste, followed by a disposition amongst his children after his death, according to the discretion of the executors of the testator, gives A. a life estate only. *McPhail* v. *McIntosh*, 14 O.R. 312.

So, also, a devise on trust for sale, and to invest the proceeds for maintenance of the devisee and her children, and till sale to take the rents and profits for the life of the devisee, gives an estate for life only with a power of sale. *Re O'Sullivan*, 5 N.S.R. 549.

A devise of the "possession, use, and occupation" of land and all the rents and profits of all the estate to a widow "for the support of herself and children," with a proviso that if the rents and profits are not sufficient resort may be had to principal, and a direction that what remains at the death of the widow shall go to the children, gives a life estate to the widow. *Knapp* v. *King*, 15 N.B.R. 309.

Where, after a direction to convert, the testator bequeathed a portion of the proceeds to M. S., with a proviso that M. S.'s interest should not be transferable or transferred to any other person, but might be inherited by her children, and in case M. S. died without legitimate issue, then, that her interest should "revert back" to other legatees, it was held that M. S. took a life estate only. *Jeffrey* v. *Scott*, 27 Gr. 314.

Province of Manitoba.

KING'S BENCH.

Macdonald, J.] PEDERSON *v.* PATERSON. [31 D.L.R. 308.

Negligence—Nuisance—Automobile—Fright to horse by wrecked car—Unlicensed driver.

The leaving of a wrecked motor car on the side of the road is not necessarily negligence, nor does it amount to an unreasonable user of the highway, entitling the owner of a runaway horse, frightened by the wreck, to damages. Neither is the owner liable by reason that at the time the motor was wrecked it was being driven by an unlicensed driver.

Kilgour, K.C., for plaintiff.

Symington, K.C., for defendant.

ANNOTATION ON THE ABOVE CASE FROM D.L.R.

Anything which essentially interferes with the enjoyment of life and property is a "nuisance"; 29 Cyc. 1152. When it affects the rights enjoyed

by citizens, as obstruction of a highway, it is a "public nuisance." An individual who suffers pecuniary damage as a direct consequence of such obstruction may maintain an action as for a private nuisance. 10 Cyc. of Eng. 81. "The question of negligence is not involved in an action for a nuisance," 29 Cyc. 1155. "If there be an act done upon a part of the highway which is not a reasonable user of it, and which has the effect of endangering its use to others, and damage results from such to one in the course of a lawful user of the highway, an action will lie for such damage." *Harris* v. *Mobbs*, 3 Ex. D. 268.

In *Wilkins* v. *Day*, 12 Q.B.D. 110, plaintiff's pony shied at the shafts of a roller slightly projecting from the side of a road, over the metalled part of the road; plaintiff's wife was thrown out and killed; plaintiff was held entitled to recover.

"The law of negligence is brought into intimate association with the law of nuisance. So far as nuisance is caused by imperfect action, or omission to act, where the action of a prudent man, according to the circumstances, is demanded, it may be proceeded against indifferently as a negligent act or a nuisance. Cases which involve infringements of public rights are more usually proceeded against as nuisances than for negligence. Beven on Negligence, Can. ed., 386.

The cases cited above (*Harris* v. *Mobbs* and *Wilkins* v. *Day*), were for nuisances. The form of action given in Bullen & Leake's Precedents, for an obstruction of a highway resulting in private damage, is for a nuisance.

In *Pederson* v. *Paterson* (above) the real point at issue was this, was the obstruction which the burned car caused to the highway a reasonable user thereof. It was of no importance, therefore, how the car got into the ditch, or that the driver was unlicensed, for the car in the roadway was clearly the proximate cause of the runaway horse. As to that the motto *res ipsa loquitur* seems undoubtedly applicable.

Was it a reasonable user of the highway to leave the burned car in the side of the road, unguarded and uncovered, after seven o'clock on Sunday morning? The result proves that it was calculated to frighten a horse, not shewn to be other than normal. It is not said that any attempt was made to move the car from the roadway after the defendant was shewn its position. Surely the onus at least was on him to shew that he had done all that was reasonably possible to avoid danger to travellers. It does not appear that he thought of that obligation.

The trial Judge said "negligence is the foundation of the action. Before the plaintiff can recover he must bring that home to the defendant." Is not that misplacing the burden of proof? But even so, upon the ground *res ipsa loquitur*, was not the defendant bound to prove that leaving his car in such a position and condition was not negligence; should he not have been called upon to prove that the car could not have been moved on Sunday morning, or that it could not have been rendered less likely to frighten horses? On this ground of negligence, the ditching of the car and even the burning of the car—both of which caused the condition which frightened the horse—were *primâ facie* proof of negligence; prudent people do not inspect wrecked cars with lighted matches. It is on this point that the fact that the car was not driven by a licensed person may be of some evidentiary value.

