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EDITOR:
HENRY O'BRIEN, K.C.

ASSISTANT EDITORS:
A. H. O'BRIEN, M.A., AND C. B. LABATT

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AMERICA'S DEBT TO ENGLAND.

The Anglo-Saxon Nations and Their Constitutions Considered.

The unlooked-for events of the past few years have brought before us in a startling manner the impotence of international law, and the brittle foundation upon which rest the administration of justice, and the protection of life and liberty. Parts of Europe are in a condition of chaos, and all of it in poverty and unrest and misery of greater or less intensity. Forms of government and constitutional safeguards are being tested as never before.

Happily situated as we are in Canada, we can contemplate with some degree of equanimity the upheavals in other parts of the world and compare conditions existing elsewhere with our own. Naturally we turn first to the two great Anglo-Saxon nations, the far-flung British Empire, whose possessions are washed by every ocean, and the United States of America, which but recently forsook its selfish isolation and entered the arena of the world's activities.

We have to recognize, much as we may perceive the danger connected with it, that the slogan of the day is the word "Democracy," that which Abraham Lincoln spoke of, in his immortal speech at Gettysburg, when he said, "We here highly resolve that these dead shall not have died in vain, that this nation, under God, shall have a new birth of freedom, and that government of the people, by the people, for the people, shall not perish from the earth."

The country that he gave his life to revive claims to be the great exponent of democracy; but, when we compare its form of government and its constitutional safeguards with those of England, there can be no doubt that the will of the people is more

quickly put in force and with less friction in Great Britain than in the United States. In the latter the President can, if he wants to, and sometimes does, block the national will and successfully oppose changes which in the Mother Country would be made almost automatically. The President has really greater power than the King. The former can, and often does of his own will, exercise arbitrary powers while the King is more or less a figure-head. This is not true democracy.

We are led to these reflections by the perusal of an interesting and instructive article received from Mr. Lucius B. Swift, counsellor-at-law, Indianapolis, Ind., in which he expresses himself as follows:—

"It would be impossible to estimate the percentage of citizens of the United States who were in heart and word on the side of the Allies from the day when the great war began in August, 1914. The two years and eight months which went by before the United States entered were passed by many of those citizens in rebellion, frequently concealed but more often open, against the President's express warning that we must be neutral, not only legally, but in our thoughts. Day by day we asked the question why we had so many people who took shelter under the President's warning and by varied outcries shewed their failure to comprehend that the struggle was shaking liberty throughout the world. There was Mr. Bryan, our painful Secretary of State, with a following of men and women who sang "I didn't raise my boy to be a soldier" and who fought hard to make us, by staying at home ourselves and by keeping our ships of commerce at home, submit to the domination of the Kaiser at once, without striking a blow, or even waiting for his final victory. Our socialists, with a few notable exceptions, preached that there was no such thing as patriotism, and there were frequent declarations of intended refusal to serve in any war. A large bulk of farmers and commercial men wanted to be kept out of the war, and labour seemed to think that the demands of labour were first in importance. Americans of German birth or descent, even to the fourth generation, seemed to rise as one man to back the Kaiser up. Greater than all the rest was the lack of English-speaking-race patriotism,

and with it an indifference as to what might happen to Great Britain in this war. As to liberty, they said, we won that by the Revolution!

Of course all this was changed. The time came when the cry that liberty was in a fight for life was in every mouth, and then the country went solid for the Allies with tremendous financial and martial strength. It put itself under autocratic power. It went into the struggle body and soul. The voice of the pacifist and the traitor was stifled. To the remotest hamlet it was work and save and give to win. And when the Americans appeared on the battle line it was with an efficiency so high and a bravery so exalted that words fail us to express our thankfulness. They equalled the Canadians, and we could not ask more. Nevertheless, may a kind providence keep us becomingly modest when we compare what we did with what Britain and her Allies have done.

But why was threatened liberty so long in finding this unanimous voice in the United States? The above declaration that we won our liberty by the Revolution answers the question. To the average American the history of the principle embodied in the words of the slogan of the Revolution, "No taxation without representation," begins with that event. Its centuries-old history back of that is unknown to him—and so with all the rest. The entire structure of Anglo-Saxon liberty has never in any school been pointed out to him as his own shelter worthy of his reverence and pride and laying upon him a duty to maintain it which binds him to the English-speaking race, which built that structure and to-day maintains it. We have never even named the foundations of their liberty to American youth. Much less have we told them the story of the storms which for centuries raged around the building of those foundations, nor of the blood and sacrifice and suffering which went into the construction; and we have never mentioned the subject to immigrant citizens. Autocratic governments impress upon their subjects the virtues of emperors and kings and princes, to cement allegiance. We do not even take the trouble to bring to American citizens the knowledge of the history of the rights which make them free. If we did it would become a religion arousing all Americans at any sign of danger.

If you ask the inhabitants of America what are the foundations of the liberty they enjoy, a great majority will name the American Revolution only. For this situation I blame the schools, and particularly the grades below the high schools, because more than three-fourths of American youth never reach the high school. For more than a century we have brought up American children to hate England, and this has led us to slur over the history of those foundations of our liberty which rest upon English soil.

We send the children out to form public opinion founded upon ignorance and prejudice, and this in a crisis is an opinion dangerous to the welfare of the country. For more than a century we have in effect taught each generation of children that Lexington, Concord and Bunker Hill were the beginning of all liberty; and, after hearing us talk, our immigrant citizens have come to the same conclusion.

Let me say at once that, whatever we have taught, the importance of the Revolution itself will never diminish. Our fathers fought for the rights of Englishmen and won. They not only secured to us imperishable blessings but they freed every English colony from a selfish colonial policy; and their action inspired the people of the civilized world to examine into their own rights. This examination caused a realization of wrongs which set the world ablaze, first in the French Revolution, and again in the continental uprisings in 1848—the one leading by painful steps to the self-governed France of to-day, the others done to death by the bayonets of autocracy.

Our Revolution and our abolition of slavery were indeed major foundations of American liberty, and they are America's noble contribution to the list. But other battles had been fought and won, in the centuries past, which educated and inspired our fathers and made them master builders to build these two American foundations. The results of those other victories lie in the midst of us and yet unseen; generations come and go in happiness because of

Ancient right unnoticed as the breath we draw.

Let me refer briefly to some of those ancient rights, and how they were won and how they have been forgotten and why.

Americans are as familiar with elections as with the alphabet. They see the representatives of the people, chosen in various ways, go to their duties in every direction, from township officers to the President and Congress; from the justice of the peace to the Supreme Court of the United States. We do not stop to consider that this representative government is vital to American liberty and that, without it, we should pass under the yoke of arbitrary rule. Knowledge of its origin and history can alone make us comprehend our debt. No youth should leave school without knowing that our Anglo-Saxon forefathers carried representative government from the forests of Germany into England; how it flourished in the hundred-moot, the shire-moot and the folk-moot; how all government was laid prostrate for the moment by William the Conqueror; how, starting again the Great Council of the Norman Kings, the people of England slowly, against their kings, built up a more and more representative government, which developed into the English Parliament and the American Congress of to-day; how the people of England drove to the block and to exile their kings who would rule in defiance of their laws and without the representatives of the people in parliament assembled; and finally how our English fathers came and planted representative government upon the shores of America; how, ever since, those who had known only the hand of a ruler have come here and have been permitted to enjoy the ancient Anglo-Saxon right of joining in the choice of representatives of the people, and so have become rulers themselves.

We settle our disputes by Courts. These were not invented by Washington and Hamilton and Jefferson. I would have children taught that they are not new; that they were not granted by any king; that they were present in the elements which produced the Anglo-Saxon race. The village-moot, the hundred-moot and the folk-moot were all Courts. In all of those Courts disputes were settled according to the customs as stated by the elder-men. This was the making of the common law. After six hundred years William the Conqueror and his successors built upon this Anglo-Saxon foundation the Courts which have developed into the English and American courts of to-day. The recorded decisions of those

courts, century after century, gave shape to the magnificent structure of the common law, the customs of the people, which had been growing from the earliest ages at a pace equal to the task of protecting the lives, the liberty, and the property of the people. When the Cavaliers and the Puritans came, they did not have to invent a system of Courts or enact a body of law; they brought both with them from England and they are here to day. To teach this history to American boys and girls is simply to prepare them to be ordinarily intelligent citizens.

In every county seat in the country is the court-house. American youth are familiar with the twelve seats for the jurymen, but beyond that they know little. No one teaches them the venerable origin of those twelve seats; that the germ of the jury appeared in France; that the Normans found it there and carried it into England 850 years ago; that it died out on the continent, to to be revived in later centuries, but that England seized upon and developed it until, in the fourteenth century, it came to its full growth when "twelve good men and true" were put into the jury seats and sworn to "a true verdict give." This was a new way to enforce an old right. Already, for many centuries, the Anglo-Saxon, in the hundred-moot, the folk-moot and the shire-moot, had had the right of trial by his equals, and Magna Charta had already registered that right in the declaration that no freeman should be proceeded against except by the "legal judgment of his peers."

No one has seen the jurymen rise from their seats, at the end of the evidence in a murder trial, and slowly file out to decide in privacy the question of life or death, without a feeling of awe; but when we add to this the fact that for six hundred years these twelve men have been a shield of justice protecting the weakest of the community, then what was commonplace becomes glorified. Which is better, to have no impression whatever of trial by jury, except that we have it, or to make the heart swell with pride by the knowledge that, for 1,500 years, every Anglo-Saxon has had the right of trial by his equals, and that all who come from all parts of the world enter here into the enjoyment of this ancient right as a free gift?

Americans have no vivid picture of the mighty drama of Magna Charta; of the English people demanding that a written record be made of their centuries-old rights. And when it was written and presented to John Lackland, he answered, "I will never grant such liberties as will make me a slave." And England rose in arms and confronted John, and then he signed. And the next day he was in arms against what he had signed, and brought over foreign troops. And the history of England for the next eighty years is the history of the struggle for the enforcement of the charter. At last, Edward I., before all the people in Westminster Hall, burst into tears and admitted that he was wrong; and while later kings evaded the charter, not one denied that it was the law. When this picture is unfolded before American youth, and when they read the words written seven hundred years ago: "We will not go against any man nor send against him save by the legal judgment of his peers or by the law of the land," then they will realize that their right to live in full enjoyment of the liberty guaranteed by those words was established by an immortal struggle; and that when our fathers came to America, no matter from what country, they stepped at once into full enjoyment of that right. We cannot afford not to have that fact and the picture of that struggle indelibly written upon the mind of every boy and girl in America.

