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MERCIER v. *CAMPBELL AND THE STATUTE OF FRAUDS.*

INTRODUCTORY.

A decision of very much more than ordinary importance, and which yet has apparently attracted little, if any, special attention, was added to our store of Ontario cases when the Divisional Court of the King's Bench Division, on the 16th of January, 1907, handed out judgment in the case of *Mercier* v. *Campbell* (14 O.L.R. 639).

The case touches that prolific source of legal contention and difficulty, the Statute of Frauds. Perhaps, although on many questions arising under it the cases are admittedly in hopeless confusion and contradiction, no enactment has, in a more marked degree, or through a longer series of years commanded the general respect both of the judiciary and the profession, and possibly none has been more jealously guarded by the courts from attacks either open or covert. Thus in *Chater* v. *Beckett*, 7 T.R. 201, we find Lord Kenyon, C.J., expressing himself as follows: "I lament extremely that exceptions were ever introduced in construing the Statute of Frauds; it is a very beneficial statute, and if the courts had at first abided by the strict letter of the Act it would have prevented a multitude of suits that have since been brought."

So we find that the courts have always been alert to detect and frustrate anything that bore the semblance of an attempt to circumvent or evade the statute; while counsel have always considered it an unanswerable argument to say that if such and such a contention were allowed then the Statute of Frauds might as well be wiped off the statute book.

In *Lord Walpole* v. *Lord Oxford*, 3 Ves. 410, for instance (where the question at issue related to the validity of an alleged

agreement to make reciprocal wills), we find the Attorney-General (arguendo) expressing himself thus: "The Statute of Frauds is at an end if under the name of an agreement a thing may be made a devise or under the name of a devise an agreement, which is not either according to that statute"; compare also the language of Lord, J., in *Chase* v. *Fitz*, 132 Mass. 361, which decides that an agreement to comply with the statute is within its provisions, and no action can be maintained for its breach. "It would leave but little, if anything, of the Statute of Frauds to hold that a party might be mulcted in damages for refusing to execute in writing a verbal agreement which unless in writing is invalid under the Statute of Frauds." All of which goes to shew that the strong feeling both of Bench and Bar has always been that come what may the Statute of Frauds must be preserved inviolate.

Heretofore, moreover, whatever may have been the fate of other enactments too numerous to mention, no one has ever been able to boast that he has succeeded in driving the proverbial coach and horses through this statute.

Effect of Decision.

That being the light in which one has grown accustomed to regard this Act, it must be confessed that the effect of the decision now under discussion was calculated to be somewhat startling, as the judgment seems at first sight to convey the impression that the Statute of Frauds may henceforth be practically evaded in all cases by a very simple expedient.

The question at issue in this case is one which has very frequently formed the subject of judicial discussion, and whatever may be the rights and wrongs of the matter, the legal world has undoubtedly been laid under a deep obligation to his Lordship Mr. Justice Riddell by the very able and thorough manner in which he has analysed the law on this much discussed question in his valuable judgment in the case.

Facts of the Case.

The facts of the case are shortly, as follows:—The defendant, desiring to purchase the hotel of the plaintiff, an agreement was entered into under the hands and seals of the parties whereby it was agreed that the plaintiff should sell, and the defendant purchase the premises in question, and there was added the following clause: "And in case Mrs. Mercier refuses to carry out the sale of the property as aforesaid, she will have to pay to said Campbell the sum of $300. And in case said Campbell refuses to carry out the part assigned to him in accepting the title to said property, he will have to pay Mrs. Mercier a like sum of $300."

Mr. Campbell declining to carry out the agreement to purchase the hotel, Mrs. Mercier sued for the $300. It was admitted on all hands that the agreement for sale of the hotel was nugatory as being insufficient to satisfy the provisions of the Statute of Frauds, but the Divisional Court (Q.B.D.) held, reversing the judgment of His Honour Judge Constantineau, senior county judge of Prescott and Russell, that the agreement to pay the $300 on default was nevertheless valid and enforcible.

Discussion.

It will, no doubt, seem to many that this decision has the appearance of running counter to a number of cases, in which it has been held that agreements of this nature cannot be enforced, for the reason that to do so would be to sanction a palpable evasion of the statute.

We quote from Browne on the Statute of Frauds (5th edition), at page 163, "This case (*Carrington* v. *Roots*, 2 Mees. & W. 248) affords a very clear exemplification of the general rule, which may be here reasserted, that no action can be brought to charge the defendant in any way upon his verbal agreement not put in writing according to the statute. (*Finch* v. *Finch*, 10 Ohio St. 501; *Culligan* v. *Wingerter*, 57 Mo. 241; *Smith* v. *Tramel*, 68 Iowa 488). And it may be briefly illustrated further. If land be sold at auction or otherwise, and no memorandum made, and

the purchaser refuse to take it, no action will lie against him to recover the loss sustained upon a second sale to another party; this could be done, manifestly only upon the ground that he was originally legally liable to take and pay for the land himself. (*Baker* v. *Jameson,* 2 J.J. Marsh (Ky.) 547; *Carmack* v. *Masterson,* 3 Stew. & P. (Ala.) 411. But, perhaps, if there were circumstances of deceit in the case, the plaintiff might recover in an action on the case for the deceit. See *Kidder* v. *Hunt,* 1 Pick. (Mass.) 328. Nor will a discharge from performing a verbal contract within the statute be a sufficient consideration to support another engagement. No action whatever could have been maintained against the defendant for any breach of that contract. A discharge from it, therefore, is of no use to him. *North* v. *Forest,* 15 Conn. 400; *Shuder* v. *Newby,* 85 Tenn. 348. But see *Stout* v. *Ennie,* 28 Kansas 503.) So, an engagement to forfeit a certain sum of money in case of failing to perform another engagement which, within the Statute of Frauds, could not itself be enforced, cannot be enforced by the party to whom it is made. (*Goodrich* v. *Nichols,* 2 Root (Conn.) 498; *Rice* v. *Peet,* 15 Johns (N.Y.) 503. But see *Couch* v. *Meeker,* 2 Conn. 308.)[1] Also paragraph 152 at page 187 as follows:—

"A class of contracts to which allusion has been heretofore made, namely, those in which a party promises to do one of two or more things, the statute applying to one of the alternative engagements, but not to the others, is sometimes referred to the head of contracts in part affected by the statute. It is needless to dwell upon the question whether they are properly so referred. It is manifest that of such alternative engagements no action will lie upon that one which, if it stood alone, could be enforced as being clear of the Statute of Frauds, because the effect would be to enforce the other; namely, by making the violation of it the ground of an action. (*Van Allstine* v. *Wimple,*

1. In *Couch* v. *Meeker* A. gave his note to B. upon condition that "A. having this day bargained his . . . farm to B. Now if A. stands to the bargain, the note is to be void; if not it is to stand in full force." The jury found for the plaintiff, and this verdict was allowed to stand, though admittedly the contract for the sale of the land could not have been enforced.

5 Cowen (N.Y.) 162; *Patterson* v. *Cunningham,* 12 Me. 506; *Goodrich* v. *Nichols,* 2 Root (Conn.) 489; *Rice* v. *Peet,* 15 Johns (N.Y.) 503; *Howard* v. *Brower,* 37 Ohio St. 402. But see *Couch* v. *Meeker,* 2 Conn. 302.)"

The law is similarly stated by other text-writers; for instance, Sutherland on Damages, 3rd ed., page 711, s. 280, expresses it as follows:—"Damages can be liquidated only on a valid contract. A valid contract must exist on which damages could be recovered. If void for not being in writing (*Newman* v. *Perrill,* 73 Ind. 153; *Scott* v. *Bush,* 26 Mich. 418-12 Am. Rep. 311), or if impeached for fraud, the stipulation for damages will share the same fate as the contract."

It will be observed that the point decided by the line of cases headed by *Goodrich* v. *Nichols* (sup.), is the precise point dealt with in the present case.

Importance of Decision.

On this point the case under discussion is a practical reversal of the line of cases referred to, in that respect agreeing with the case of *Couch* v. *Meeker,* above mentioned. Indeed Mr. Justice Riddell in his judgment, expressly impugns the statement of the law as above set forth in the extract from Browne on the Statute of Frauds, and in the line of cases cited.

It is largely for this reason that the judgment seems to us to possess such special significance.

Whether the present case will mark the parting of the ways as between the law of Ontario, and that of England and the United States on the point in question, it may be as yet too early to say. Two things, however, seem fairly assured: First, that the case has effected a change in the law of Ontario on the point in question and, secondly, that the decision seems to countenance doctrine which is much at variance with what has heretofore been generally considered to be the law upon the subject in England and the United States.

Heretofore we believe the extract from Browne above quoted has been taken to be a correct exposition of the generally accepted law on the subject in both the last mentioned countries.