War Notes.

The Allies and German Peace Proposal.

Perhaps the most important official document that has been issued since the declaration of war is the answer of the allied powers to the note delivered to them by the President of the United States in reference to the suggestions for peace (or peace proposals as the Germans would call them) of the central powers. Our readers will be glad to have this on record, and we therefore make no apology for publishing it.

"The allied Governments have received the note which was delivered to them in the name of the Government of the United States on the 19th of December, 1916. They have studied it with the care imposed upon them both by the exact realization which they have of the gravity of the hour and by the sincere friendship which attaches them to the American people.

"In a general way they desire to declare their respect for the lofty sentiments inspiring the American note and their whole-hearted agreement with the proposal to create a league of nations, which shall assure peace and justice throughout the world. They recognize all the advantages for the cause of humanity and civilization which the institution of international agreements, destined to avoid violent conflicts between nations, would prevent; agreements which must imply the sanctions necessary to insure their execution and thus to prevent an apparent security from only facilitating new aggression. But a discussion of future arrangements for assuring a durable peace pre-supposes a satisfactory settlement of the present conflict; the allies have as profound a desire as the Government of the United States to terminate as soon as possible a war for which the Central Empires are responsible, and which inflicts such cruel sufferings upon humanity. But in their judgment it is impossible to obtain at this moment such a peace as will not only secure to them the reparation, the restitution and the guarantees justly due them, by reason of the act of aggression, the guilt of which is fixed upon the Central Powers, while the very principle from which it sprang was undermining the safety of Europe; and at the same time such a peace as will enable future European nations to be established upon a sure foundation. The allied nations are conscious that they are not fighting for selfish interests, but, above all, to safeguard the independence of peoples, of right and of humanity

"The allies are fully aware of the losses and sufferings which

the war causes to neutrals as well as to belligerents, and they deplore them; but they do not hold themselves responsible for them, having in no way either willed or provoked this war, and they strive to reduce these damages in the measure compatible with the inexorable exigencies of their defence against the violence and the wiles of the enemy.

"It is with satisfaction, therefore, that they take note of the declaration that the American communication is no wise associated in its origin with that of the Central Powers transmitted on the 18th of December by the Government of the United States. They did not doubt, moreover, the resolution of that Government to avoid even the appearance of a support, even moral, of the authors responsible for the war.

"The allied Governments feel it their duty to challenge in the most friendly, but also in the clearest way, the analogy drawn between the two groups of belligerents. This analogy, based on public declarations of the Central Powers, is in direct conflict with the evidence, both as regards responsibility for the past and guarantees for the future. President Wilson, in alluding to this analogy, did not, of course, intend to adopt it as his own.

"If there is an historical fact established at the present date, it is the willful aggression of Germany and Austria-Hungary to insure their hegemony over Europe and their economic domination over the world. By her declaration of war, by the instant violation of Belgium and Luxemburg, and by her methods of warfare, Germany has proved that she systematically scorns every principle of humanity and all respect due to small States. More and more, as the struggle has progressed, has the attitude of the Central Powers and their allies, been a constant challenge to humanity and civilization. Is it necessary to recall the horrors that marked the invasion of Belgium and of Serbia, the atrocious regime imposed upon the invaded countries, the massacre of hundreds of thousands of inoffensive Armenians, the barbarities perpetrated against the populations of Syria, the raids of Zeppelins on open towns, the destruction by submarines of passenger steamers and of merchantmen even under neutral flags, the cruel treatment inflicted upon prisoners of war, the juridical murders of Miss Cavell, of Captain Fryatt, the deportation and the reduction to slavery of civil populations, etc.? The execution of such a series of crimes perpetrated without any regard for universal reprobation fully explains to President Wilson the protest of the allies.

"They consider that the note which they sent to the United States in reply to the German note will be a response to the

questions put by the American Government and according to the exact words of the latter, constitute a 'public declaration as to the conditions upon which the war could be terminated.'

"President Wilson desires more: he desires that the belligerent powers openly affirm the objects which they seek by continuing the war; the allies experience no difficulty in replying to this request. Their objects in the war are well known; they have been formulated on many occasions by the chiefs of their divers Governments. Their objects in the war will not be made known in detail with all the equitable compensations and indemnities for damages suffered until the hour of negotiations. But the civilized world knows that they imply in all necessity and in the first instance the restoration of Belgium, of Serbia, and of Montenegro, and the indemnities which are due them; the evacuation of the invaded territories of France, of Russia, and of Roumania with just reparation; the reorganization of Europe, guaranteed by a stable settlement, based alike upon the principle of nationalities, on the right which all peoples, whether small or great, have to the enjoyment of full security and free economic development, and also upon territorial agreement and international arrangements so framed as to guarantee land and sea frontiers against unjust attacks; the restitution of provinces or territories wrested in the past from the allies by force or against the will of their populations, the liberation of Italians, of Slavs, of Roumanians and of Tcheco-Slovaques from foreign domination; the enfranchisement of populations subject to the bloody tyranny of the Turks; the expulsion from Europe of the Ottoman Empire, which has proved itself so radically alien to Western civilization. The intentions of His Majesty the Emperor of Russia regarding Poland have been clearly indicated in the proclamation which he has just addressed to his armies. It goes without saying that while the allies wish to liberate Europe from the brutal covetousness of Prussian militarism, it never has been their design, as has been alleged, to encompass the extermination of the German peoples and their political disappearance. That which they desire above all is to insure a peace upon the principles of liberty and justice, upon the inviolable fidelity to international obligation, with which the Government of the United States has never ceased to be inspired.