Some months ago a man was locked up in Indianapolis upon the charge of loitering. He had not loitered, but the police, suspecting him to be a criminal, made this charge to keep him in jail while they looked up his record. By command of the Judge the sheriff brought the man into our Circuit Court in order that the lawfulness of his detention might be determined. The Court found the detention unlawful and the prisoner was set free. This is the process of *habeas corpus*, and it is so familiar and so matter-of-fact that we have forgotten that we owe anybody anything for it.

Americans never stop to think that from the earliest records of the English law, running back centuries, no freeman could be rightfully detained in prison except by the legal judgment of his peers; and when Magna Charta so declared, it only declared what

had always been the law. Nevertheless in the face of Magna Charta the King claimed the right to put a man in prison and keep him there and give no reason; and the claim was sustained by a cringing Court. Then began a new struggle, lasting 464 years, through the Plantagenet, the Tudor, and into the Stuart line, from Magna Charta to 1679. During all those centuries, the King laid his hand upon men and cast them into prison. Three hundred years after the Charter eleven Judges filed a protest against imprisonment by order of noblemen; but they admitted that Elizabeth might send men to prison at her own will. The fight went on and a later Court held that the order of Charles I. was enough to deprive a man of his liberty; and men like John Hampden looked out from behind prison bars. Still the fight went on until in the second parliament after the Restoration, in 1679, the English people, again in possession of their government, "declared that not even the King's order could stand against the writ of *habeas corpus*. When the writ of *habeas corpus* was mentioned in our constitution in 1789, it was not defined; it needed no definition. The makers of the constitution knew what this bulwark of their liberty had cost; but we do not teach it to American youth.

Americans do know that we fought the American Revolution with "no taxation without representation" as our leading war-cry, but they never think of the struggle of the English people through many centuries to settle it that they should not be taxed except by law which they had a hand in making. Yet without the example of that fight before them our Revolutionary fathers would never have thought of raising objection to the Stamp Act and the Tea Tax. Americans do not realize that when, five hundred years after the Conqueror, Henry VIII., in 1525, without law, levied a tax of one-tenth of every man's substance, and when the people rich and poor cursed the King's Minister, Cardinal Wolsey, as "the subverter of their laws and liberties" and rose in insurrection, and when Henry, bull-dog though he was, had to back down and pay back, the English people were in the midst of a battle which never ended until Cornwallis surrendered at Yorktown.

Here we find the man not afraid to stand alone—to make the one-man fight. Twenty years later Henry called for voluntary

contributions but fixed the amount each man had to pay. Alderman Reed refused and was put into the army as a soldier on the Scotch border at his own charge, with orders to be put to the hardest and most perilous duty; he was captured by the Scots and had to pay more for his ransom than the gift to the King amounted to; but he made his fight, and here is his name on the roll of those who have advanced the cause of self-government. Charles I., in 1627, called upon each man to make him a loan. Two hundred country gentlemen were clapped into irons for refusing and were shifted from prison to prison to break their spirit. Dr. Mainwaring preached before Charles that the King needed no parliamentary warrant for taxation, and that to resist his will was to incur eternal damnation. John Hampden, one of the richest commoners in England, answered that he could lend the money but he feared the curse named in Magna Charta for its violation; and he was sent back into close confinement.

Again, the Petition of Right said that no man should be taxed except by law of parliament, and Charles agreed to it. Then he levied tonnage and poundage. Parliament denounced it and was adjourned by the King. Merchants refused to pay, but the Courts decided against them. Parliament came back furious and Charles dissolved it. Richard Chambers refused to pay. Summoned before the King in Council, he told them in their teeth that not even in Turkey were merchants so wrung as in England. The Star Chamber fined him two thousand pounds and ordered him to make humble submission. He was a Puritan. He refused and was sent to prison; and for three hundred years his name has been on the roll of patriots.

In 1636 Charles ordered ship-money collected, and the highest Court decided that no statute prohibiting arbitrary taxation could be pleaded against the King's will. But notwithstanding Courts and Kings we always find the English people facing the King with the declaration that they cannot be legally taxed without their own consent, and long before the American Revolution they had won the victory.

George III. and his packed and corrupted parliament, which did not represent the people, proposed to tax America. Our

fathers, mindful of the centuries-old struggle which the English people had won, answered the proposal to tax them with a demand for the rights which Englishmen enjoyed in England; and for those rights they fought. And from whatever country our fathers came that was the fight. Lafayette, Muhlenberg, Herkimer, Steuben, Kalb, Pulaski and Kosciusko did not fight for the rights of the French in France nor of the Germans in Germany, nor of the Poles in Poland, but they fought for the rights which Englishmen had won for themselves in England, and which as part of the British Empire were our heritage, along with the common law, trial by jury and *habeas corpus*. And this was Washington's opinion. "American freedom," he said, "is at stake; it seems highly necessary that something should be done to avert the storm and maintain the liberty which we have derived from our ancestors".

In the New York farm house in which I was born, great beams hewn from forest trees outlined the foundations; these were the sills. Other hewn timbers extended across from side to side, a few inches apart; those were the sleepers. This massive foundation, which a hundred years have not shaken, is all unseen, unless you go into the cellar. American children have never been taken into the cellar of their political history where they might see the sills and the sleepers which are the foundations of the marvellous and well-ordered liberty which they enjoy to-day. If they had been, the first gun of this war would have warned a united people of the danger of democracy. It is time to begin; and when the children ask who build these foundations of free speech, free press, right of petition, trial by jury and all the rest, with the two American exceptions, there can be only one answer—England. And when they ask, what of England to-day, they will have to be told that when George III. was trying to conquer us, the English people, led by Chatham and Burke and Fox, were struggling for the same ideals we were fighting for; and that what we won by the sword they won against the same enemy by years of political struggle until England stands to-day the government most responsive to the will of the people. And when they ask what race has preserved these foundations and spread civil liberty over the world, the answer will have to be—the English-speaking race.

In teaching history it is essential to be truthful for truth's sake; but it is equally essential that all immigrant citizens as well as native born Americans realize the struggle and the sacrifices of the hundreds of years consumed in building up the Anglo-Saxon foundations of liberty upon which the government of civilized democracy rests to day. Knowing its history they will recognize the vast heritage of civil liberty which they here enjoy, and that that heritage was not built up by America alone, but is the common work of the English-speaking race. They will feel in their inmost souls that civilized democratic government is a pearl without price, and will view with the deepest anxiety, and place before everything else, the danger of its being shaken or checked in the world, and with their backs to the wall will resist very kind of encroachment upon it.

DAMAGES AGAINST JOINT TORT FEASORS.

On the appeal from the judgment at the trial in the action of *Basil* v. *Spratt*, 15 O.W.N. 174, the learned Chief Justice of Ontario in delivering the judgment of the majority of the Court is said to have dissented from the dictum of Lord Atkinson in *London Association for Protection of Trade* v. *Greenlands* (1916) 2 A.C. 15. In so doing his Lordship virtually dissented, not only from the particular dictum referred to, but from the unanimous opinion expressed by all of their Lordships in the House of Lords who heard that case. All were unanimous that the damages against joint tort feasors cannot be separately assessed against the individuals.. That was an action for libel against an unincorporated association, its secretary, and its local agent. Judgment was given on the verdict of the jury for £1,000 against the association and its secretary and for £750 against the local agent. The association and its secretary appealed from an order directing a new trial. The local agent did not appeal. All of their Lordships agreed that the judgment against the appellants could not be set aside unless the judgment against the local agent was also set aside and he was accordingly notified of the appeal in order that

he might say whether or not he objected to the judgment against him being also set aside

In the result it was held that the association was not suable, and that its secretary was not liable on the ground of privilege; consequently the judgment against the two defendants was set aside, and the judgment against the local agent remained.

As to this Lord Buckmaster, L.C., said as the judgments against the other defendants could not stand "the reason for setting aside the judgment against Wilmshurst (*the local agent*), is removed and that judgment may remain." Lord Loreburn also said: "As to the defendant Wilmshurst, *it would be necessary* to discharge the judgment against him, if judgment against Hadwen (*his codefendant*), were to be entered, for they were sued as joint tort feasors," thus plainly indicating that in the opinion of these two learned lords there could properly be but one judgment in the action for the like damages against all the defendants liable. Lord Atkinson states in the dictum referred to the same principle more explicitly, and in greater detail, but Lord Parker also says: "Nothing can be clearer than that in an action for a joint tort each of the joint tort feasors is liable for the whole damage, and that there is no contribution between them. Further, a judgment against one precludes subsequent proceedings against the other or others."

Thus, it will be seen, there was an absolute consensus of opinion that in an action against joint tort feasors there can be but one judgment and for the like amount against all who are found liable. In the circumstances of the case before their Lordships it was not necessary to judicially decide the point and their opinions may therefore be deemed to be merely dicta; at the same time these dicta, should the occasion ever arise, may be found to be a true enunciation of the law notwithstanding the adverse opinion of the majority of the learned Judges of the Appellate Division.

THE ADMINISTRATION OF JUSTICE IN JEOPARDY.

(COMMUNICATED.)

The due administration of justice is the very life blood of every civilized community; without it, ordered civilization becomes chaos. The administration of justice means the enforcement of the law of the land by courts and magistrates appointed by the Government of the country for that purpose. This enforcement should be certain, without fear or favour, impartial, prompt, and effective. Rigid attention to these principles has been characteristic of England's rule, at home and abroad, and largely the secret of her pre-eminence among the nations. When she fails to observe them, or any of them, her declension will have begun. Recent events in this country show that there is danger ahead in this regard.

In saying this we make no reflection on the magistracy, for our courts and magistrates are doing their duty in this respect in a most effective manner, with due regard to the complete and thorough administration of justice. But there is a weakness on the part of the advisers of the Executive in not resisting the influences, political and otherwise, brought to bear for the purpose of obtaining pardon or remission of sentences imposed by those appointed by the Crown and responsible to the public in criminal cases. This occasional, and too frequent, interference with the course of justice and necessary punishment of crime engenders a contempt for the administration of the law, which must produce disastrous results; for this practice leads to the very anarchy now shewing itself, and which the Government desires to repress.

Extreme laxity in the enforcement of criminal law in the United States made lynch law for a time almost a necessity. It will not be necessary for us to adopt some similar means of self preservation. The remedy, on the one hand, is the education of the people in the principles of true democracy—not democracy run mad—and as to the perils and fallacies underlying socialism. On the other hand, there must be prompt and stern dealing with those who transgress the law.