To Mr. Campbell, the defendant, the general result must have seemed not a little confusing. When the case was finally disposed of he would be told that the law had condemned him to pay $300 and costs for declining to do what the law at the same time said he was not bound to do. To a layman this would doubtless seem puzzling enough, but it is not the layman alone who will find matter of perplexity in the case. Many aspects of the case present themselves which may well give the lawyer serious food for cogitation. For instance, it might be thought that the agreement by either party to pay the other $300 in case of refusal to carry out the agreement was neither more nor less than an agreement liquidating the damages for breach of the main agreement[2].

And, if so, must the plaintiff not first prove that there is a valid main agreement for breach of which she is entitled to some damages, before having recourse to the subsidiary question as to what amount those damages shall be assessed at? But the statute would obviously step in to prevent the first step, inasmuch as, by reason of its provisions, there was no valid main agreement for breach of which any damages at all could be recovered.

On this branch of the question we quote from the judgment of the learned County Court judge whose judgment is appealed from, which, although unfortunately unreported, we have been privileged to puruse, and which contains an admirable discussion of the points arising under the Statute of Frauds, and a very full collection of the authorities:—

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2. In his judgment in *Knapp* v. *Carley*, 3 O.W.R. 940, at page 942, the learned Chief Justice of the Common Pleas Division, speaks as follows:—

"The appellant is, I think, right in his contention that the damages are liquidated. The words of the agreement are, 'we, the said parties hereto, agree to forfeit each to the other the sum of $200 in case either fails to comply with the conditions of the above agreement.'

"The word 'forfeit' is perhaps more consistent with the idea of a penalty than a sum payable as liquidated damages, and the latter term is not used. That is not, however, conclusive either way. The question is one of law, to be decided upon a consideration of the whole instrument, and the principle upon which it is to be decided is simply to ascertain the real intention of the parties. Having regard to the moderate sum named, and the fact, as I take it to be, that the loss which would accrue to the other party from a failure of one of them to perform the agreement on his part, cannot be accurately or reasonably calculated in money antecendently to the breach, I think that the sum which the parties have named should be treated as liquidated."

"Finally, it was insisted by the plaintiff's counsel that, even if the memorandum does not satisfy the requirements of the Statute of Frauds, yet that the plaintiff may recover on the promise of the defendant to pay $300 in case of breach of the contract by him. This is an attempt to introduce a most startling principle. It amounts to this; that any contract within the Statute of Frauds, however informal it may be, may be the foundation of an action at law for damages, provided the parties have beforehand fixed and agreed upon what sum shall be recoverable in case of breach thereof. To admit the application of such doctrine, would be, to use the language of a learned judge, in effect to "permit parties to agree that the Statute of Frauds shall not affect their contracts." Gantt, J., *Ringer* v. *Holtzclaw* (1892), 20 S.W. 800. Indeed, whether the damages are assessed by a jury or the amount thereof is fixed by the parties, they must always be for the breach of a valid contract. A stipulation in a contract as to liquidated damages, cannot alter the nature of such damages nor indirectly validate a void agreement. Such stipulation must stand or fall with the contract itself. Supposing that the agreement contained a proviso that in case of breach thereof by one of the parties the other shall be entitled to recover damages, surely it could not contended that such proviso would be of any help to the party suing. But does it alter the nature of such proviso by mentioning the amount that would be recoverable? Supposing also, that I were to hold that the $300 were in the nature of a penalty, could I proceed to assess the damages if I thought the agreement invalid under the Statute of Frauds? I think clearly not. But by holding that the $300 are liquidated damages, do I alter my position or the position of the parties, assuming always that the contract is invalid? In an action for breach of contract it is obvious that the plaintiff must prove the existence of a legal contract, the breach thereof, and the damages which he has suffered. Where, however, the amount of the damages is fixed beforehand by the parties, the last proof is dispensed with, but this is the only essential difference there is between a contract containing a stipulation for liquidated damages and one silent as to damages.

The application of a different principle by permitting recovery of the amount mentioned in the stipulation, notwithstanding the invalidity of the agreement in law, would be to allow a party in one breath to admit its illegality and in another to maintain its validity.

Not only such doctrine, I apprehend, cannot be upheld upon principle, but so far as I know, it has never received the sanction of any authority. Indeed, quite an extensive search made by me through the English and American reports has failed to reveal a single case affording support thereto.

Browne on Statute of Frauds, s. 122, says: "As a general proposition, however, we shall hereafter see that a verbal contract within the statute cannot be enforced in any way, directly or indirectly, whether by action or in defence."

In *Dung* v. *Parker* (1873) 52 N.Y. 494 it is held "that a contract void by the Statute of Frauds cannot be enforced, directly or indirectly. It confers no right, and creates no obligation between the parties to it, and no claim can be founded upon it as against third persons. Whatever may be the form of an action at law, if the proof of such a contract is essential to maintain it, there can be no recovery."

This identical language is adopted by Mr. Justice Woods, delivering the judgment of the Supreme Court of the United States in *Dumphy* v. *Ryan* (1885), 116 U.S. 496. And at page 27, "In order to establish his cause of action, he must put before the court an invalid agreement and prove a breach thereof, and then ask the court for the indirect enforcement of such a contract by giving effect to the stipulation for liquidated damages. This, we repeat, is against principle and authority. I think I can safely say, that no case can be found where a plaintiff has been allowed to succeed in a court of law, where in order to do so, he was obliged to prove and base his claim upon an invalid contract under the statute." To use the language of Eyre, C.J., in *Walker* v. *Constable* (1798), 2 Esp. 659, 1 B. & P. 306, I may say: "The plaintiff cannot proceed without production of the contract. The defendant's objection is a strictly legal one; the foundation of the action is the contract for the sale of the prem-

ises; which contract, in order to be valid, the Statute of Frauds requires that it should be in writing." See argument of Macaulay in *McCollum* v. *Jones* (1827), Tay. (U.C.) 443.

On the whole, my conclusion is that if the contract sued upon in this action is invalid, as I hold it is, it cannot be enforced either directly or indirectly, in violation of the plain words of the Statute of Frauds, which says that no action shall be brought on such contract. The stipulation as to damages is not divisible from the rest of the agreement; it is one entire contract, and if one part falls, the whole must fall."

REASONS FOR JUDGMENT OF DIVISIONAL COURT.

The considerations which seem mainly to have weighed with Mr. Justice Riddell in deciding this case are as follows:—

1. The view that the citation from Browne on the Statute of Frauds, s. 152: ("A class of contracts . . . namely, those in which a party promises to do one of two or more things, the statute applying to one of the alternative engagements, but not to the others, is somethimes referred to the head of contracts in part affected by the statute . . . It is manifest that of such alternative engagements, no action will lie upon that one which, if it stood alone, could be enforced as being clear of the Statute of Frauds, because the effect would be to enforce the other; namely by making the violation of it the ground of action"), is an erroneous statement of the law, and that the cases on which it rests[3] are unworthy of credit, as being either erroneously decided or failing to support the proposition for which they are cited.

2. The view that the contract in this case is not entire, but severable.

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3. See *Goodrich* v. *Nichols* (1797) 2 Root (Conn.) 489; *Van Alstine* v. *Wimple* (1825) 5 Cowper (N.Y.) 162; *Rice* v. *Peet* (1818) 15 Johns N.Y. 503; *Patterson* v. *Cunningham* (1825) 12 Me. 506; *Newman* v. *Perrill*, 73 Ind. 153; *Scott* v. *Bush* (1873) 26 Mich. 418; *Weatherley* v. *Choate*, 27 Tex. 272; *Kraak* v. *Fries*, 21 Sup. Ct. D.C. 100; *Levy* v. *Bush* (1871) 45 N.Y. 589; *Howland* v. *Blake* (1878) 97 U.S. 624; *Mather* v. *Scholes*, 35 Ind. 1; Lord Lexington, Clark 2 Ventr. 223; *Chater* v. *Beckett*, 7 T.R. 201, etc.

DISCUSSION.

It is, of course, well-recognized law that a contract may be good in part, and bad in part; and if you can separate the good part from the bad, the good part may be enforced, *Wood* v. *Benson* (1831), 99; *Mann* v. *Nunn* (1874), 43 L.J.C.P. 241.

The judgment under consideration puts the matter as follows, page 650: "It seems to me clear that the promise of the defendant to pay the sum of $300 if he should not carry out his agreement is distinct from the agreement to purchase; it is an alternative." The judgment therefore assigns the present case to the same category as that occupied by such cases as *Mayfield* v. *Wadsley* (1824), 3 B. & C. 357; *Kerrison* v. *Cole* (1807), 8 East 231; *Green* v. *Saddington* (1857), 7 E. & B. 503; *Jeakes* v. *White* (1851), 6 M. 873; *Morgan* v. *Griffiths* (1871), L.R. 6 Ex. 70; *Boston* v. *Boston* (1904), 1 K.B. 124.