"United in the pursuit of this supreme objective the allies are determined, individually and collectively, to act with all their power and to consent to all sacrifices to bring to a victorious close a conflict upon which they are convinced not only their own safety and prosperity depends, but also the future of civilization itself."

The translation of the Belgian note, which was handed to Ambassador Sharp with the Entente reply, follows:

"The Government of the King, which has associated itself with the answer handed by the President of the French Council to the American Ambassador on behalf of all, is particularly desirous of paying tribute to the sentiment of humanity which prompted the President of the United States to send his note to the belligerent powers, and it highly esteems the friendship expressed for Belgium through his kindly intermediation. It desires as much as Mr. Woodrow Wilson to see the present war ended as early as possible.

"But the President seems to believe that the statesmen of the two opposing camps pursue the same objects of war. The example of Belgium unfortunately demonstrates that this is in no wise the fact. Belgium has never, like the Central Powers, aimed at conquests. The barborous fashion in which the German Government has treated, and is still treating, the Belgian nation does not permit the supposition that Germany will preoccupy herself with guaranteeing in the future the rights of the weak nations which she has not ceased to trample under foot since the war, let loose by her, began to desolate Europe. On the other hand, the Government of the King has noted with pleasure and with confidence the assurances that the United States is impatient to co-operate in the measures which will be taken after the conclusion of peace to protect and guarantee the small nations against violence and oppression.

"Previous to the German ultimatum, Belgium only aspired to live upon good terms with all her neighbors; she practised with scrupulous loyalty towards each one of them the duties imposed by her neutrality. In the same manner she has been rewarded by Germany for the confidence she placed in her, through which from one day to the other, without any plausible reason, her neutrality was violated, and the Chancellor of the empire, when announcing to the Reichstag this violation of right and of treaties, was obliged to recognize the iniquity of such an act, and predetermine that it would be repaired. But the Germans, after the occupation of Belgian territory, have displayed no better observance of the rules of international law or the stipulations of The Hague Convention. They have, by taxation, as heavy as it is arbitrary, drained the resources of the country; they have intentionally ruined its industries, destroyed whole cities, put to death and imprisoned a considerable number of inhabitants. Even now, while they are loudly proclaiming their desire to put an end to the horrors of war, they increase the rigours of the oc-

cupation by deporting into servitude Belgian workers by the thousands.

"If there is a country which has the right to say that it has taken up arms to defend its existence, it is assuredly Belgium. Compelled to fight or to submit to shame, she passionately desires that an end be brought to the unprecedented sufferings of her population. But she could only accept a peace which would assure her, as well as equitable reparation, security and guarantees for the future.

"The American people, since the beginning of the war, have manifested for the oppressed Belgian nation its most ardent sympathy. It is an American committee, the Commission for Relief in Belgium, which, in close union with the Government of the King and the National Committee, displays an untiring devotion and marvellous activity in revictualling Belgium. The Government of the King is happy to avail itself of this opportunity to express its profound gratitude to the Commission for Relief, as well as to the generous Americans eager to relieve the misery of the Belgian population. Finally, nowhere more than in the United States have the abductions and deportations of Belgian civilians provoked such a spontaneous movement of protestation and indignant reproof.

"These facts, entirely to the honor of the American nation, allow the Government of the King to entertain the legitimate hope that at the time of the definitive settlement of this long war, the voice of the Entente powers will find in the United States a unanimous echo to claim in favor of the Belgian nation, innocent victim of German ambition and covetousness, the rank and the place which its irreproachable past, the valor of its soldiers, its fidelity to honour and its remarkable faculties for work assign to it among the civilized nations."

Bench and Bar.

Judicial Appointments.

Robert Ruddy, of the City of Peterborough, in the Province of Ontario, K.C., to be Junior Judge of the County Court of the County of Ontario, in the said Province. (Jan. 1.)

Right Hon. James H. Campbell, K.C., Attorney-General of Ireland, has been elevated to the office of Lord Chief Justice and

made a Baronet. It is said that he will be a great acquisition to the Bench, having been for many years at the head of the Common Law Bar. Mr. James O'Connor becomes Attorney-General.