A member of the Chicago Bar recently wrote a book containing an indictment of those concerned in the administration of justice in the United States, the title being "Toward the Danger Mark." Many years ago a political writer startled people in this country by an article entitled "Whither Are We Drifting?" These two titles, putting them in reverse order, are worthy of thought at the present time.

To the legal profession, judges and lawyers, courts and officers, has been assigned the duty of interpreting the law as applicable to each particular case, and then enforcing the decree of the court or the magistrate. Our profession is therefore largely interested in the discussion of all matters which appertain to the administration of justice. They are also intelligent and influential in seeing that it is properly done.

Three sinister events or episodes are at this time much in the mind of thoughtful men, viz.: (1) The conviction, imprisonment and subsequent release of Arthur Skidmore, at Stratford; (2) The strike of the police force in the city of Toronto; and (3) The utterances of certain daily newspapers. Let us for a moment refer to these, and see what they mean and their logical sequence.

If this evil tendency is allowed to grow, increase, widen out, and bear fruit, the sequence must be anarchy, and the newspapers tell us day by day what anarchy means. We may well believe in this connection there will be no drifting toward the "danger mark," beyond which lay the ghastly scenes of the French Revolution and which now, on the continent of Europe, bears fruit in brutal barbarism, and the bloody butchery of Bolshevism. But we have recently heard of the distribution of poisonous propaganda in the city of Toronto by some unknown persons desiring the destruction of the present safeguards of law and order. We see therefore that the hydra-headed monster, lawlessness, is already beginning to shew itself.

This revolutionary pamphlet or "manifesto" of the "Provincial Council of Soldiers and Workers Deputies of Canada" declares that "the time is ripe for revolution and you must rise." One of these startling pronouncements says: "The only solution is that the workers take over all the factories, mines, and mills in the name of the working class and use them for themselves and sup-

press all those who try to prevent this. This is revolution, and this course is the only one which will aid the workers."

Now as to the Skidmore case. The facts are very simple.

The accused was charged with having in his possession objectionable literature within the meaning of the consolidated Orders-in-Council respecting Censorship, promulgated with the authority of, and pursuant to, sec. 6 of the War Measures Act of 1914. He was found guilty, and on December 19th was sentenced to thirty days in jail, and a fine of $500. There was no question as to jurisdiction.

The evidence for the Crown was clear and conclusive. On December 31st he was released from jail by orders from Ottawa, on the application of the Trades and Labour Council of which Skidmore was the local financial secretary. The president of the council met him at the door of the jail and congratulated him upon his release. The reasons for this act of clemency have not been disclosed, but it may not be far to seek when all the circumstances of the case are taken into consideration.

Skidmore was prominent in the socialist element in his neighbourhood. He and others had been seen to leave meetings when the audience rose to sing "God Save the King." He, with others, had made several excursions into the country around Stratford, for the purpose of forming branches of the Social Democratic Party amongst men of German origin, who, to say the least, were not of British sentiment!

It is noteworthy that the prisoner did not appeal from the sentence and did not apply for bail; if he had given notice of appeal bail would have been granted as a matter of course; thus giving colour to the statement, made at the time, that he desired to play the role of a martyr, true to his seditious and revolutionary proclivities.

More recently one Charles Watson, an ex-policeman, was found guilty by the Police Magistrate of the City of Toronto of having in his possession numerous copies of various objectionable and seditious pamphlets. He was sentenced to the penitentiary for three years, and to the payment of a fine of $500. The public will watch with curiosity and interest the result of a probable application by someone for the release of this culprit.

It is unnecessary to discuss in detail the recent police strike in the city of Toronto. The very fact that, for several days, they refused to act as police officers is, without more, sufficient to indicate the spirit of anarchy to which we now desire to draw attention. The police force is, within its local jurisdiction, in the same category as the army is in relation to the Empire. Can we imagine a body of British soldiers striking to do less work, or for larger pay. The army and the police should be treated most generously, and be well paid—no one would grudge this; but they must of necessity be outside the influence and control of labour unions, and be absolutely loyal to the governing body to which they owe allegiance.

As to our third point, it is not altogether surprising that disloyal men should disobey laws intended to protect the public against evils resulting from the promulgation of seditious literature, when some of our leading daily journals seek by unworthy sophistry to find excuses for those who openly defy the plain letter and spirit of the law. Our readers know as much about this as we do; we will therefore only give one illustration. A certain daily newspaper in the city of Toronto, of wide circulation, takes the ground that an offence created by Order-in-Council is so different from one created by an Act of Parliament that it may be treated with a measure of indifference. The writer of such rubbish must know that it is not a question as to the origin of the law, but whether in fact it is a law. If there is a law, that law must be obeyed or the offender punished. And anyone inciting others to transgress such law is himself committing a crime. The writer mentioned must know, or should have known, that the Order-in-Council in question is given authority by statute duly passed with all attendant forms and ceremonies, and has the same force as a statutory enactment to the like effect.

Since the above was written, an Order-in-Council has been passed as follows: "No conviction for any offence against the aforesaid regulations (as to objectionable publications, etc.) shall be had unless the prosecution has been assented to or approved by the Attorney-General of the Province in which the offence is alleged to have been committed.

FEES IN CRIMINAL CASES.

A very unseemly occurrence, referred to in the public papers, in connection with the Police Court business of a large city in Ontario, shews the necessity of having a tariff of fees in criminal cases for the guidance of practitioners, and the protection of the public.

It would appear that an exorbitant counsel fee was demanded and paid by a poor woman, terror-stricken by her son being brought before a Police Magistrate, charged with a petty theft. Legal services, which would have been well paid for by a fee of ten to twenty dollars, cost the unfortunate woman one hundred and fifty dollars, which she had to pay promptly. The fact that the practitioner subsequently returned the woman $125, when remonstrated with, only shews that he recognized his misconduct, but did not remove the smirch cast upon his class in the eyes of the public. It only gave rise to the suspicion that his charge was gauged, not by the value of his services, but by the mother's state of mind, and the amount of her savings.

If a tariff of fees is desirable and necessary in civil cases, it is very much more so in criminal cases. It is unfortunate that there are those in the profession who need to be watched and guarded against, but so it would appear to be, if the report in the newspapers is correct. An appropriate tariff should be prepared at once for many reasons and it is for the Law Society to take action to this end.

THE RIGHT TO TRIAL BY JURY.

The right of trial by jury is part of the British Constitution, and should not lightly be taken away. Taking advantage of the rules of court in that behalf, and possibly straining them, certain Judges (speaking now of Ontario), are much given to doing away with juries in cases coming before them. It is true, that there are many cases where the facts had better be found by a Judge than by a jury; and in certain cases, where popular prejudice might interfere with justice, juries are abolished. But to say that

one man (even though a Judge) can as a rule form a better opinion as to facts than twelve men is doubtful. A Judge is "a man of like passions" with a juryman, having the prejudices and whims belonging to his personality. The prejudice or whim of one juryman however will not sway the rest, and so there is a certain safety in numbers, although the number twelve may be larger than necessary in this respect.

The importance of a correct finding as to facts is the foundation of a just judgment. The law depends on the facts. Again, it is an almost universal rule that an appellate Court takes the facts as found by the trial Judge. This is not always safe, for the trial Judge may have some unconscious prejudice or predeliction which may affect his mind as to the facts, and he has no one beside him to criticize his conclusions. If there were two or more Judges to find the facts, greater accuracy might be expected, and the law would be laid down as applicable to this correct state of facts, and not as applicable to the supposed facts. Many of our readers, we are sure, could call to mind cases where injustice had been done by reason of an appellate Court declining to pass judgment upon the correctness of the facts as found by the trial Judge, and so giving an unjust judgment.

The subject is a large one, and worthy of full consideration; and possibly the rules above referred to might, with advantage, be amended.

SOLICITOR ACTING AS TRUSTEE.

Sometimes a testator specially desires that his legal adviser should not only act as the solicitor under his will, but also as one of his trustees; and again it is frequently to a solicitor's own professional interest to be a trustee, as he thereby usually obtains a determining voice in the solicitorship of the trust. In either case a solicitor acting as a trustee and also being paid for professional services to the trust comes into conflict with the principle that a person in a position of trust cannot be *auctor in rem suam.*

Not to cite any further authority this principle will be found enforced and explained by Lord Chancellor Cranworth in the

English case of Broughton v. Broughton, 1855, 5 De. Gex M. & G. 160, and his statement of it has ever since been accepted as practically the last word on the matter: "The rule applicable to the subject has been treated at the bar as if it were sufficiently enunciated by saying, that a trustee shall not be able to make a profit of his trust; but that is not stating it so widely as it ought to be stated. The rule really is, that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty; and a case for the application of the rule is that of a trustee himself doing acts which he might employ others to perform, and taking payment in some way for doing them. As the trustee might make the payment to others, this Court says he shall not make it to himself; and it says the same in the case of agents, where they may employ others under them. The good sense of the rule is obvious, because it is one of the duties of a trustee to take care that no improper charges are made by persons employed for the estate. It has been often argued that a sufficient check is afforded by the power of taxing the charges, but the answer is this, that that check is not enough, and the creator of the trust has a right to have that, and also the check of the trustee."

In consequence, in order to permit of a testator's law adviser acting as his trustee and for other motives, clauses expressly permitting him to receive the usual remuneration came to be almost invariably inserted. These clauses have, however, been adversely commented on twice by Mr. Justice Kay, *Re Chappel*, 27 Ch. Div. 584; and in *Re Fish*, 1893, 2 Ch. 413, his latest dictum being: "I wish to say on my own behalf that when a solicitor trustee himself prepares a document containing a clause of that kind in his own favour, he must not be surprised, if, when the matter comes before the Court, the Court is inclined to watch very jealously indeed his conduct as solicitor and trustee under the clause."

Notwithstanding the obvious intention of these clauses, which is to place the trustee agent in the same position as if he were not a trustee, yet in England, they have come to be regarded as conferring a benefit; in other words, as being of the nature of a legacy. Certain consequences which are not beneficial to the solicitor

trustee follow from this. If the estate is insufficient for payment of the pecuniary legacies in full, then, in default of any direction to the contrary, they all abate. Mr. Justice Eve has accordingly lately held, *Re Brown*, 1918, L.T.J. p. 441, that the solicitor's profit costs must abate among the other legacies. This case is very similar to that of *Re White*, 78 L.T. Rep. 770 (1898); 2 Ch. 217, where the Court of Appeal decided that, the testator's estate being insolvent, the solicitor trustee could not claim any profit costs until the creditors were satisfied, as the declaration made by the testator was bounty on his part. Another consequence is that neither the solicitor trustee nor his wife must attest the execution of the will, or the clause will be null and void under sec. 15 of the Wills Act, 1837. In *Re Pooley*, 60 L.T. Rep. 73; 40 Ch. Div. 1, the Court of Appeal so decided, Lord Justice Cotton saying: "It is urged that it is not a gift, for that he has to work for what he receives. That is true, but the clause gives him a right which he would not otherwise have to charge for the work if he does it, and that, in my opinion, is a beneficial gift within the meaning of the section."