Of these cases that of *Jeakes* v. *White* (of which the judgment under comment says, "the case nearest the present that I have found is *Jeakes* v. *White*"), may be taken as typical. The facts in *Jeakes* v. *White* were that there was a verbal agreement that the plaintiff should lend the defendant £2,000 on a mortgage of land, and the defendant agreed to pay the plaintiff any expense he might incur in case the loan should fall through by reason of the defendant withdrawing or of his title proving insufficient. The defendant failed to make out a good title. The plaintiff sued for the expenses incurred and succeeded, it being held that the agreement was not within the Statute of Frauds. It may perhaps be thought that the circumstances in this case are not very closely analogous to those in the case under discussion. It seemed clear that the contract there sued on could not be said in any sense to be within the Statute of Frauds, and there would seem to be no good reason why the action should not be permissible. The matter was referred to during the course of the argument as follows: "Alderson, B., 'Then the contract merely relates to the investigation of a title, the parties agreeing that in case the title should turn out to be defective, the defendant should pay all the costs of the investigation. The con-

tract does not relates to any interest in land, and is not within the statute.' Pollock, C.B., 'We all think that is the true construction of this agreement.' '' Upon this point the following cases and text-writers were cited; *Cocking* v. *Ward,* 1 C.B. 858; *Inman* v. *Stamp,* 1 Stark 12; 1 Addison on Contracts 36; Dart on Vendors and Purchasers, 92, 104; *Vaughan* v. *Hancock,* 3 C.B. 766; *McIver* v. *Richardson,* 1 M. & Seleo. 557, and *Carrington* v. *Roots,* 2 M. & W. 248.

In *Green* v. *Saddington* (sup.), another of the cases in this category, the plaintiff and defendant agreed verbally that the plaintiff should pay the defendant £37 for the interest of the defendant in certain premises, and that the defendant should return £10 if the plaintiff were refused a license to use the premises as a slaughter house. The £37 was paid, and the license refused. The plaintiff thereupon sued for the £10 and was held entitled to recover, on the ground that the contract was not entire, but that there was a separate promise to pay, and that it was not within the Statute of Frauds.

It will be observed that there is a very significant point of distinction between the line of cases falling within this category and the case under discussion, in that in the former that part of the contract which would fall within the Statute of Frauds had been executed.

In the case last cited (*Green* v. *Saddington*), Erle, J., expresses himself as follows, page 597: ''The defendant objects that the whole contract was for a contract or sale of an interest concerning land, and void for the want of writing; and the objection would prevail if the action was for the land or purchase money, according to *Cocking* v. *Ward,* 1 Con. B. 858 (E.C.L.R. vol. 50). But the interest in land in this case has passed; and the purchase money has been paid. As far as the land is concerned the contract is completely executed and cannot now be rescinded. In the present action the whole consideration for the promise now sued on was money, viz., £37. The whole of the promise now sued on is for money, viz., £10. It, therefore, appears to us not to be within the Statute of Frauds; but on the

contrary to be within the class of cases where, after the contract directly concerning an interest in land has been executed, the action has been held to be upon a separate promise to be performed after such execution." *Griffith* v. *Young*, 12 East 513; *Poulter* v. *Killingbeck*, 1 Bos. P. 397; *Seaman* v. *Price*, 2 Bing. 437 (E.C.L.R. vol. 9); *Souch* v. *Strawbridge*, 2 Com. B. 808 (E.C.L.R. vol. 52), also referred to.

Then a word as to whether a contract of this kind is in fact entire or severable.

It is well-settled law that if the agreement is entire, and parts of it are bad by reason of the Statute of Frauds, the whole is bad, and no action can be maintained upon it. *Thomas* v. *Williams*, 10 B. & C. 664; *Mechelen* v. *Wallace*, 7 Ad. & E. 49; *Vaughan* v. *Hancock*, 3 C.B. 766; *Prante* v. *Schutte*, 18 Ill. App. 62; *Coyler* v. *Roe*, 99 Ind. 1; *Ranboll* v. *East*, 56 Ind. 538, etc., etc.

And on the other hand that if the agreement is severable the good part may be enforced.

The latter case is generally illustrated by cases where there is an agreement to pay for past services and to pay for others to be furnished in the future, another person being also liable for the past debt. A promise for instance to pay for gas that has been furnished a third person, and for all gas to be furnished, is severable, and an action may be maintained on the promise not obnoxious to the statute. *Wood* v. *Benson*, 2 Crompt. & J. 94; *Mayfield* v. *Wadsley*, 3 B. & C. 357. Similarly in the case of an agreement to pay for board already furnished a child and for board to be furnished. *Haynes* v. *Nice*, 100 Map. 327. See also *Mobile Insce. Co.* v. *McMillan*, 31 Ala. 711; *Pierce* v. *Woodward*, 6 Pick. (Mass.) 206.

Some may be inclined to think that between cases of the character of those last mentioned where the agreement was held to be severable, and the present case there is a very marked distinction.

It may be thought by many that the agreement in the present case to pay the $300, is so bound up with the contract to purchase the land that it is impossible to sever them, and that in

fact to do so would be practically to allow an action in the teeth of the statute—in fact that the present case falls within the statement of the law which is found expressed in the following terms in the American and English Encyclopædia of Law, 1st ed., vol. 8, page 662n, 6: "When the agreement is so far entire that to allow recovery would be virtually to repeal the statute, no such action can be maintained. A series of English cases illustrate this."

Reference is there made to *Cockins* v. *Ward*, 1 C.B. 858; *Kelly* v. *Webster*, 12 C.B. 283; *Smart* v. *Harding*, 15 C.B. 652, etc.

3. The impression that the line of American cases above referred to as supporting the defendant's contention herein (*Goodrich* v. *Nichols* (1797), 2 Root (Conn.) 498, Sup. et al.), is based on what the judgment describes as "the supposed principle that in the case of alternative promises, if one cannot be enforced, the other cannot be enforced." As to this principle the judgment goes on to say, "I find absolutely no trace of any such doctrine in the cases in England or in Ontario. I have examined text-book after text-book and find no suggestion of such a principle. The contrary is, I think, laid down in *Stevens* v. *Webb* (1835), 7 C. & P. 60, in which the court holds that if an agreement is in the alternative, and one branch of the alternative cannot by law be performed, the party is bound to perform the other.

In that case the agreement was "In consideration of the discharge of the defendant I hereby undertake to pay £35 on Wednesday next, or in default thereof to surrender him to the sheriff in this action. The defendant tendered himself to the sheriff, who could not retake him without being liable to an action. It was held that the £35 must be paid." *Da Costa* v. *Davis* (1798) 1 B. & P. 242; and *Wharton* v. *King* (1831) 2 B. & Ad. 528, are also cited to the same effect.

Stated in the manner above mentioned it would seem clear that the supposed proposition of law could not be supported for a moment, but that the direct contrary is, as pointed out by the judgment, the well-established law. The point is dealt with by such well-known text-writers as Leake & Chitty, as follows:—

"If a person promises to do one of two things in the alternative, and at the time of making the contract one of them is impossible, as a general rule he must perform that which is possible." Leake on Contracts, 4th ed., page 501, and again, "When a contract is in the alternative . . . if one branch of the alternative cannot be performed the promissor is bound to perform the other." Chitty on Contracts 15th ed., pages 700 to 701.

But is there not room for question whether the cases referred to (*Goodrich* v. *Nichols*, Sup. et al.), are in fact founded on the supposed doctrine as above stated? Is it not a somewhat different doctrine that forms their basis? A doctrine to the effect that in case of alternative promises, if one cannot be enforced *by reason of the Statute of Frauds*, the other cannot be enforced. That would seem to be an entirely different proposition, and one which seems to be supported by a very respectable line of authority; for instance, we find it stated in the English and American Encyclopædia of Law, 1st ed., vol. 8, page 633, as follows:—"Where an agreement is in the alternative, if one alternative is bad by the statute, no action can be maintained on the agreement, although the other is good. Thus an oral agreement by sons with their father to convey certain land to a sister, or, in default of conveyance, to pay her a certain sum of money is wholly bad. *Patterson* v. *Cunningham*, 12 Me. 506." In addition to the cases above cited in support of this doctrine (*Goodrich* v. *Nichols*, *Rice* v. *Pett*, etc.), see also *Howard* v. *Brown*, 37 Ohio 402; *Van Allstine* v. *Wimple*, 5 Cow (N.Y.) 162.

The reason for this doctrine would seem to be that to allow the enforcement of the apparently unobjectionable alternative would be in effect to allow enforcement of the alternative within the statute, and especially would this be the case when the former alternative was merely the payment of a sum of money conditioned on the breach of the latter alternative.