Hamilton Law Association.

The annual meeting of the Trustees of the Hamilton Law Association was held on January 9th. Mr. William Bell, K.C., was elected President of the Association in the place of the late S. F. Lazier, K.C., Mr. T. C. Haslett, K.C., was elected Vice-president of the Association. There is a membership of 85. Three members of the Association have already died for their King and Country namely: Thomas Crosthwaite, Ernest Appleby and Herbert Daw.

Death Roll of 1916.

Mr. Clarence Bell in his useful circular for Ontario practitioners has published a list of the members of the Legal profession of that Province who have died during the last year. It appears to comprise an unusually large number of our prominent men. Besides two Judges of the Supreme Court of Ontario, we have lost four County Court Judges, and three Crown Attorneys and fifteen of His Majesty's Counsel. Among the more prominent of the latter being G. H. Shepley, Treasurer of the Law Society; Hon. J. J. Foy, an Ex-Attorney-General; C. H. Ritchie, A. R. Creelman, John McIntyre, John King and E. H. Tiffany. We have given in our War Notes the names of our professional brethren who have given their lives for the Empire so far as we have been able to ascertain them.

Flotsam and Jetsam.

Solicitors and the Future.

One question which the thoughtful lawyers are beginning to consider is the inevitable changes which the future will bring about in the activities of our profession. Such changes are bound to come; that is one of the invariable results of a great war. For war inevitably destroys capital and therefore, to a certain extent, reduces an old country to the status of a new one until it has had time to recuperate and build up its civiliza-

tion once more. Now there are three great characteristics of a new country, such as Canada—to take the nearest example. It is full of new enterprises. It is in great need of capital. There is less specialization in it; the professions are businesses, are not marked off so clearly from one another. Thus in British Columbia, before the war, a solicitor was generally a great many things besides a mere lawyer. He was usually an estate agent, who helped in the development of land and minerals; a financial agent, who brought the farmer in touch with the banker and the investor; and, in a small way, a stockbroker as well. Moreover, he not infrequently abandoned his own practice to enter business or run a mine. Something of the kind, *mutatis mutandis* of course, we expect to happen in England. The solicitor of the future will tend to be less of a legal adviser and a conveyancer, more of an estate agent and a man of business than he has been in the past. Some of us, who love the old ways of the *ancien régime*, will regret the change. But changes cannot be prevented by those of us who would prefer the rôle of a *laudator temporis acti*.—*Solicitors' Journal*.

Peking's Ancient Library.

The library of the "School of the Sons of the Empire," an ancient Chinese university, which, it is claimed, was in existence a thousand years before the Christian era, comprises 182 tablets of stone, whereon are carved all of the "Thirteen Classics," the essence of Chinese culture.

This stone library is not, however, of the same age as the "School of the Sons of the Empire." It probably dates from a late period of the Mongol or an early period of the Ming dynasty. In the north-east of Peking stand the buildings of the old university, long since abandoned as a place of instruction or inspiration in letters.

In the Imperial lecture hall of this "School of the Sons of the Empire" (Kuo Tze-Chien) the Emperor would go, once a year, to hear a discourse on the responsibilities and duties of his office, and to receive reproof and exhortation from the heads of the institution. This practice was retained down to the time of Chien Lung, the great Emperor of the Manchus, in the eighteenth century, a patron of the arts and literature. The stone library in Peking is only a copy of that in Shianfu, in Shensi, which was the capital of the empire.

The reason for carving the classics on stone is not clear. It

may have been done in order that there might remain a standard of the works in the land. It is more probable, however, that these classics carved on stone were safer from destruction at the hands of vandals than would be the case were they preserved on paper or wood.—*Philadelphia Record.*

FOLLOWING PRECEDENTS.—One of the Judges of the Colorado Supreme Court recently took exception to a slavish following of precedents. In a case before him he quoted the quaint philosophy of Sam Walter Foss, who wrote some well known lines familiar to most New York lawyers who have to use a queer winding street in that great city. We have only place for a few of them:—

One day through the primeval wood
A calf walked home, as good calves should:
And left a trail all bent askew,
A crooked trail, as all calves do.
Since then, three hundred years have fled,
And, I infer, the calf is dead,
But still he left behind his trail,
And thereby hangs my moral tale.

And many men wound in and out,
And bent and turned and dodged about,
And uttered words of righteous wrath,
Because 'twas such a crooked path;
But still they followed—do not laugh—
The first migrations of that calf;
And through this winding woodway stalked
Because he wabbled when he walked.

A hundred thousand men were led
By one calf near three centuries dead.
They followed still his crooked way,
And lost one hundred years a day;
For thus such reverence is lent
To well-established precedent.
A moral lesson this might teach,
Were I ordained and called to preach.