DONALD MACKAY.

Glasgow, Scotland. —*Central Law Journal.*

VALUE OF GOODWILL.

In most business transactions there arise questions as to the goodwill of the business, and it is of importance to have clear ideas as to the meaning, and consequently the value, of "goodwill." It is proposed in this article to set down shortly a few of the leading principles which apply to goodwill in considering its legal and commercial aspects.

There is, of course, no exact legal definition of goodwill. In *Trego* v. *Hunt* (73 L.T. Rep. 814; (1896) A.C. 7), a case in which the meaning of the term was discussed at length, Lord Macnaghten says: "It is the whole advantage, whatever it may be, of the reputation and connection of the firm which may have been built up by years of honest work or gained by lavish expenditure of money." If it is permissible to expand the idea which seems to the writer to underlie those words, it may be said that goodwill

has two aspects—(1) perfected organisation of the business, and (2) expectation of future profits from past connection and reputation. As to (1), the value of a "going concern" as compared with its "break up" value is largely a question of work and money which has been expended in converting the latter into the former. The lifeless concern has to be organised into a living concern; the suitability of premises has to be ascertained; convenient methods discovered; communications opened up; the right man found for the right job, and so forth. As to (2), this is a matter of notoriety and satisfaction to past customers. In any particular business the value of its goodwill may be composed of either or both of items (1) and (2). The value of a commercial business might well be composed of both items almost equally, while the value, *e.g.*, of a daily newspaper might consist almost entirely of the second item. It is thus obvious that goodwill is in many cases a genuinely very valuable asset—it may be the sap and life of a business—and may represent an asset of real capital value which has been acquired by laying out very large sums in experiments in organisation or acquiring publicity. It is quite proper, therefore, for a company to regard losses made during the first few years of its existence, while it is building up a business, as being capital expenditure made in the acquirement of goodwill. In this connection it is interesting to note that the rule of law that, although dividends must not be paid out of capital, a loss shewn in past years on revenue account need not be made good before profits earned in any subsequent year are distributed as dividend: (see *Ammonia Soda Company* v. *Chamerlain* (118 L.T. Rep. 48; (1918) 1 Ch. 266).

As regards the value of goodwill, generally speaking, there is not much more to be said. Goodwill varies with the nature and circumstances of the particular business. The cautious business man will be careful not to value goodwill too high, and past expenditure and the expectation of future profits are the guides thereto.

In dealing with the value of goodwill of a partnership rather different considerations apply, and there are rules in connection with the matter which it is well to note as they may be of value

to arbitrators and others who have to assess the value of goodwill on the dissolution of a partnership by death or otherwise.

Where the partnership is dissolved by the death of one partner, or by the expiration of the agreed time, or otherwise, the rule of law is that the partnership assets and effects, including the goodwill, must be sold and the proceeds divided according to the share of each partner therein. The general rule is, of course, often varied by special agreement in the partnership articles, which provide some special method of winding-up the partnership. In the absence of special stipulation, however, even if one partner buys the share of his deceased or former partner, the measure of the value which he ought to pay is what the deceased or former partner's share would fetch if the whole business were sold to a stranger. This will materially effect the value of goodwill, because on any sale to a stranger the goodwill would be depreciated in value owing to the fact that the former partners could (apart from special stipulation) set up immediately in competition with the purchasing stranger. Mr. Justice Romer said in *Re David and Mathews' Arbitration* (80 L.T. Rep. 75; (1899) 1 Ch., at p. 382): "I think that the goodwill ought to be valued on the footing of the consideration of what its value would have been to the partnership if there had been no contract between the partners that the surviving partner should purchase the share of the deceased partner in the partnership effects and securities, and, therefore, on the footing that, if it were sold, the surviving partner would be at liberty to carry on a rival business, but also, I think, on the footing that he could not use the firm name of the partnership firm, and would not have the right to solicit the old customers of the firm." The prohibition against soliciting old customers does not, of course, extend to the right to deal with them, nor does the prohibition against using the firm name extend to a former partner trading under his own name even if such name has formed part of the firm name. Hence it follows that where the goodwill is, as it were, personal, *i.e.*, has become attached to an active partner, although the goodwill may in itself be very valuable, it may be of little value to a "sleeping partner" or the executors of a deceased partner where the surviving partner has managed the business alone for some time. —*The Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

LANDLORD AND TENANT—INCOMPLETE AGREEMENT—TENANT LET INTO POSSESSION—LEASE SUBSEQUENTLY DRAWN UP—TERMS AGREED TO, BUT LEASE NOT SIGNED—RETENTION OF POSSESSION AFTER CONCLUDED AGREEMENT—PART PERFORMANCE—STATUTE OF FRAUDS (29 CAR. 2, c. 3) s. 4—(R.S. O., c. 102 s. 5).

Biss v. *Hygate* (1918) 2 K. B. 314. This was an action by a landlord to recover rent, in the following circumstances: The defendant had agreed to rent a nursery garden and had been, thereupon, let into possession, before the terms of the lease had been definitely settled. Subsequently a lease had been drawn up in the terms agreed to, but had not been signed by the defendant, who thereafter continued in possession for some weeks, when he decided to give up the premises. He set up the Statute of Frauds as a defence and the Judge of the County Court held it a good defence and dismissed the action: but a Divisional Court (Lawrence and Avory, JJ.) held that the defendant's continuance in possession after the terms of the lease had been agreed to was an act of performance unequivocally referable to the contract sufficient to take the case out of the statute, and judgment was consequently given in favour of the plaintiff.

SUMMARY JURISDICTION—SERVICE OF SUMMONS—"USUAL PLACE OF ABODE"—PLACE OF BUSINESS—Cr. Code, s. 789.

Rex v. *Braithwaite* (1918) 2 K.B. 319. In this case the Court of Appeal (Pickford, Warrington, and Scrutton, L.JJ.) affirmed the decision of the Divisional Court (1918) 1 K.B. 1 (noted *ante* vol, 54. p. 148), to the effect that service of a summons at a place of business was good service as being "a place of residence"—though not the place where the party summoned slept.

TRESPASS—SHEEP INFECTED WITH SCAB—LIABILITY OF DEFENDANT FOR DAMAGES—SCIENTER.

Theyer v. *Purnell* (1918) 2 K.B. 333. This was an action to recover damages occasioned by the defendants' sheep, which were infected with scab, trespassing on the plaintiff's land, whereby the plaintiff's own sheep also became infected with the disease. The defendant set up as a defence that he was ignorant that his sheep were infected with the disease. The Judge of the County

Court who tried the action, in the absence of any evidence that the defendant knew of the condition of the sheep, nonsuited the plaintiff; but a Divisional Court (Lawrence and Avory, JJ.) held that he was wrong; and that in case of trespass the question of *scienter* is immaterial, and therefore that the plaintiff was entitled to recover all damages consequent on the presence of the defendant's sheep on the plaintiff's land as well before as after they had been interned on the plaintiff's land, on the discovery of the disease, pursuant to an order made under the Diseases of Animals Act, 1894.

EMPLOYER AND EMPLOYEE—CONTRACT OF HIRING—IMPLIED CONDITION—TERMINATION OF CONTRACT—REASONABLE NOTICE.

Payzu v. *Hannaford* (1918) 2 K.B. 348. This was a case stated by a magistrate, on a complaint made by an employer that the defendant being employed in their service at a weekly wage of 35s. had left the employment without notice—in consequence of which the complainants claimed damages 35s. less 5s. 10d., one day's wages, which the defendant had actually worked. The magistrate was of opinion that it was not an implied term of the contract of service that the party desirous of terminating it should give a week's notice and he thereupon dismissed the complaint; but a Divisional Court (Darling, Lawrence, and Avory, JJ.) held that in the absence of an express agreement to the contrary, it is an implied condition of every contract of hiring that it cannot be determined by either except upon reasonable notice, and that in the case of a weekly hiring, a week's notice is a reasonable notice, and in the case of a daily hiring a day's notice is a reasonable notice; and because it was not quite clear on the facts presented to the Court whether the contract in question was a weekly, or daily hiring, the case was remitted for further investigation on that point.

LANDLORD AND TENANT—NOTICE TO QUIT—COVERING LETTER—VALIDITY OF NOTICE—UNCERTAINTY.

Norfolk v. *Child* (1918) 2 K.B. 351. The point in issue in this case was the validity of a notice to quit on October 11, 1917, accompanied by a letter from the agent of the landlord in the following terms: "I am instructed by the Small Holdings and Allotment Committee to serve upon you the enclosed notice to quit which is intended to terminate the tenancy at Michaelmas next unless they see sufficient reason in the meantime to change their opinion." It was claimed by the tenant that this rendered the notice uncertain and therefore void and the Judge of the

County Court so held; but a Divisional Court (Avory and Lawrence, JJ.) upset his decision, considering that the covering letter only gave expression to the right which a landlord has to waive a notice to quit by arrangement with his tenant.

COPYRIGHT—ASSIGNMENT OF COPYRIGHT—ASSIGNMENT OVER—ROYALTIES—LIABILITY OF SECOND ASSIGNEE—COVENANT—RUNNING WITH PERSONALTY—CHARGE—VENDORS' LIEN.

Barker v. *Stickney* (1918) 2 K.B. 356. The plaintiff in this case was the original owner of a copyright. He sold it to a company in consideration of a certain number of shares in the company and also certain royalties which the company covenanted to pay, and subject also to a condition that the company would assign only to successors in business and subject to the terms of the deed so far as applicable. The company got into difficulties and a receiver appointed by debenture holders, with the assent of the ordinary creditors of the company, sold to the defendant who was a successor in business of the company the copyright so far only as the vendors had any right to sell and subject to all equitable claims thereon. The present action was brought against this vendor for an account and payment of royalties in respect of the copyright. McCardie, J., who tried the action, held that the plaintiff was not entitled to succeed: (1) because the defendant was not under any contractual liability to pay royalties to the plaintiff; (2) because the original deed of assignment did not purport to make the royalties a charge upon the copyright; (3) because the deed constituted the company sole owners of the copyright and did not express that the royalties were to be paid as part of the purchase money, therefore it did not reserve a vendor's lien on the copyright for the royalties; (4) and because a mere reservation of royalties does not amount to a reservation of any lien therefor. The plaintiff's action therefore failed.