It will be seen that the distinction between the two doctrines is marked. In the case of an alternative agreement which is simply unenforcible, as in the case of the undertaking to re-deliver a person to the sheriff above referred to, there is noth-

ing to prevent the other alternative being enforced, but in the case of the alternative, unenforcible by reason of the Statute of Frauds, there is the distinct provision of the statute that no action shall be brought on such an agreement, and the practically uniform trend of the decisions on the subject seems to be that that means no action in any shape or form, either directly or indirectly. (See authorities above cited, and also *Dung* v. *Parker* (1873) 52 N.Y. 494; *Dumphy* v. *Ryan* (1885) 116 U.S. 496). In *Carrington* v. *Roots* (1837) 2 M. & W. 248, Lord Abinger, said, "But wherever an action is brought on the assumption that the contract is good in law, that seems to me to be in effect an action on the contract." *McCollum* v. *Jones* (1827) Tay. (U.C.) 442.

Were there a similar statute, providing that no action should be brought on agreements such as that in *Stevens* v. *Webb* (Sup.) (to surrender a person to the sheriff) it might perhaps be that an alternative agreement in such a case would, pari ratione, be held nugatory also. It is worthy of attention also that in the present case the contract is not exactly in the form of an even alternative, but is a contract to purchase the realty (which is plainly the main object of the contract) with a provision added, "and in case Campbell refuses to carry out the part assigned to him in accepting the title to said property, he will have to pay Mrs. Mercier a like sum of $300."

The net result of the matter seems to be that there are undoubtedly contradictory currents of authority on the subject.

On the one side there is the array of cases above mentioned, a no inconsiderable one, and the statements of numerous text-writers founded thereon, while on the other the main authorities seem to be *Couch* v. *Meeker*, 2 Conn. 308 (Sup.), and the case under discussion, while some countenance is undoubtedly lent to the same doctrine by the case of *Knapp* v. *Carley*, 3 O.W.R. 940. The case under discussion is referred to in *Kinzie* v. *Harper*, 15 O.L.R. 582, which however is on a different point.

The point involved is undoubtedly one of great practical importance; it has already, as above indicated, been the subject

of much judicial discussion, in which diverse views have been expressed, and no doubt in the future it will again be the subject of similar discussion.

F. P. BETTS.

London, Ont.

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*THE ONTARIO BAR ASSOCIATION.**

The most important event, so far as this Association is concerned, in the past year has been the widening of the basis upon which the Association rests, so that now the president or elected representative of each County Law Association has become a member of our council. This completes the organization which the Association has always had in view and makes it, in fact, as well as in name, a body representative of the profession throughout Ontario.

Another matter to which reference must be made is the hearty co-operation of our sister society, the Toronto Bar Association, in the work done in connection with the so-called Law Reform Act of last year. I wish to express personally, and on behalf of this Association, my thanks for the cordial way in which the members of the Toronto Bar Association worked with us in endeavouring to impress on the Government the inadvisability of interfering with the constitution of the Court of Appeal. Our united efforts were successful to the extent of postponing the operation of the Act which was finally passed. No good reason is yet apparent for the remodelling of our appellate practice. It was also demonstrated that the percentage of double appeals in this province was, in comparison with the number of cases tried, trifling, and except in cases of compensation for personal injuries did not need a legislative cure. The profession seemed fairly well united in the opinion that while in those cases a remedy might and ought to be found, the remedy proposed was inappropriate.

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*Address of the president, Mr. Frank E. Hodgins, K.C., delivered at the annual meeting at Osgoode Hall, April 8th.

But I mention this subject chiefly to say that the relations created in this way between the two Associations is of itself sufficiently important to call for notice. There is indeed great need for a closer drawing together of the members of the Bar, both for the sake of the common interests of our strenuous life, but also so that we may not entirely lose what is the greatest charm connected with practice of the law, the intimate companionship of congenial minds and the enjoyment of the lighter and more social side of our incomparable though jealous profession. The work of that profession is, owing to the development of Canada, becoming more absorbing and exacting every day, and there is a very great danger to ourselves if we do not cultivate those qualities which relieve the tedium of work and help us to become a more effective element among our fellows. Otherwise we run the risk of degenerating into mere machines, unattracted by, and out of touch with, the numerous interests and movements which it is our privilege to safeguard and sometimes even to illuminate. Acting upon this feeling, which ought not to be a purely local one, this Association sent some of its members to represent it at various gatherings of the Bar, namely, at the meeting of the American Bar Association at Detroit, in August; at the New York State Bar Association meeting at Rochester, in November; and at the Montreal Bar Association banquet, in December. The representatives selected were Mr. Charles Elliott, Mr. H. M. Mowat, K.C., and Col. W. N. Ponton, K.C. I need hardly say that they were received with great hospitality, and one reason why we expect to have such a distinguished representative from the New York State Bar Association present with us to-night, is because in the words of the secretary, "Mr. Justice Riddell and Mr. Mowat made such a good impression upon the members of the New York Bar that they feel they could do not less than send us their best." Mr. Elliott, as a lawyer with literary leanings, was greatly appreciated, and Col. Ponton's speech to the Montreal Bar Association in French was much enjoyed. He was selected not only on account of his qualifications, but because Belleville has, I think, set an example to the rest of the Bar in its hospitality to the members of the Bench

and Bar going circuit in that city. For some years past they have given a dinner to the visiting judge, and have in every way endeavoured to make the event a very pleasant one for outside counsel.

It may be well here to remind you that a suggestion has recently been made looking to the preservation of the records of our Bench and Bar by no less a person than Sir Wilfrid Laurier, who, in speaking in Toronto, told us how we ought to prize and preserve the speeches of eminent lawyers such as Edward Blake and the late B. B. Osler. I am glad to say that Mr. Morang, the publisher, to whom Sir Wilfrid publicly made the suggestion, has expressed his interest in the work, and is proposing to take it up, and I bespeak the co-operation of every member of the Bench and Bar in endeavouring to rescue from oblivion these mementoes of the past which we should not willingly let perish. Indeed, I would like this Association to go further and undertake the collection and arrangement not only of memorials, but, before it is too late, something of the wit and wisdom of our Bench and Bar, and secure its publication in one of our law magazines in such a manner that it can ultimately appear in book form. We have not here what they have in England, viz.: a cultivated and somewhat leisure class of briefless barristers, going circuit, whose keen interest in their profession leads them to preserve at all events the quips and jests of the circuit mess. Possibly we might supply their place, at all events in one respect, but the more important part of the work will need active co-operation by the members of the Association as to insure us against the loss of what is always recognized as very precious possession. Mr. Justice Brunea.u, of Quebec, at a recent dinner of the Junior Bar of Montreal, urged that they should undertake the publication of a history of the members of the Bench and Bar in the Province of Quebec, with a view of keeping before the minds of the profession what prominent members of the Bar have done in the past to preserve the traditions of their forerunners and their devotion to the duties they had in hand.

Among the things which a Bar Association may do is one which, if properly handled, may be of great usefulness. I mean the constant watch upon legislation, so as, from a purely legal standpoint, to prevent, or at all events to minimize, the passing of hasty, ill-considered, or inapt statutes. Of course there is always the danger that attention will be diverted from the language and its practical result and given to the effect, political or otherwise. But a committee of lawyers, distinguished for their learning instead of their politics, and presided over by a judge, could safely be trusted to adhere to their proper role. No doubt the suggestions emanating from such a committee will be met with some distrust, as coming from volunteer critics, but if those forming the proposed body act judiciously they may be of great help in supplying the place of the experienced counsel by whom in England legislation is revised.

I do not understand, however, that the duty of such a committee is limited to merely watching the phraseology of new law. We must remember, that, as said by Chief Justice Cockburn, "Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied."

It is our privilege as citizens, as well as our duty as members of a learned profession, to endeavour to take our part in the discussion of industrial and political changes which promise to make a momentous difference to the investment of capital on the one hand and the comfort and welfare of ourselves and of our fellow citizens on the other. We have been backward as a profession in this, but there is no body of men better fitted by their training and opportunities to lend assistance to the solution of these questions and to make their opinion felt not only in shaping legislation, but in moulding the convictions upon which it is founded.

No one who has watched the trend of affairs both in Canada and in our own province can be ignorant of the fact that in recent years the ideas of public ownership and public and provincial control, as expressed in legislation, have modified our conception of vested rights and created many difficult situations. We have seen in this province two distinct views enunciated with regard to competition by the public with private enterprise. The Conmee Act illustrates one phase of the subject in which municipal enterprise was prevented from operating until it had bought out its private rival. The Hydro-Electric legislation exemplifies the contrary idea, that governmental, or municipal competition assisted by the Government, should freely enter into the domain of private monopoly without making compensation for loss of profit or being obliged to expropriate. Competition is the soul of trade, and it is universally accepted as the legitimate right of private individuals. But public rivalry has not yet settled down into a practice which is welcomed by everyone.

It must be evident that capital in its relations to the working classes; in its relation to a municipality and in its relation to a government is either recognizing or having forced upon it the realization that the old-fashioned immunity from direct obligations and from competition has passed away. This is to be seen in the progressive steps under which the Workmen's Compensation for Injuries Act has finally in England put the employer in the position of an insurer of his workmen. That situation has not arrived yet in this province, but it has been recommended by the Commission appointed by the New York Legislature and also by the Commission designated by the Government of Manitoba, and it is likely to be dealt with by the Commission to be nominated by the Ontario Government. The two Commissions which have reported have endeavoured to do away with the question of contributory negligence and to provide for direct liability in case of death and temporary disablement.

Opinions have differed as to the advisability of competition by a municipality or government with an existing industry or franchise, and many have advocated regulation instead of opposi-

tion. In this connection it may be interesting to note that President Brown, of the New York Central Railway, in his annual report recognizes that the influence and co-operation of Commissions of regulation have been uniformally beneficial to the road and have done much to improve the service for the public. This is the view generally expressed with regard to the work done by the Dominion Railway Commission and by the Ontario Municipal and Railway Board. But competition to an extent unknown before is advocated by many, and if approved will no doubt be of a much more important character than that with which we have been hitherto familiar. We are all accustomed to such old-fashioned examples as are shewn by the post office which is doing express company business in its parcel post service, and by national canals in keeping down the transportation rates of railway companies. The Dominion Government has not yet adopted any active policy of competition except with the Provincial Government in incorporating companies. But the International Waterways Commission and the Conservation Commission are now dealing with problems that will affect vested rights, and the legislation which may be adopted as the outcome of their work, and the special acts incorporating various power and other companies will raise interesting and important problems not only as to private interests, but as to provincial rights and powers.

The usefulness of such a committee as I have suggested might well be shewn not only in systematically perusing all bills dealing with these subjects when introduced, but in endeavouring —without any regard to political effect—to secure such temperate discussion and consideration as may help to mould the legislation carrying out the new ideas underlying them, so as to do the least measure of harm to those affected, and with as little disturbance to settled principles as is possible. The New York State Bar Association has a committee which watches not only legislation introduced, but that which is contemplated, and its deliberations and discussions, both oral and in print, have been most useful.

A very interesting contribution to the *Canada Law Times*, by Mr. J. D. Falconbridge, which was at a later date emphasized by

the CANADA LAW JOURNAL, draws attention to the provision in the British North America Act, unused now for thirty-five years, for the assimilation of the laws of the various provinces upon subjects within their jurisdiction. There are many heads of law in which uniformity of enactment would be of great benefit to the community, considering the great volume of business between the provinces. Of these, insurance (in which the Civil Code and Statutes of Quebec are to be commended), the enforcement of judgments, the law of contracts, and the Workmen's Compensation for Injuries Acts afford excellent examples. On these subjects similarity of legislation would immensely simplify matters. Mr. Falconbridge draws attention to a Commission which is charged with the duty of endeavouring to systematize the various state enactments. The work of this Commission is most instructive and interesting, and we might, I think, endeavour to emulate its example.

One matter of interest to ourselves has been recently mooted, and that is the appointment of a French-Canadian Judge in Ontario. My own feeling is that in Ontario neither race, nor religion nor politics should enter into our calculations when an appointment to the Bench is to be made, and for that reason I should feel disposed to think that the contention put forward was inadmissible. But the request has perhaps a wider significance, and it should in justice to those who put it forward be fairly and thoroughly considered. The French language was preserved to the Province of Quebec after the Conquest, and it became one of the official languages of Canada. No one, however, can deny that it would, as a matter of business, be better for us, as a nation if the English language were spoken universally from the Atlantic to the Pacific. Should we then foster in any way the perpetuation of another language outside the limits originally assigned to it?

To extend the official use of the French language to Ontario courts would be the natural outcome of the appointment of a French-speaking judge. To do this would necessitate an amendment of the British North America Act.

In this connection the language of Michel, J., in *Lilburne's* case reported in Howard's State Trials, might well be adopted.

"You were speaking of the laws being in other tongues; those that we try you by are in English; and we proceed in English against you; and therefore you have no cause to complain."

An Act has been passed at the last session of our Legislature which will allow seven or eight of the younger men to be elected to the honourable office of Benchers of the Law Society. Benchers who have been elected for twenty years will continue in office, but their names will not be counted among the thirty elected members. Those who will be affected are, generally speaking, the elder brethren of the profession, against whom no one would vote. Indeed they are the men who ought to be honoured by the profession. Seven or eight seats which will thus be put at the disposal of the electorate, will, no doubt, be evenly divided between Toronto and the rest of the profession. At the last election the ten who came next to the first thirty included five Toronto barristers and five from outside cities and towns.

There are one or two matters which in conclusion I might bring before you. Our profession needs to wake up and insist on modern methods being adopted. We are working under a tariff over a half century old, and we still have to justify before a taxing officer each petty item of fifty or twenty-five cents. I refer not merely to the inadequacy of the tariff, but to its annoying and burdensome requirements, necessitating the keeping of dockets filled with the minutest particulars of work done and telephone messages sent and received. Some change is necessary whereby both we and our clients can ascertain by a system of block charges what the issue of a writ will cost, what a case can be taken down to trial for, what a trial would cost, and what an appeal will involve. This could readily be done if undertaken in a businesslike way.

The whole system of circuits needs reorganization; the development of legal business in Northern Ontario requiring more time to be given to that district, while in many of the Eastern counties circuits might be grouped, saving judicial time and

strength. If ir these united circuits courts were held at the county towns in rotation, no injustice would be done considering the volume of business transacted. Speaking of Toronto, there are only three jury sittings in a year, and much injustice is worked by the inability of the profession to secure in advance an order determining the mode of trial. Hence jury notices serve the purpose of delay, although when the cases are heard they may never be tried by a jury. The method adopted for non-jury work is productive of much inconvenience to the profession, and the public, and it is well that the latter should understand that the fault does not lie wholly with the legal profession. Three weeks' notice of trial is given, but when that time elapses, the case may either be put at once on the peremptory list or may find thirty or forty cases interposed, which have priority, and no one can rely upon any particular week or even any particular month for trial.

In the business activity which now prevails, it is a hard matter to get together witnesses on both sides. More than half the cases are not wholly local, and while the profession are frequently reprimanded for not being ready with non-jury cases the fact is that the system is to blame and lacks certainty and convenience. These difficulties are aggravated by the constant change of judges in the Divisional Court which makes it impossible for counsel to arrange their engagements from week to week with any degree of finality. Both the judges, the public and we ourselves would be better off if it were left to the clerk of assize to prepare for every day a list of cases that wanted to be heard.

It is not generally known that we are collecting fees by way of law stamps for the Government in payment of imaginary debentures, long since paid off by the transfer of valuable property to the province worth probably six times the amount of the debentures. This ought to be changed as these fees rest upon no real basis, and are collected from the clients as though they were part of the solicitor's bill. If some of these matters were remedied our life would be an easier one.

In conclusion, I wish you a very prosperous year, and thank you for the honour which you did me more than a year ago by electing me president of the Association.

COMPANY LEGISLATION.

In Canada we have had for some time a number of companies with provincial charters carrying on business in the four corners of the globe. On the other hand we have had companies with Dominion charters whose undertaking is confined wholly to one province.

In view of the fact that the powers of the provinces in regard to the creation of companies are limited by the British North America Act, and that the Legislature can only incorporate companies with "provincial objects," there have been doubts expressed from time to time as to the operations and securities of such provincial companies.

On the other hand we have seen frequent struggles between the local authorities and promoters who sought to get Dominion charters containing the "general benefit of Canada" declaration, when in reality they were frequently required for purely local purposes.

A still further point has been raised which will likely become of more critical importance in the near future, viz., the right of the provinces to make companies incorporated by the Dominion subject to the extra-provincial license laws.

It is understood that the Honourable Charles Murphy, Secretary of State, has now decided, with the co-operation of the Minister of Justice, to bring the legal issues involved in these matters before the Supreme Court. Having regard to the great extent of the interests involved, and the nature and complexity of the questions raised, it seems to be a matter for the State rather than for private individuals to have settled, and the action of the Secretary of State is to be commended.

KING'S COUNSEL.