PRACTICE—PARTIES—ADDING A PARTY DEFENDANT ON A DEFENDANT'S APPLICATION—JURISDICTION—ADDITION OF ALLEGED JOINT CONTRACTOR AS DEFENDANT.

Norbury v. *Griffiths* (1918) 2 K.B. 369. This was an action on a contract and the defendant alleged that the contract was made jointly with another person whom he applied to add as a co-defendant. Bray, J., refused the application, but the Court of Appeal (Pickford, Warrington, and Scrutton, L.JJ.) made the following order which as it is peculiar we give in full: "That S. A. Vasey be joined as a co-defendant in this action, and that the defendants be then at liberty to bring a counterclaim jointly

against the plaintiffs, and that the plaintiffs are not to be prejudiced by such joinder if it should be held that the contract sued upon was not a joint contract and that the said S. A. Vasey is not liable thereon, and in that case the defendant F. Griffiths is to pay his co-defendant, S. A. Vasey, his costs subject to any right of contribution one may have against the other," and the plaintiff was ordered to pay Griffiths the costs of the appeal in any event. This seems an anomalous proceeding and we have referred to it more at length on another page.

NUISANCE—CHILDREN'S HOSPITAL FOR SURGICAL TREATMENT OF TUBERCULOSIS—RISK OF INFECTION—LEASE—RESTRICTIVE COVENANTS—BUILDING SCHEME—CONVEYANCE OF REVERSION—HOUSE NOT TO BE USED OTHERWISE THAN AS PRIVATE DWELLING—INJUNCTION.

Frost v. *The King Edward VII. Welsh National Association* (1918) 2 Ch. 180. This was an action to restrain the defendants from carrying on a children's hospital for the surgical treatment of tuberculosis, on two grounds, (1) that the hospital was a nuisance; (2) that the defendants were bound by a restrictive covenant not to use the premises in question otherwise than for a private residence. Eve, J., who tried the action, held that no case of nuisance had been made out; but, on the second ground, he granted an injunction suspending its operation for six months. The facts relating to the restrictive covenant in respect of which the injunction was granted were somewhat complicated. The premises in question were originally demised in 1887 for a term of 99 years subject to a covenant by the lessee not to carry on any offensive business. The reversion was afterwards in 1889 conveyed to a Mrs. Wilson, who covenanted with the grantors for the benefit of themselves and those claiming under them not to use the premises otherwise than for a dwelling; she then in 1893 conveyed the reversion to the lessee who covenanted to indemnify her against her covenant. The lessee being then owner of the fee conveyed to the defendants, and it was held that they were bound by the covenant in the lease of 1889, the premises in question being the subject of a building scheme of which the plaintiff's property was part.

WILL—CONSTRUCTION—"ISSUE"—CONTEXT.

In re Burnham, Carrick v. *Carrick* (1918) 2 Ch. 196. In this case Sargant, J., in considering a will, holds that for the purpose of determining the meaning of the word "issue" in a will the context may be looked at, and where it is apparent from other

parts of the will that the testator has drawn a distinction between "issue" and "children," the word "issue" may have a wider meaning than "children" and include grandchildren and other similar issue, and he so construed the word "issue" in the will under consideration.

LANDLORD AND TENANT—PAYMENT OF RENT—DEDUCTION BY TENANT OF PROPERTY TAX PAID BY HIM—PROOF OF PAYMENT BY TENANT.

North London and General Property Co. v. *Moy* (1918) 2 K.B. 439. In this case the Court of Appeal (Pickford, Warrington, and Scrutton, L.JJ.) have reversed the judgment of Low, J. (1917) 2 K.B. 617 (noted *ante* vol 54, p. 62). The question was whether a tenant who claimed to have paid the property tax was bound to produce proof of payment to his landlord. Low, J., thought that he was, but the Court of Appeal came to the conclusion that the Act authorizing the tenant to pay the tax and deduct it from his rent did not impose on him liability to produce evidence of the payment to his landlord. Their Lordships thought that the defendant had acted very unreasonably, and though they dismissed the action, did so without costs, but allowed the defendant the costs of the appeal.

SHIP REQUISITIONED BY ADMIRALTY—SALVAGE SERVICES PERFORMED BY VESSEL REQUISITIONED—RIGHT TO SALVAGE—"SHIP BELONGING TO HIS MAJESTY"—MERCHANT SHIPPING ACT, 1894 (57-58 VICT. C. 60) S. 557—MERCHANT SHIPPING (SALVAGE) ACT, 1916 (6-7 GEO. V. C. 41) S. 1.

Admiralty Commissioners v. *Page* (1918) 2 K.B. 447. By the Merchant Shipping Act, 1894, s. 557 it is provided that when salvage services are rendered by a ship belonging to His Majesty no charge is to be made therefor, but by the Merchant Shipping (Salvage) Act, 1916, s. 1., it is provided that if salvage services are rendered by any ship belonging to His Majesty specially equipped with salvage plant then, notwithstanding s. 557 above referred to, the Admiralty shall be entitled to claim for salvage services rendered by such vessel. In the present case a tug was requisitioned by the Admiralty upon terms which amounted to a demise of the vessel and while so in the service of the Admiralty was especially equipped with salvage plant and rendered salvage services; and the question presented for Bailhache, J's, decision was whether the owners, or the Admiralty were entitled to the amount of the salvage award. This depended on whether or not the vessel was to be regarded as "belonging to His Majesty," within the

meaning of the Act of 1916, and the learned Judge held that it was, and consequently that the Admiralty were entitled.

COMPANY—ISSUE OF SHARES—BROKERAGE—COMMISSION—NON-DISCLOSURE IN PROSPECTUS OF PAYMENT OF COMMISSION—COMPANIES' ACT, 1908 (8 EDW. VII. c. 69) s. 89—(R.S.O. c. 178, s. 100).

Andreae v. *Zinc Mines* (1918) 2 K.B. 454. The plaintiff claimed to recover from the defendant company a balance alleged to be due under an agreement whereby the company bound itself to pay a commission of ten per cent. on all shares in the defendant company for which the plaintiff should find subscribers. This agreement was not disclosed in the prospectus. Part of the commission had been paid and the defendant company counterclaimed that the agreement was illegal and for a return of the commission actually paid. The plaintiff endeavoured to support the agreement as being one for brokerage and therefore protected by the Companies' Act, 1908, s. 89 (see R.S.O. c. 100 (3)), but Bailhache, J, held that the agreement was really an agreement to pay a commission (the plaintiff being a *feme sole* and not carrying on business as a broker or otherwise), and that the agreement was illegal because not disclosed in the prospectus of the company: but while he dismissed the action, he also refused to give the defendant company any relief on its counterclaim.

CONTRACT—SALE OF GOODS—IMPOSSIBILITY OF PERFORMANCE DUE TO OUTBREAK OF WAR.

Blackburn Bobbin Co. v. *Allen* (1918) 2 K.B. 467. This was an appeal from the decision of McCardie, J (1918) 1 K.B. 540. The contract was made in 1914 for the sale of Finnish birch timber to be delivered in England. The plaintiffs had no notice that the timber was not kept in stock by the defendants. The contract contained no war, or *force majeure*, or suspension provisions. Owing to the war the defendants were unable to procure shipment of the timber from Finland and were consequently unable to perform the contract. McCardie, J, held, that this did not relieve the defendants from liability and the Court of Appeal (Pickford, Bankes, and Warrington, L.JJ.) affirmed his decision.

CONTRACT—ILLEGALITY—ALIEN ENEMY—SUSPENSION CLAUSE—ABROGATION OF CONTRACT—PUBLIC POLICY.

Naylor v. *Krainische Co.* (1918) 2. K.B. 486. This was an appeal from the judgment of McCardie, J. (1918) 1 K.B. 331

(noted *ante*, vol. 54, p. 222). The contract in his case was made before the war for the sale of iron. After the contract had been partly performed the war commenced and the defendants thereby became alien enemies. In these circumstances McCardie, J., held that, quite apart from any special provisions as to the suspension of the contract in case of war, on the ground of public policy, the contract was dissolved, and the Court of Appeal (Pickford, Bankes, and Warrington, L.JJ.) held that after the judgment of the House of Lords in *Ertle Bieber Co* v. *Rio Tinto Co.* (1918) A.C. 260, the case was unarguable and dismissed the appeal.

SHIPOWNER—CHARTERPARTY—CONTRACT TO PAY BROKER'S COMMISSION—CUSTOM—ENFORCING CONTRACT IN FAVOUR OF THIRD PARTY.

Leopold Walford v. *Les Affreteurs Anonyme* (1918) 2 K.B. 498. This was an action to enforce a contract made in favour of a person not a party thereto, in the following circumstances: By a charterparty made by the defendants it was provided that "a commission of three per cent. on the estimated gross amount of hire is due to Leopold Walford on signing this charter (ship lost or not lost)." The action was brought by Leopold Walford but it was arranged between the parties, to avoid the necessity of amendment, that the action should be treated as if brought by the charterers as trustees for Leopold Walford; and it was held that, so brought, the action was maintainable, following *Robertson* v. *Ward* (1853) 8 Ex. 299. The defendants sought to escape liability on the ground that, by a custom, brokerage was never payable, no matter what the form of the contract, unless the hire was earned. Bailhache, J., who tried the action, held that such a custom had been proved and as no hire had been in fact earned under the charterparty, no brokerage was payable; but the Court of Appeal (Pickford, Bankes, and Scrutton, L.JJ.) held that a custom which purported to override the express terms of a written instrument was bad, and that under the terms of the contract in question the brokerage was payable though no hire was earned.

RAILWAY COMPANY—UNDERTAKING LEASED TO ANOTHER COMPANY—RENTAL—DEPRECIATION OF CAPITAL—DEBENTURE HOLDERS—PAYMENT OF DIVIDENDS OUT OF RENTAL—RESTORATION OF CAPITAL.

Lawrence v. *West Somerset Mineral Ry.* (1918), 2 Ch. 250. This was an action by a debenture holder of the defendant company to restrain payment of dividends on the ground that the capital

had depreciated and that it should be first restored. The facts of the case were that the defendants, capital consisted of £105,000, of which £30,000 had been raised on the security of debentures. The defendant company had leased its whole undertaking to another company for which it received £5,575 per annum. This sum it applied in paying the interest on the debentures and the surplus was applied in payment of dividends. The assets of the company had depreciated in value below the £105,000 and the plaintiff (whose debentures were not in arrear), claimed that the equilibrium between the assets and the capital should be first restored out of the annual rental before any part was applied to the payment of dividends. Eve, J., who tried the action, held that the plaintiff was not entitled to the relief claimed; and that the dividends, in the circumstances, could not be held to be paid out of capital.

TRADE MARK—INFRINGEMENT—RECTIFICATION OF REGISTER—SEVEN YEARS REGISTRATION OF MARK THAT SHOULD NOT HAVE BEEN REGISTERED—"REGIMENTAL" AS TRADE MARK—TRADE MARKS ACT, 1905 (5 EDW. VII. c. 15) ss. 11,35,41—(R.S.C. c. 71, s. 42).

Imperial Tobacco Co v. *Pasquali* (1918) 1 Ch. 207. This was a proceeding to remove a trade mark from the register on the ground that it should never have been registered. The trade mark in question was the word "Regimental" as applied to cigarettes. It had been registered over seven years. Astbury, J., who heard the application, ordered its removal; but the Court of Appeal (Eady, Warrington, and Duke, L.JJ.) reversed his order on the ground that a trade mark which had been registered upwards of seven years is, unless open to the objection that it is calculated to deceive, or is otherwise disentitled to the protection of the Court, or is contrary to law or morality or is scandalous, is irremovable under s. 41 of the English Trade Mark Act, 1905. Under the Canadian Trade Mark Act, (R.S.C. c. 71.) s. 42, it is possible that the opposite conclusion might be reached. The Court of Appeal held that the mere fact that the mark registered ought not to have been registered, was not alone sufficient to disentitle it to the protection of the Court.

Reports and Notes of Cases.

Dominion of Canada.

EXCHEQUER COURT.

Cassels, J.] [43 D.L.R.1.

RE LAVERS' HEELS PATENT LTD.

Patents—Old elements—Patentable combination—Elements in previous patents—Validity.

Bringing together all elements in such a way as to be useful and produce a combination which has the essentials requisite to a valid patent entitles an applicant to have patent issue, notwithstanding that each of such elements can be traced in previous patents.

Russel S. Smart, for petitioner.

ANNOTATION ON ABOVE CASE FROM 43 D.L.R.

What are termed combinations form an important class of inventions. The term "combination" has no statutory foundation. Patents are granted in Canada for any new and useful "art, machine, manufacture or composition of matter." The machine or manufacture or composition of matter may be composed of a number of elements co-operating together, and when this is so the term "combination" is often applied to it.

Frequently the word "combination" is used, especially in the specification of a patent to describe any invention made up of parts more or less complex. Technically, however, the word is used to refer to cases where there is some interaction or functional co-operation of the parts, producing a separate entity having a result and characteristics different from the sum of the individual results and characteristics of its elements. Buckley, L.J., in *British United Shoe Machinery* v. *Fussell* (1908), 25 R.P.C. 631, 657, defined a combination as meaning "a collocation of intercommunicating parts with a view to arrive at a simple result." *Proctor* v. *Bennis* (1887), 36 Ch. D. 740; *Wood* v. *Raphael* (1896), 13 R.P.C. 730; *Crane* v. *Price* (1840), 1 W.P.C. 377, 383, 409; *Murray* v. *Clayton* (1872), L.R. 7 Ch. App. 570.

Combinations when they produce a new result or a known result in a new way are considered to be patentable inventions. (*British United Shoe Machinery Co.* v. *Fussell*, *supra*; *Williams* v. *Nye* (1890), 7 R.P.C. 62; *Wood* v. *Raphael*, *supra*; *Anti-Vibration Incandescent Lighting Co.* v. *Crossley* (1905), 22 R.P.C. 441; *Goddard* v. *Lyon* (1894), 11 R.P.C. 354; *Marconi* v. *British Radio Telegraph & Telephone Co.* (1911), 28 R.P.C. 181; *British Westinghouse Electric and Mfg. Co.* v. *Braulik* (1910), 27 R.P.C. 209; *International Harvester Co. of America* v. *Peacock* (1908), 25 R.P.C. 765, 777; *Gramaphone and Typewriter Co. Ltd.* v. *Ullmann* (1906), 23 R.P.C. 752.)

All of the elements of a combination may be old, but the combination may itself constitute an invention. (*Lister* v. *Leather* (1858), 8 El. & Bl. 1004, 120 E.R. 373; *Bovill* v. *Keyworth* (1857), 7 El. & Bl. 725, 119 E.R. 1415; *Crane* v. *Price* (1842), 1 W.P.C. 383.)

The leading Canadian case of *Smith* v. *Goldie* (1882), 9 Can. S.C.R. 46, deals with this point. The headnote reads:—

"An invention consisted of the combination in a machine of three parts, or elements, A, B and C, each of which was old, and of which A had been previously combined with B in one machine, and B and C in another machine, but the united action of which, in the patented machine, produced new and useful results. *Held* (Strong, C.J., dissenting), to be a patentable invention."

In the judgment, Ritchie, J., said, p. 50:—"Where the patent is for a combination, the combination itself is the novelty and also the merit."

And Henry, J:—"The result in this case is produced by the combined and simultaneous action of the draft upwards created by the fan, and the continuous operation of the brush or brushes worked by the machinery as described in the specification. It was the simultaneous action which produced the result. . . . By the co-operation of the constituents, a new machine of a distinct character and function was formed, and a beneficial result produced by the co-operating action of the constituents, and not the mere adding together of the separate contributions."

For other Canadian authorities on combinations see *Toronto Telephone Mfg. Co.* v. *Bell Telephone Co. of Canada* (1885), 2 Can. Ex. 495; *Robert Mitchell* v. *Handcock Inspirator Co.* (1886), 2 Can. Ex. 539; *Griffin* v. *Toronto R. Co.* (1902), 7 Can. Ex. 411; *Mattice* v. *Brandon Machine Works* (1907), 17 Man. L.R. 105; *Dansereau* v. *Bellemare* (1889), 16 Can. S.C.R. 180; *Barnett McQueen* v. *Canadian Stewart* (1910), 13 Can. Ex. 186.

A new combination may be formed by the omission of an element from, or by the addition of an element to, the elements of an old combination, provided there is a new result produced by a different interaction of the elements. (*Pneumatic Tyre Co.* v. *Tubeless Tyre Co.* (1897), 15 R.P.C. 74; *Wallington* v. *Dale* (1852), 7 Exch. 888; *Russell* v. *Cowley* (1834), 1 W.P.C. 459; *Morris* v. *Bransom* (1776), 1 W.P.C. 51; *Vickers* v. *Siddell* (1890), 15 App. Cas. 496.) The substitution of a new element in an old combination, if the element substituted is not obviously and demonstrably an equivalent of the one for which it was substituted, may involve invention. (*Unwin* v. *Heath* (1855), 5 H.L. Cases, 505, 522, 1 W.P.C. 551; *Badische Anilin und Soda Fabrik* v. *Levinstein* (1885), 2 R.P.C. 73.)

For American cases on combination see *San Francisco* v. *Keating*, 68 Fed. 351, 15 C.C.A. 476; *Von Schmidt* v. *Bowers*, 80 Fed. 140, 25 C.C.A. 323; *American* v. *Helmstetter*, 142 Fed. 978, 74 C.C.A. 240; *National* v. *Aiken*, 163 Fed. 254; *Hoffman* v. *Young*, 2 Fed. 74; *National* v. *American*, 53 Fed. 369; *Green* v. *American*, 78 Fed. 119, 24 C.C.A. 41; *Gill* v. *Wells*, 89 U.S. 1; *Electric* v. *Hall*, 114 U.S. 87; *Prouty* v. *Ruggles*, (1842), 16 Pet. 336; *McCormick* v. *Talcott*, (1857), 20 How. 402; *Vance* v. *Campbell* (1861), 1 Black 427; *Dunbar* v. *Myers*, 94 U.S. 187.

It is necessary to distinguish combinations from mere aggregations. Aggregation is not invention either in processes, machines or manufactures. (*Hailes* v. *Van Wormer* (1873), 20 Wall 353.) The elements which are col-

located in an aggregation may themselves, if new, amount to separate inventions, but assembling these elements, unless there is interaction, can produce no new result, and there can, therefore, be no invention. For example, in *Reckendorfer* v. *Faber* (1875), 92 U.S. 347, a rubber eraser was placed on the end of a pencil and a patent claimed for the alleged combination. The Supreme Court of the United States held that the pencil and eraser each continued to perform its own duty and nothing else. No effect was produced; no result followed from the use of the two and consequently the union was an aggregation and not invention. (See also *Williams* v. *Nye* (1890), 7 R.P.C. 62; *Thompson* v. *James* (1863), 32 Beav. 570, 55 E.R. 224; *Rushton* v. *Crawley* (1870), L.R. 10, Eq. 522.)

The test of combination is the presence of a result different from the individual results of its elements. Buckley, L.J., in *British United Shoe Machinery* v. *Fussell* (1908), 25 R.P.C. at p. 631, thus states the rule:—

"For this purpose a combination, I think, means not every collocation of parts, but a collocation of intercommunicating parts so as to arrive at a desired result, and to this, I think, must be added that the result must be what, for the moment, I will call a simple and not a complex result. . . . It is not every combination of parts which is for this purpose a combination."

For other English authorities see *Crane* v. *Price* (1840), 1 W.P.C. 377; *Cannington* v. *Nuttall* (1871), L.R. 5 H.L. 205; *Huddart* v. *Grimshaw* (1803), 1 W.P.C. 86; *Bovill* v. *Keyworth* (1857), 7 El. & Bl. 725, 119 E.R. 1415; *Minter* v. *Wells* (1834), 1 Cr. M. & R. 505; *Anti-Vibration Incandescent Lighting Co.* v. *Crossley* (1905), 22 R.P.C. 441, 445; *British United Shoe Machinery Co. Ltd.* v. *Fussell* (1908), 25 R.P.C. 257; *Williams* v. *Nye* (1890), 7 R.P.C. 62; *Newton* v. *Grand Junction R. Co.* (1850), 5 Exch. 331, 334; *Boulton* v. *Bull* (1795), 2 H. Bl. 463; *Lister* v. *Leather* (1858), 8 El. & Bl. 1004, 120 E.R. 373; *Morton* v. *Middleton* (1863), 1 Macph. (Ct. of Sess.) 718; *Marconi* v. *British Radio Telegraph & Telephone Co.* (1911), 28 R.P.C. 181; *British Westinghouse* v. *Braulik* (1910), 27 R.P.C. 209.