Picking up the other day an old law list of Upper Canada, published by Rordans in 1858, we found that in that year the Bar of the province numbered 383, of whom only 28, one in every fourteen were Queen's Counsel. In a little sketch of the history of the profession contained in the work it is said: "As this distinction confers professional rank on the recipient, it is seldom conferred, and then only for merit. Political services are not generally taken into account when the honour is bestowed. Of this we have a good illustration in the list of Queen's Counsel last gazetted (October, 1856). Upon the recommendation of the present Attorney-General, John A. Macdonald, of the eleven gentlemen then made entitled to silk gowns, two at least, at the time members of the Legislative Assembly, were in opposition to the Government that gazetted them."

Referring to the law list for the present year (1910), we find that the Bar now numbers 1578, and of these 341 are of His Majesty's Counsel, being one in every four and two-thirds—which goes to shew how extraordinarily meritorious the present Bar of the province is, compared with that of 1858, and yet when we look around its ranks for new judges, very few seem to shine forth with such distinction as to make them obviously fitting subjects for the promotion.

In the year 1858, though there were good and able men on the Bench, there were also in the ranks of the Bar men whose obvious fitness for promotion were plainly apparent to all.

We are sometimes inclined to think that the general decentralization of business which has been the darling project of all county practitioners for some years past, has had a deleterious effect on the Bar and left us with an abundance of men of mediocre qualifications, and at the same time deprived us of men of commanding ability, and for this reason, that skill and ability in the profession of an advocate depends largely on the opportunities he has for exercising his talents. The greatest advocates formerly always commanded the greatest practice. This

led to the concentration of business in the hands of a few who were generally overloaded, but by decentralizing business, it is more generally distributed, with the result that no one has an opportunity of gaining that abnormal skill and experience which go to make up the really great lawyer. Perhaps if the title of King's Counsel were not quite as lavishly distributed and were made, as it ought to be, the mark of conspicuous merit, then it might become more readily apparent who are the men from whose ranks the Bench should be recruited. It ought to be possible to say that any man of good moral character, who has attained a silk gown, and also is not too old, is a fitting person to be appointed a judge, but can we, as a matter of fact, say so now?

REVIEW OF CURRENT ENGLISH CASES.

MARRIAGE WITH DECEASED WIFE'S SISTER—REPULSION FROM HOLY COMMUNION—7 EDW. VII. c. 47.

The King v. *Dibdin* (1910) P. 57 is a case which has arisen under the Act permitting marriage with a deceased wife's sister (7 Edw. VII. c. 47). Prior to this Act such marriages had been declared by Parliament to be contrary to God's law and were regarded both civilly and ecclesiastically as incestuous. The recent Act removed the civil objection, but it was considered by the Rev. Canon Thompson that it had not removed the ecclesiastical offence and he accordingly rejected from communion a Mr. and Mrs. Banister, who had so offended. Mr. and Mrs. Banister then brought suit in the Ecclesiastical Court against Canon Thompson for a monition to abstain from denying the Sacrament to them, which was granted by the Dean of Arches, Dr. Dibdin, and the present proceedings were then commenced for a prohibition to the Dean of Arches from further proceeding in the matter. Darling, Bray and Lawrence, JJ., refused the rule, and from their decision an appeal was had to the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.), by whom the appeal was dismissed. It may be somewhat hard for some people to understand how Parliament can have any jurisdiction to remit sins. It may make a sinful act legal from the temporal standpoint, or free it from temporal punishment, but how it can give the sinner a clean bill of health spiritually, is one of those things that is not very apparent, and seems to require further elucidation.

LEGITIMACY DECLARATION ACT, 1858 (21-22 VICT. c. 93), SS. 4, 11—(R.S.O. c. 135, s. 33)—MODE OF TRIAL—RIGHT TO TRIAL BY JURY.

Sackville-West v. *The Attorney-General* (1910) P. 143. This was a petition under the Legitimacy Declaration Act, 1858 (21-22 Vict. c. 93), (see R.S.O. c. 135, s. 33), praying a declaration of the legitimacy of the petitioner. The petitioner applied that the issues of fact should be ordered to be tried before a jury. The motion was resisted, and it was held by Bigham, P.P.D., that the court had an absolute discretion under the Act as to the mode

of trial, and while admitting that if the questions to be decided at the trial were simple matters of fact it might be proper to direct a trial by jury, yet inasmuch as it appeared that already a great mass of evidence of over 2,000 folios had been taken abroad under commissions and would have to be read at the trial and questions of admissibility would have to be discussed and decided, he concluded that the case could not be conveniently tried before a jury, and he refused the application.

WILL—CONDITIONAL WILL.

In re Vines, Vines v. *Vines* (1910) P. 147. In this case a testator had made a will beginning, "If anything should happen to me while in India," whereby he left all his property to his wife. The will was made in 1872, while the deceased was in India. In 1876 he returned to England and was then asked by his wife if he was going to alter his will, and said, "No, it is all yours, and you are my all." He repeated this remark about a fortnight before he died, in October, 1908. His next of kin contended that the will was conditional, and the condition not having been fulfilled it was nugatory. Bigham, P.P.D., however, came to the conclusion that it was not conditional, that the words above quoted applied to what was to be done in case the testator died in India, but he considered the words "all property belonging to me at the time of my death to be disposed of to the best advantage, after paying all expenses the remainder to be paid to my wife," provided for the event of his dying at any time wherever he might be, and he therefore declared in favour of the will.

COMPANY—WINDING UP—CONTRIBUTORY—TRANSFER OF SHARES TO ESCAPE LIABILITY—BONA FIDES—EQUITIES BETWEEN TRANSFEROR AND TRANSFEREE.

Re Discoverers' Finance Corporation (1910) 1 Ch. 312. In this case the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) have affirmed the judgment of Neville, J. (1910) 1 Ch. 207 (noted ante, p. 167), and in doing so have overruled the decision of Parker, J. (1908) 1 Ch. 141 (noted ante, vol. 45, p. 149). The Court of Appeal holds that there is a distinction between companies which do, and which do not, give their directors a discretion as to approving of transfers. In the former case a shareholder may, up to the last moment, get rid of his liability on unpaid shares by transferring them to a man of

straw, provided he do so out and out, reserving no beneficial right therein; but where the directors have a discretion the shareholder cannot escape liability if he has actively or passively induced the directors to pass and register a transfer (even though it be out and out) which but for his conduct they would have refused to register.

RESTRICTIVE COVENANTS—BUILDING SCHEME—SUBSEQUENT PURCHASERS—RIGHT OF SUB-PURCHASERS TO ENFORCE COVENANTS MADE TO A PRIOR VENDOR—NOTICE OF RESTRICTIVE COVENANTS.

Willé v. *St. John* (1910) 1 Ch. 325. In this case the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.), have affirmed the judgment of Warrington, J. (1910) 1 Ch. 84, noted ante, p. 94.

WILL—CONSTRUCTION—ABSOLUTE GIFT—SUBSEQUENT PROVISION FOR SETTLEMENT OF SHARE—TRUSTS BY REFERENCE TO MARRIAGE SETTLEMENT—DEFAULT OF ISSUE—ULTIMATE TRUST FOR TESTATOR, "HIS EXECUTORS, ADMINISTRATORS AND ASSIGNS."

In re Currie, Rooper v. *Williams* (1910) 1 Ch. 329. In this case a testator had in his lifetime made a marriage settlement on his daughter's marriage, the ultimate trusts of which were in favour of himself, the settlor, his executors, administrators and assigns; by his will he gave his residuary estate to trustees upon trust for his children living at his decease as tenants in common, but went on to provide that the share which "would belong to" any daughter who at his death should be or have been married should "go and be paid to" the trustees of her marriage settlement to be held upon the same trusts as were thereby declared concerning the settled property or such of them as should be then subsisting or capable of taking effect. The share of the daughter in the residue was accordingly paid to the trustees of her settlement, and she and her husband having died without issue the question was whether the ultimate trust in favour of the testator, "his executors, administrators and assigns," took effect, or whether the residuary share in the circumstances passed to the daughter's personal representatives. Joyce, J., decided in favour of the latter alternative, on the ground that there was in the will first an absolute gift in favour of the daughter which on the authority of *Lassence* v. *Tierney* (1849) 1 Mac. & G. 551, was not a cut down by the subsequent direction to settle the share. That the ultimate trust in favour of the testator, if it

had been contained in the will itself, would have been inoperative, and it was equally so when imported into the will by reference to the trusts of the settlement.

COMPANY — DIRECTOR — CONTRACT OF SERVICE — RESTRAINT ON TRADE—WINDING UP—DISMISSAL OF SERVANT—SPECIFIC PERFORMANCE—INFORMATION ACQUIRED BY SERVANT DURING SERVICE—CONFIDENTIAL RELATION—INJUNCTION.