The same distinction was drawn in *Hunter* v. *Carrick* (1885), 11 Can. S.C.R. 300, where it was held that a mere aggregation of parts not in themselves patentable and producing no new result due to the combination itself, was not invention, and consequently it could not form the subject of a patent.

For Canadian cases see *North* v. *Williams* (1870), 17 Gr. 179; *Walmsley* v. *Eastern Hat & Cap Mfg. Co.* (1909), 43 N.S.R. 432; *Smith* v. *Goldie* (1882), 9 Can. S.C.R. 46; *Dompierre* v. *Baril* (1889), 18 Rev. Leg. 597; *Wisner* v. *Coulthard* (1893), 22 Can. S.C.R. 178; *Copeland-Chatterson* v. *Lyman Bros.* (1907), 9 O.W.R. 908, 912; *Yates* v. *Great Western* (1877), 2 A.R. (Ont.) 226; *Woodward* v. *Oke* (1906), 17 O.W.R. 881; *Toronto Telephone Mfg. Co.* v. *Bell Telephone Co. of Canada* (1885), 2 Can. Ex. 495; *Robert Mitchell* v. *The Handcock Inspirator Co.* (1886), 2 Can. Ex. 539; *Griffin* v. *Toronto Railway* (1902), 7 Can. Ex. 411; *Mattice* v. *Brandon Machine Works Co.*, 17 Man. L.R. 105; *Emery* v. *Hodge* (1861), 11 U.C.C.P. 106; *Summers* v. *Abell* (1869), 15 Gr. 532.

For United States authorities see *Gill* v. *Wells*, 89 U.S. 1; *Electric* v. *Hall*, 114 U.S. 87; *Prouty* v. *Ruggles*, 16 Pet. 336; *McCormick* v. *Talcott*, 20 How. 402; *Vance* v. *Campbell*, 1 Black 427; *Dunbar* v. *Myers*, 94 U.S. 187; *San Francisco* v. *Keating*, 68 Fed. 351; *Hailes* v. *Van Wormer*, 20 Wall 353; *Reckendorfer* v. *Faber*, 192 U.S. 347; *American* v. *Helmstetter*, 142 Fed. 978; *National* v. *Aiken*, 163 Fed. 254.

R. S. SMART.

Province of New Brunswick.

SUPREME COURT—APPEAL DIVISION.

Hazen, C.J., White and Grimmer, JJ.] [43 D.L.R. 158.

MARITIME COAL, RAILWAY & POWER CO. v. CLARK.

1. *Sale—Acceptance of goods—No complaint as to quality—Action for purchase price—Defence of inferiority.*

A purchaser who makes no complaint to the vendor as to the quality of goods sold, until months after the goods have been accepted and paid for, although he has complained to an agent of the vendor, who has no authority except to receive orders, cannot set up such claim in an action for the purchase price of the goods.

2. *Sale—Screened coal—Trade designation—Coal screened at mine.*

A contract for the delivery of "screened coal" is carried out by the delivery of coal properly screened at the mine, although owing to the soft and friable nature of the coal more slack is produced in transit than would be produced from coal from other mines.

W. B. Wallace, K.C., for appellant; *M. G. Teed*, K.C., contra.

ANNOTATION ON ABOVE CASE FROM 43 D.L.R.

ACCEPTANCE OR RETENTION OF GOODS SOLD.

Damages where title fails. A purchaser from one who has no title was held in Ontario to be entitled to recover as damages the value of the chattel, and not merely the amount paid therefor. In *Confederation Life Association* v. *Labatt* (1900), 27 A.R., (Ont.) p. 321, Osler, J.A., said:—

"As to the MacWillie company: they undoubtedly sold as owners, and cannot successfully deny their liability to indemnify their vendee, *Eichholz* v. *Bannister* (1864), 17 C.B.N.S. 708, 144 E.R. 284, but they contend that recovery as against them must be limited to the amount of the purchase money paid by Labatt. There is no case in the English courts or our own which expressly decides that unliquidated damages may be recovered on the breach of an implied warranty of title. In all the reported decisions on the subject, the recovery has been confined to the price paid, but in all these cases the claim was simply one to recover back money paid as upon a failure of consideration, *Eichholz* v. *Bannister, supra, Raphael* v. *Burt & Co.* (1884), Cab. & Ell. 325, *Peuchen* v. *Imperial Bank* (1890), 20 O.R. 325. In Benjamin on Sales (1899), 7th Am. ed., from the Eng. ed. of 1892, and in earlier editions published in the author's lifetime, it is said: "*Eichholz* v. *Bannister* was on the money counts and therefore, strictly speaking, only decides that the price may be recovered back from the buyer on the failure of title to the thing sold; but as the *ratio decidendi* was that there was a warranty implied as part of

the contract, there seems no reason to doubt that the vendor would also be liable for unliquidated damages for breach of warranty." In the fourth edition of Judge Chalmers' work on the Bills of Sale Act, 1893, it is pointed out that this suggestion has been adopted in that Act. In the most recent edition of Mayne on Damages (1899), the subject is not noticed. In America there is much diversity of opinion, both in the text writers and decisions. In Sedgewick on Damages, 8th ed. (1891), vol. 2, p. 492, the general rule is said to be that "the measure of damages for breach of warranty of title to a chattel is the value of the chattel at the time of the purchase, with interest and the necessary costs of defending a suit brought against a vendee to test the title, with interest from the time of payment. But the vendee may disaffirm the contract and recover the consideration paid, though that is greater than the value of the property." It is remarkable that the editors do not discuss or even refer to *Eichholz* v. *Bannister*, one of the two leading English cases on the question of an implied warranty of title, and cite only *Morley* v. *Attenborough* (1849), 3 Ex. 500, 154 E.R. 943, for the English law on the subject. In Sutherland on Damages (1882), vol. 2, pp. 418, 419, it is said: "The value of the property at the time the vendee is dispossessed has been held to be the measure of damages. Generally, however, the measure has been stated to be the purchase money and interest: thus adopting the same rule that is applied generally in estimating the damages for breach of covenants for title to real estate. . . . Where the vendee is dispossessed by suit, and has, in good faith, incurred expenses in defending it, he is entitled to recover these also from the vendor as an additional item of damages." It appears to me that the law is accurately stated in the passage quoted from Mr. Benjamin's learned work, and that the vendee, going upon a breach of the implied warranty, is entitled to recover the value of the thing he has lost in consequence of the failure of the vendor's title. Can less be supposed to have been in the contemplation of the parties when the sale was made? Why should a loss by failure of title be less fully compensated than a loss by breach of warranty of quality? The case appears to fall fairly within the general rule of the common law, as stated by Parke, B., in *Robinson* v. *Harman* (1848), 1 Ex. 850, at 855, 154 E.R. 363, at 365, that "where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

Conditional sale. Evidence may be given of non-compliance with warranty to reduce damages. In *Cull* v. *Roberts* (1897), 28 O.R. 591, an agreement was made for the sale of machinery, a note being taken for the price, or, rather, an agreement called a note, by which it was stipulated that if the note was not paid, or if the purchaser should dispose of his land or personal property, etc., the vendor might retake the property and sell the same, possession to be kept in the meantime by the purchaser. The defendant set up the defective character of the machinery as a breach of warranty, but was not allowed, at the trial by the County Court Judge, to give evidence of it. It was sought in the argument to distinguish between this case of a conditional sale and the case of *Abell* v. *Church* (1875), 26 U.C.C.P. 338, which was a straight sale. *Per* Boyd, C., *Tomlinson* v. *Morris* (1886), 12 O.R. 311, "is not opposed, but rather favourable to the view that in case of conditional sale of a machine, if

the price is sued for, the defendant may shew that the machine was not as warranted, and so reduce the claim by the difference between the value of the machine as warranted and its actual value in fact."

Compare *Copeland* v. *Hamilton* (1893), 9 Man. L.R. 143.

Damages governed by market price. Where the defendant failed to deliver according to contract, the plaintiff's damages were held to be the difference between the contract price and the market price. Defendants sought to reduce this amount by saying that the plaintiff had contracted to sell the goods at a lower price, so that he had not in reality lost as much as he was claiming. "But, said Osler, J., in *Ballantyne* v. *Watson* (1880), 30 U.C.C.P. 529, at 541, "this is not the way to look at it. The defendant has nothing to do with the profit the plaintiff might have made. Assuming that the plaintiff sold this cheese, he was not able to deliver it, for he had not got it from the defendant. If the sub-sale went off for that reason, the plaintiff was not thereby disentitled from going into the market and purchasing the same quantity at the market price, which was ten cents per lb., or it is perhaps not assuming too much to infer that he filled the sub-contract by the delivery of other cheese which he would have had to purchase in the market at the increased price, or to supply from his own stock, which was then worth to him ten cents per pound. In either case he would sustain a loss of four cents per lb. There seems no reason, therefore, to reduce the damages."

Notice of purpose for which goods required. Damages in such case. In *Watrous* v. *Bates* (1854), 5 U.C.C.P. 366, defendants agreed to furnish plaintiff with railway ties to enable them to carry out a contract for the supply of ties to Sykes & Co. The trial judge directed the jury that the measure of plaintiff's damages was the difference between what he was to pay defendant for the ties and the price he was to receive from Sykes & Co. Although the profits to be made on the article contracted for are in general too remote to be considered as damages for a breach of contract, this principle is subject to be controlled by the circumstances of the particular case. The words of Baron Alderson in *Hadley* v. *Baxendale* (1854), 9 Ex. 341, 156 E.R. 145, were quoted: "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such contract which they would reasonably contemplate would be the amount of the injury which would ordinarily follow from a breach of contract, under these special circumstances so known and communicated."

An attempt was made to apply this principle in *Feehan* v. *Hallinan*, (1856), 13 U.C. Q.B. 440, the purpose for which cordwood was bought being the burning of bricks, and the defendant having failed to supply wood according to his contract. Plaintiff claimed that he was entitled to recover damages occasioned by the fall in the price of bricks while he was waiting for the wood. It does not appear that the purpose for which the wood was bought was communicated, but the judgment does not seem to proceed upon this ground. It reads as if the damages would have been considered remote under any circumstances.