Measures Brothers v. *Measures* (1910) 1 Ch. 336. In this case the defendant had agreed with the plaintiff company, of which he was a director, to hold office for seven years at a fixed salary, and had covenanted that so long as he should continue to hold office, he would not solely or jointly, with or as manager or agent for, any other persons or company, carry on or be engaged in any business that would compete with that of the plaintiff company. Before the term of seven years had expired the plaintiff company was ordered to be wound up at the instance of debenture holders, and the receiver and manager gave notice to the defendant that his services would be no longer required, and ceased to pay his salary. The defendant then commenced to carry on a similar business on his own account. During his employment as director he had made lists of the plaintiff company's customers, which he carried away with him and used for the purpose of soliciting the custom of such customers. The action was brought to restrain the defendant from carrying on business in competition with the plaintiff company, and to compel him to deliver up the list of the plaintiffs' customers. Joyce, J., who tried the action, held that the winding-up order having operated as a wrongful dismissal of the defendant, that he was no longer bound by his covenant, but that he had no right to make or take copies of the lists of the plaintiffs' customers for his own purposes, and he was accordingly ordered to deliver them up.

CONFLICT OF LAWS—CONTRACT—CONTRACT TO ISSUE DEBENTURES —FLOATING CHARGE ON FOREIGN LAND—CLOG ON REDEMPTION—CHARTERED COMPANY—BREACH OF CHARTER—ULTRA VIRES.

British South Africa Co. v. *De Beers Con. Mines* (1910) 1 Ch. 354. The plaintiff company was incorporated by Royal charter for the purpose of trading, and also for administering the government of certain regions in South Africa. By an agreement be-

tween the plaintiffs and the defendants, a company incorporated under the laws of Cape Colony, the defendants advanced a large sum to the plaintiffs on the security of debentures, which, by a trust deed, were made a floating charge on the plaintiffs' lands in South Africa, and by the terms of the agreement it was provided that should any diamondiferous ground, belonging to the plaintiffs, be discovered during the year in which the agreement was made, the defendants should be entitled to an exclusive license to work the same at a specified royalty. All advances having been paid off by the plaintiffs, the defendants, nevertheless, still claimed to be entitled to the exclusive right to work the diamondiferous ground. The plaintiffs claimed a declaration that the agreement was ultra vires of the plaintiff company, that it was a clog on the equity of redemption and therefore void, and that in any case all rights under it ceased on repayment. Questions of importance as to the law applicable were raised. The ground on which the agreement was claimed to be ultra vires was because by a clause in its charter the plaintiffs were prohibited from granting any monopoly of trade which it was contended an exclusive right to work all the diamondiferous ground within its territory would be, but Eady, J., was of the opinion that the clause in the charter referred to, had reference to its administrative powers, but did not affect the plaintiffs' right to deal with its proprietary rights as it should see fit. It therefore became unnecessary to decide the question of ultra vires, but the learned judge expressed the opinion that it cannot be assumed that if a chartered company does some act which is forbidden by its charter, the act is necessarily void as ultra vires, although it may lay the corporation open to have its charter revoked by the Crown. In which respect a common law corporation differs from a statutory corporation whose powers are strictly limited by its act of incorporation. The common law corporation having the same powers to contract as a natural person, but subject to the right of the Crown to intervene if it shall see fit in case of its doing anything forbidden by its charter. He was, however, of the opinion that the stipulation for the exclusive license was void as being a clog on redemption, and was in any case at an end when the debt was paid off. The contract was made in England and was English in form, and partly to be performed in England, and, as the learned judge found, by the intention of both parties was to be governed by the law of England, which he therefore held was applicable to it.

ADMINISTRATION—ANNUITY—PECUNIARY LEGACIES—DEFICIENCY OF ASSETS—VALUATION OF ANNUITY—RIGHT OF ANNUITANT TO CAPITALIZED VALUE OF ANNUITY.

In re Cottrell, Buckland v. *Bedingfield* (1910) 1 Ch. 402. In this case a testatrix had, by her will, given pecuniary legacies, and to her husband an anuuity of one pound a week during his life, and she directed her trustees to appropriate and invest a sum and to apply the income, and if necessary the corpus to paying the annuity, and after her husband's death the residue of the fund was to fall into her residuary estate, which was to be held in trust for her son. The estate was insufficient to pay the legacies and to provide a sufficient sum to answer the annuity, but it was sufficient to pay the legacies, and the value of the annuity at the time of the testatrix's death. On a summons for directions, Warrington, J., held that the proper course for the trustees to adopt, was to value the annuity as at the date of the testatrix's death, and pay the amount of such valuation to the annuitant, or invest it in the purchase of an annuity as he should choose, and pay the pecuniary legacies in full.

COMPANY—GENERAL MEETING—SPECIAL BUSINESS—NOTICE OF MEETING.

Betts & Co. v. *Macnaghten* (1910) 1 Ch. 430. This was an action by the plaintiff company to restrain two persons from acting as directors. A notice was issued for an annual general meeting of shareholders, which stated that the meeting was for the purpose of considering, and if thought fit, passing certain resolutions "with such amendments and alterations as shall be determined on at such meeting." One of the resolutions was that three named gentlemen should be appointed directors. The three named gentlemen were proposed at the meeting, but by an amendment it was proposed that two additional directors should be appointed, which amendment was duly carried. The articles of association provided that notice of an ordinary general meeting should specify any special business to be transacted, and they also provided that the number of directors should be no less than three nor more than seven, and that the minutes of a meeting should be conclusive evidence that the proceedings were regular. Eve, J., held that the two additional directors had been regularly appointed, and that the business transacted at the meeting was within the scope of the special business indicated in the notice. The injunction, therefore, was refused.

LANDLORD AND TENANT—COVENANT NOT TO PLOUGH UP PASTURE LAND—WASTE—GOOD HUSBANDRY—COSTS.

Rush v. *Lucas* (1910) 1 Ch. 437 was an action by landlord against tenant to restrain the tenant from ploughing up pasture land, contrary to an alleged covenant. The demised premises consisted of a farm of 215 acres, and at the time of the lease all but 53 acres of arable land were in pasture. The tenant agreed not to plough up any pasture land, nor commit waste or spoil. Included in the 53 acres was a field of 22 acres which had been regularly tilled by the tenant for thirteen seasons prior to 1894, but in 1895 the tenant laid it down in grass because the crops had deteriorated. In 1901 he broke up 9 acres of this field, but in 1902 he re-laid it in grass. In 1909 the landlord gave notice to determine the tenancy. The tenant thereupon required the landlord to pay him for the grass land laid down by him, and on the landlord's refusal threatened to plough up this land again, and it was to restrain him from so doing that the action was brought. Eve, J., who tried the case held that upon the true construction of the agreement the clause against ploughing up pasture land only applied to the land in pasture at the time of the agreement, and that ploughing the land in question was not a breach of that agreement, nor would it be waste or spoil, and that an act which would not be a breach of the agreement while the tenant was not under notice to quit, could not be converted into a breach as soon as notice to quit was served, and that it was immaterial that the defendant's conduct was dictated by a desire to force the landlord to compensate him, and that that fact could neither affect the construction of the contract, nor disentitle the defendant to costs.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Quebec.] DESORMEAUX *v.* STE. THÉRÈSE. [Feb. 16.

Appeal—Prohibition—Quebec case—R.S.C. 1906, *c.* 129, *ss.* 39 *and* 46.

No appeal lies to the Supreme Court of Canada from the judgment of a court of the Province of Quebec in any case of proceedings for or upon a writ of prohibition. *Shannon* v. *Montreal Park & Island Railway Co.*, 28 Can. S.C.R. 374, overruled.

Appeal quashed with costs.

Cousineau, for motion. *Surveyor,* contra.

N.B.] LOVITT *v.* THE KING. [March 11.

Succession duties—New Brunswick statute—Foreign bank—Special deposit in local bank—Depositor domiciled in Nova Scotia—Debt due by bank—Notice of withdrawal—Enforcement of payment.

L., whose domicile was in Nova Scotia, had, when he died, $90,000 on deposit in the branch of the Bank of British North America at St. John, N.B. The receipt given him when the deposit was made provided that the amount would be accounted for by the Bank of British North America on surrender of the receipt and would bear interest at the rate of 3% per annum. Fifteen days' notice was to be given of its withdrawal. L.'s executors, on demand of the manager at St. John, took out ancillary probate of his will in that city and were paid the money. The Government of New Brunswick claimed succession duty on the amount.

Held, reversing the judgment of the Supreme Court of New Brunswick (37 N.B. Rep. 58), that the Government was not entitled to such duty.

Held, per DAVIES and ANGLIN, JJ., that notice of withdrawal could be given and payment enforced at the head office of the bank in London, England, and perhaps at the branch in Montreal, the chief office of the bank in Canada.

Appeal allowed with costs.

Newcombe, K.C., for the appellants. *Hazen*, K.C., Attorney-General of New Brunswick, for the respondent.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] RE SIMON. [April 11.