"The plaintiff's case shews nothing more than that he dealt with the bricks which he intended to make and burn, in the same manner that a mer-

chant would do with goods which he was importing, viz., that he took his chance and incurred the risk of a rising or falling market. In such case the mere ordinary chances of the market cannot be supposed to have entered into the minds of the parties when the bargain was made for the delivery of the wood. If the fluctuations of the market are to form an ingredient in estimating damages in such a case as the present, then the contract must be special with reference to that. The contract here is not made for bricks, in which case the rise or fall might have had some bearing upon the question, but the contract is for wood to burn the bricks, and therefore the immediate damage is that which is connected with the price of wood at that time."

Contract price of goods fifty-two dollars, damages three hundred and ninety-seven dollars. Held not excessive for failing to supply them. The contract in *Lalor* v. *Burrows* (1868), 18 U.C.C.P. 321, was to furnish 180 sets of locks of malleablized iron. Damages were claimed in a lump sum of between $700 and $800, and the jury awarded $397.50, without specifying the items allowed. The court held that there might be damages amounting to this sum and discussed the law as to the various items that might be claimed for, saying, among other things: "If the plaintiff be entitled to procure other goods by reason of the defendant's failure of contract, it makes no difference to him how little he paid, or was to pay the defendant for them, and how much he had to pay to procure or replace them. The damages the defendant may be liable to pay may be enormously beyond any profit or price he was ever to receive for his work, as in *Wilson* v. *The Newport Dock Co.* (1866), L.R. 1 Ex. 177, and as often happens when a lawyer, who was to get a few dollars for searching a title, has to pay the whole value of the property by reason of some defect which he should have guarded against; or, when a surgeon who has got a few dollars for his services, is called upon to pay for the loss of a limb, or some other misfortune which his patient has suffered from his alleged neglect, far beyond the trifling sum which was to have been his compensation."

Damages for goods not delivered according to contract. In *Colton* v. *Good* (1854), 11 U.C. Q.B. 153, 155, the plaintiff claimed as damages for the delivery of mill stones not according to the contract, the cost of endeavouring to repair the stones and expenses of dressing them and the damage done to his mill machinery by the broken stones. It was held that he could recover the cost of dressing the useless stones on the same principle as expenses incurred with respect to articles bought in the confidence that they would prove such as the vendor was bound to furnish. The cost of repairing the damage to the machinery was also allowed, the jury being satisfied that the breaking of the stones was not such an accident as could not be fairly charged against the manufacturer, but was occasioned by their not being secured by a sound and strong iron band as usual. The expense of attempting to repair the broken stones was not allowed. The plaintiff had done this on his own responsibility; he could have rejected the stones and recovered back what he had paid for them. He could not be allowed to recover back the amount paid for the stones and also the cost of attempting to repair them.

Note the difference between recovering the cost of dressing the stones under the assumption that they were such as the plaintiff was bound to accept, and the cost of attempting to repair them after it was clear that the plaintiff would be justified in refusing acceptance.

Recovery of deposit where vendor wrongfully sold goods. The plaintiff purchased cattle to be kept by the defendant until fit for the English market and paid a deposit of two hundred dollars. Defendant considered that he was not bound to keep them beyond August 20th, and insisted upon plaintiff taking them off his hands, notifying him that if he did not do so they would be re-sold. Plaintiff refusing to take them until the proper time, the defendant did sell them and claimed to retain the deposit. It was held that the plaintiff could waive the breach of the contract and sue simply for the recovery of the money paid. *Murray* v. *Hutchinson* (1887), 14 A.R. (Ont.) 489.

Purchaser must accept delivery in reasonable time. Damages for refusal. Where a specified quantity of hay was sold to be delivered at a specified place, at such times and in such quantities as the purchaser might order, it was held that the purchaser must accept the hay tendered within a reasonable time, and that the measure of damages was the difference between the contract price and the market price or value on the day fixed for delivery, or in the present case, the day when the hay was tendered to the defendant and he should have taken delivery, that being the time when the contract was broken. The plaintiff was not bound to re-sell the hay, though he might, if he thought proper, have done so and charged the vendee with the difference between the contract price and the price realised at the sale. But it would be requisite, in such a case, to show that the hay was sold for a fair price and within a reasonable time after the breach of the contract. The plaintiff was also allowed for extra expenses which he had incurred owing to the refusal of the defendant to fulfil his contract, such as labour, cartage, storage, weighing and selling the hay. *Chapman* v. *Larin* (1879), 4 Can. S.C.R. 349.

Damages for refusal to accept where the contract was to deliver wood in instalments and after one instalment had been delivered. The plaintiff in *Moore* v. *Logan* (1856), 5 U.C.C.P. 294, received as damages the difference between the contract price and the selling price "at the time the contract was broken or to be performed." These periods are not necessarily the same, but the case does not discriminate and is of no value on the question which is discussed, which is the proper time at which to take the selling price, whether it is the time when the instalments were to be delivered, or the time when the defendant refused to accept further instalments and thus broke the contract. On the whole, it is not a very valuable case.

In *Brunskill* v. *Mair* (1857), 15 U.C.Q.B. 213, the defendant failed to accept a quantity of flour delivered at Oswego, in consequence of which the plaintiff was obliged to resell. He was held entitled to recover the difference between the contract price and the price at which he had been obliged to resell at Oswego. The defendant was contending that the price at Toronto should govern, but this contention was overruled, as the plaintiff was at liberty to deliver it at Oswego.

Damages for refusing to accept deed of transfer. The plaintiff sued in an action, among other things, for the refusal to accept the deed of a vessel sold by plaintiff to defendant and of which the defendant had received possession. The jury gave as damages the whole value of the vessel and the court declined to disturb the verdict. The defendant was objecting that no title to the vessel had passed to him for want of the transfer under the provisions of 8 Vict., c. 5 but the court, held that it was not competent for him to set up

such a defence, as he had refused to accept the transfer. *Phillips* v. *Merritt* (1853), 2 U.C.C.P. 513.

A few additional cases where the subject of acceptance and rejection of goods sold has been considered may be noted.

Jacobsen v. *Peltier*, 3 D.L.R. 132, held that a rehibitory action (or action in cancellation of sale for latent defects) must be brought with reasonable diligence according to the nature of the defect and the usage of the place where the sale is made; and where there is no usage, the old French law prescription of six months from the date of the sale will be applied; also that use of the thing sold as the buyer's property, the making of extensive repairs, alterations and improvements thereto, are acts of acquiescence to the sale and will bar a resolutory action, more especially when the defendant was never notified thereof.

Ironsides v. *Vancouver Machinery Depot*, 20 D.L.R. 195, 20 B.C.R. 427, was an action for the price of railway construction dump cars and equipment, the defence being shortage and unfitness. The defendants did not advance the contention put forward at the trial for a year or more after they took delivery, the British Columbia Court of Appeal affirming the judgment of Gregory, J., held that the lapse of time before making the complaint of alleged shortage of or unfitness were elements to be considered as adversely affecting the credit to be given the evidence adduced for the buyer to sustain a defence based on such complaint.

Alabastine Company, Paris v. *Canada Producer and Gas Engine Co., Ltd.*, 17 D.L.R. 813, was an appeal from the judgment of Clute, J., in favour of the plaintiff in an action to recover $5,500 paid by the plaintiff on account of purchase-money for an engine (to be built according to specifications) bought from the defendant and alleged to be useless for the purpose intended, and for damages and for rescission. The engine was being "tried out" from September, when it was set up in respondent's factory, until the time of the breakdown in the following March. The Ontario Supreme Court (Appellate Division), affirming the judgment of Clute, J., held that when a sale of personalty not yet in existence or ascertained is made with a condition that it shall, when existing or ascertained, possess certain qualities, the "trying out" of the thing sold after delivery covering a protracted period does not constitute an acceptance against the buyer where such "trying out" was, as understood by both parties, to be for the purpose of discovering whether or not it answered the conditions of the contract.

In *Duncan & Buchanan* v. *Pryce Jones Ltd.*, 22 D.L.R. 45, McCarthy, J., of the Alberta Supreme Court, held that the buyer of goods is liable, because of his acceptance of same, if he retained them after actual receipt of same for such a time as to lead to the presumption that he intended to take possession thereof as owner.

Haug Bros. v. *Murdock*, 25 D.L.R. 666: Elwood, J., of Saskatchewan, held that where, in the sale of a traction engine, a purchaser accepts the engine and continues to use it after discovery of the defects, he is thereby precluded from later returning the engine. This case was reversed in 26 D.L.R. 200, but on the ground that as the engine was not constructed in accordance with the Steam Boilers Act (R.S.S. 1911, c. 22, sec. 19), the regu-

lations not having been complied with, the sale of the engine was wholly illegal.

In *Hart-Parr Co.* v. *Jones* (Sask.), [1917] 2 W.W.R. 888, the facts were: The receipt of an engine, the property therein not having passed, and user of it for threshing purposes for about 30 days and the signing of an acknowledgment that an expert had spent a certain number of days in repairing it and had made it satisfactory.—Lamont, J., the trial judge, held, under the circumstances, that there had been no acceptance. From August till spring could not be regarded as an unreasonable time for the rejection of an engine, the vendor by painting it having made inspection on the part of the purchaser at the time of delivery ineffective.

The following Quebec cases may also be of interest:

Macey Sign Co. v. *Routtenberg*, 48 Que. S.C. 346. A defect in the "flasher" of an electric sign consisting in the fact that it produces only a red light in place of producing simultaneously a red and white light is an apparent defect. The irregular placing of the interior wires of the sign is a latent defect, but the purchaser cannot complain of it eight months after its installation.

Martin v. *Galibert*, 47 Que. S.C. 181. When a purchaser has examined merchandise before buying, and has not objected to the price on account of its inferior quality, he cannot afterwards refuse to accept and pay for it on account of such inferiority.

Mackay v. *Temple Baptist Church*, 25 Que. K.B. 417. The buyer of a debt who, after having accepted a first transfer, received from the same seller another one containing in addition to the first, other claims against new debtors, and who instead of notifying the seller of his refusal to accept the second transfer, keeps it in his possession for several years, and meanwhile proceeds to collect the debts from the two debtors, has thereby tacitly accepted the last transfer.

Where a transfer of claims contains the debts of several debtors, and the buyer, without positively accepting, collects the debt of any one of the debtors, he accepts tacitly the whole transfer.

Southern Can Co. v. *Whittal*, 50 Que. S.C. 371. A delay of four months after the delivery of a machine is too long to refuse to accept it on account of defects. If considerable changes are made by a buyer to a machine sold and delivered, it amounts to an acceptance.