Will—Words of absolute gift to A. followed by direction that after death of A. on the happening of a certain event, the property be equally divided between B. and C.—Transfer under Real Property Act.

Appeal from the refusal of the district registrar to register a transfer of land under the Real Property Act from the testator's widow in her capacity of executrix to herself individually in fee simple.

Testator by his will, after using words which imported an absolute gift of all his property to his widow, proceeded to direct that, upon the happening of a certain contingency, after the death of his widow, the property be divided equally between two named classes of persons. That contingency might still happen.

Held, that the district registrar was justified in refusing to register the transfer on the ground that the widow did not take an estate in fee simple under the will.

Affleck, for widow. *Wilson*, K.C., for the district registrar.

Full Court.] SALTMAN *v.* MCCALL. [April 14.

Mortgagor and mortgagee—Redemption after sale by mortgagee—Real Property Act, R.S.M. 1902, *c.* 148, *ss.* 80, 108-112—*Setting aside sale for gross under-value.*

Appeal from judgment of MACDONALD, J., noted, vol. 45, p. 757, dismissed with costs.

Trueman and *Levinson*, for plaintiff. *Galt*, K.C., and *Hoskin*, K.C., for respective defendants.

KING'S BENCH.

Macdonald, J.] MURRAY *v.* HENDERSON. [April 18.

Alien Labour Act, R.S.C. 1906, *c.* 97, *s.* 4—*Action brought with written consent of Judge for violation of Act—Only the person who gets the consent can sue.*

Under s. 4 of the Alien Labour Act, R.S.C. 1906, c. 97, it is only the party or parties who obtain the written consent of a judge of the court that can be plaintiff or plaintiffs in an action to recover the prescribed penalty for violation of the Act.

The action in this case was accordingly dismissed with costs because it was brought by Ira S. Murray, whereas the consent was given on the application of Murray Brothers.

Cohen and *Crichton*, for plaintiff. *A. M. S. Ross*, for defendants.

Metcalfe, J.] [April 6.

BANK OF BRITISH NORTH AMERICA *v.* WOOD.

Chose in action—Assignment of—Notice to debtors—Right of assignee to moneys collected by assignor and handed over to another creditor—Estoppel by conduct—Duty of assignee to notify other creditors of the assignment.

The plaintiffs had an assignment from one Thomas of all his book debts, notes and other choses in action as security for their claim, but did not notify the debtors or any of the other creditors of Thomas, although they knew there were such creditors. They allowed Thomas to collect the accounts and pay over the proceeds to them. The defendants, not knowing of the assignment, and having a large claim against Thomas, induced him to allow them to receive the proceeds of the collections of some of the debts and a number of the promissory notes covered by the assignment and the plaintiffs brought this action to recover these moneys and notes including some received after notice of the plaintiff's claim.

Held, that the defendants were equitable assignees of all such moneys and notes as they had reduced into possession before receiving notice of the assignment and were entitled to retain them, but that the plaintiffs were entitled to judgment for all collections of book debts made by the defendants after receipt of such notice.

Held, also, that there was no estoppel against the plaintiffs by reason of their failure to notify the defendants of their assignment.

Troughton v. *Gittley*, Amb. 630, and subsequent cases in which it was followed, distinguished.

Galt, K.C., and *C. S. Tupper*, for plaintiffs. *Hoskin*, K.C., and *Montague*, for defendants.

Bench and Bar.

The retirement of the Hon. Mr. Justice Osler from the Court of Appeal on April 18th called forth a fitting and well-deserved tribute from the Bar of the province to the splendid services, extending over a period of thirty-one years, rendered to his country by that eminent judge.

On the assembling of the court, in presence of a large and representative gathering of members of the Bar, Sir Æmilius Irving, the venerable dean of the profession, representing the Benchers of the Law Society, the York County Law Association and the Ontario Bar Association, voiced the sentiments of the Bar.

"We are met," he said in part, "to do honour to an illustrious member of the Bench, who is about to retire. The importance of the occasion and the depth of feeling evoked are attested by the large attendance of members of the Bar who are desirous of shewing their loyalty to, and esteem, not only for a judge, but, if I may use so familiar a term, for a friend. Although we are sensible of the loss which the Bench and Bar sustain through the retirement of Mr. Justice Osler, we are rejoiced to know that we shall not lose him as our friend, that his retirement comes while he is still possessed of his brilliant powers, while he is still enjoying roboust health and the honour, love and affection of his family and of troops of friends. While terms of encomium would be out of place at this tribunal—we esteem all the judges, the great body I am addressing, and the High Court as well—we may be allowed to say that Mr. Justice Osler has steadfastly upheld and splendidly exemplified the purity and learning of the Bench which lie so near the foundations of public liberty."

Chief Justice Moss, speaking for himself and his colleagues on the Bench fully concurred in the remarks of Sir Æmilius and

referred to the great personal loss they were sustaining through the retirement of one of their ablest members.

Mr. Justice Osler on rising to reply was visibly affected, almost overcome, by his emotions. He said in part:—

"Those of you who know me will, I am sure, know how difficult it is for me at this moment to express in any adequate way my sense of the honour which has been conferred upon me. I have during my connection with the Bench striven to live up to the high standard I set for myself on accepting a position on it. I feel it a high honour to be allowed to leave it, not in the cold silence of the most critical profession in the world, but with their approval as you have expressed it.

"As for the errors I have made—and no one is more acutely conscious of them than I am—some were capable of correction, and some were not, but I have the happiness of knowing that the court which, while it has the right to pardon, has also the prerogative to condemn, has extended its pardon to me. Let me wish you all happiness and prosperity, and through you to the several associations for their kindness in joining in this expression. And let me now bid you my judicial farewell."

After bidding the assembled company his official farewell, he passed out of the court-room, receiving a friendly pat on the shoulder from Chancellor Sir John A. Boyd, the President of the High Court of Justice, who represented that court.

JUDICIAL APPOINTMENTS.

James Thomas Brown, of Moosomin, in the Province of Saskatchewan, Esquire, one of His Majesty's counsel, to be puisne judge of the Supreme Court of Saskatchewan, in the room and stead of the Honourable Mr. Justice Prendergast, transferred to the Court of King's Bench of the Province of Manitoba.

The Honourable James Magee, a judge of the Supreme Court of Judicature for Ontario, and a member of the Chancery Division of the said High Court of Justice, to be a judge of the Court of Appeal for Ontario, with the title of Justice of Appeal, in the room and stead of the Honourable Featherston Osler, retired.

William Edward Middleton, of the City of Toronto, in the Province of Ontario, one of His Majesty's counsel, to be a judge of the Supreme Court of Judicature for Ontario, and a member of the Chancery Division of the said High Court of Justice, in the room and stead of the Honourable Mr. Justice Magee, transferred to the Court of Appeal for Ontario.

United States Decisions.

SALES.—Executed Contract: Where it does not appear that goods shipped were not consigned to shipper's order, nor that the buyer received the goods from the carrier, an executed contract of sale is not shewn.—*American Jobbing Ass'n* v. *Wesson*, Ark. 122 S.W. 664.

CARRIERS.—Act of God: A snowstorm, which obstructed defendant's yard, held an "act of God," so as to relieve defendant from liability for non-delivery of the passengers.—*Cormack* v. *New York, N.H. & H.R. Co.*, N.Y. 90 N.E. 56.

COMPROMISE AND SETTLEMENT.—Consideration: Where a right is disputed and a compromise ensues, the compromise is supported by a sufficient consideration, and it will not be disturbed on it subsequently appearing that one of the parties thereto had no right in law.—*Wood* v. *Kansas City Home Telephone Co.*, Mo. 123 S.W. 6.

CONTRACTS.—Completion of Building: Where building material was furnished under a contract providing for payment of the price on completion of the building, the price was recoverable on the owner's failure to complete the work within a reasonable time.—*De Long* v. *Zeto*, 119 N.Y. Supp. 765.

CRIMINAL LAW.—Threat of Perjury Prosecution: That witnesses were told that the district attorney had said he would prosecute for perjury if they did not tell the truth, held not ground to set aside a conviction.—*State* v. *Williams*, La. 50 So. 711.

DAMAGES.—Excessive Verdict: A verdict for $4,750 for injury to a telephone lineman by which he permanently lost the use of his right arm, underwent several operations, suffered much pain, and was confined to the hospital for a considerable time, held not excessive.—*Clark* v. *Johnson County Telephone Co.*, Iowa 123 N.W. 327.

EXPLOSIVES.—Care Required: The degree of care required of persons using such dangerous instrumentalities as dynamite in their business is of the highest, and what might be reasonable care in respect to grown persons of experience would be negligence as applied to children.—*Wood* v. *McCabe & Co.*, N.C. 66 S.E. 433.