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## *DURATION OF THE DOMINION PARLIAMENT AND THE WAR.*

SUSPENSION NOT ALTERATION OF THE B.N.A. ACT.

A memorable and interesting event took place at Ottawa on the 8th ult., when the Parliament of the Dominion of Canada asked the Imperial authorities to extend the life of the present Parliament for one year to avoid the necessity of a general election during the present war. The resolution was presented to the House of Commons by the Premier, Sir Robert Borden, and was carried without a dissenting voice.

The occasion was not only memorable and interesting in itself, but additionally so as there are said to be only two precedents for the extension of a Parliamentary term. The first was the Septennial Act of 1716. By the Imperial Act of 1694, the duration of the British Parliament was limited to three years, and involved the extension of the Parliamentary terms from three to seven years. As stated by Sir Robert Borden, the constitutionality of that Act was questioned, but had been upheld on the ground that it was in the public interest of the State. The second and only other precedent was that offered by the legislation passed by the British Parliament recently, in view of the great war now in progress.

The extension now asked of the present House of Commons was to lengthen the life of this Parliament to October 11th, 1917. It was also explained by the Premier that the Dominion Parliament had to depend upon the Imperial Parliament for this extension. The resolution was, therefore, a request to the same body that gave effect to the British North America Act. Sir Robert concluded as follows:—

"One who has seen 150,000 Canadians under arms, the very flower of the country's youth at Valcartier, at Shorncliffe, and holding the trenches, one who realizes the uplifting spirit of unity and patriotism, cannot but shrink from pouring on the fires of patriotism the water of political strife and bitterness. That is the consideration that has animated the Government. We hope it will be accepted in the same spirit."

As was natural, interest was largely centred in the reply of the Opposition to the Government resolution, as it was admitted that no steps would be taken unless the House was of one opinion as to the desirability of securing the necessary legislation from the British Parliament.

Sir Wilfrid Laurier, leader of the Opposition, rose to the occasion, and in an eloquent address accepted for himself and his party the resolution as offered; and it was unanimously passed. During the course of his address he paraphrased the burning sentence of the Liverpool labourer, saying that, "If Germany wins, nothing else in God's world matters." He continued. "It is not the time for giving play to motives of ambition, thoughts of advancement or even the removal of unfaithful stewardship. . . . It is our duty to aid measures that have for their object the successful prosecution of the war, and to oppose all measures detrimental thereto. . . . But let us, above all, remember what we owe to ourselves, to Britain, to Europe and to mankind at large. . . . Civilization is greater than Empire, and civilization is the issue of the present war, who would doubt now that if Germany were to win it would mean the end of all that Canadian hold sacred? . . . The issue of the war is still pending, and until Belgium regains her independence, and France her territory, Canada's part is to give all the assistance in its power to England in the struggle she has undertaken against the common enemy of mankind."

## *CONSOLIDATE THE CRIMINAL CODE.*

Is it not time that the Criminal Code was again "consolidated?" The last consolidation was in 1906 on the issue of the Revised Statutes of Canada. While a decennial revision of the Canada Statutes is not called for in their entirety, it would seem that a ten-year period is a long enough interval between revisions of a law which is so frequently amended upon points of practice as is the Criminal Code of Canada.

It is sometimes said that this Code is based upon the English draft Code which was formulated by leading jurists of England over thirty years ago. That statement is, however, applicable only to half of our present Code. The first half of the Code in which the offences are declared was largely derived from the English draft Code which was an admirable statement of the law although it did not pass into the statute books of Great Britain.

The second half of our Code is little better than a jumbled accumulation of various statutes of Canada relating to criminal procedure. This is the part that demands a thorough revision and re-classification and re-arrangement of the clauses affecting criminal procedure. Then there are many subjects of criminal law as to which the Code contains only an incidental reference in some alleged curative clause, and the practitioner must search elsewhere for the common law or the old English statutes dealing with the matter. The trial practice might well be codified and the principal laws of evidence relating to criminal trials included. The law as to *habeas corpus* and *certiorari* should also be formulated into a uniform Code for the entire Dominion.

It is to be hoped that the proper authorities at Ottawa will take up this question with a full appreciation of the public benefit which would result from having the criminal law procedure assimilated in all the provinces and clearly and concisely defined.

## *NOTES FROM THE INNS OF COURT.*

### International Law Through German Glasses.

Many lawyers have wondered how the German government reconciles its conduct of the submarine campaign with the principles of international law. Dr. Scholz, a member of the Berlin Court of Appeal, in an article in the *Deutsche Juristen-Zeitung* gets over one troublesome question by enunciating the following rule: "All British merchant ships must be presumed to be armed. Every German submarine boat is therefore justified, *until the contrary has been proved in the individual case*, to assume that every British merchant ship is a fighting ship, which, like a man-of-war or an auxiliary cruiser, may be sunk without warning, and in respect of which it must be deemed a mild practice if the crew are not treated as pirates." The words in italics suggest a question of some nicety. When and where is the contrary to be proved? After the fatal torpedo has been charged—after the shell has burst in the saloon and killed 50 innocent passengers? "Sentence first and trial afterwards" is evidently to be one of the rules of procedure in the international court if constituted according to German ideas.

### German Law to be International Law.

The rule drafted by Dr. Scholz embodies a proposition which is entirely consistent with German policy. The German Emperor is making a bid for world power. Having achieved its purpose, the government of the Kaiser will frame laws for the world. In authorizing a "tame judge" to lay down the above astounding proposition, the War Council at Potsdam imagines that it is merely anticipating events a little. Instances of other "intelligent" anticipation of the like order are to hand.

Dr. Von Campe, in another article in the same journal (the *Deutsche Juristen-Zeitung*) boldly justifies the tearing up of treaties. He says: "The highest principle of civil law is the observance of good faith, not so in international law. Each

nation has the duty to preserve itself. That is its highest commandment. A nation which, against its vital interest, would observe an international treaty would commit high treason against itself." From this passage it is evident that the Germans have drafted or are drafting a new international code for themselves. For the last 30 or 40 years they have determined to become a world power: a power which shall be so strong as to be able to dictate terms to other nations. Germany, as a world power, would be the maker and the interpreter of international law. If one article in the code turned out to be inconvenient she would ignore it or (for the sake of appearances or consistency) cause it to be amended.

### Sir John Simon.

Sir John Simon, K.C., M.P., a distinguished member of the Bar, has recently resigned the post of Home Secretary, owing to disagreement with the Government on the matter of compulsory service.

Of him, as a politician, it is not proposed to speak; suffice it that he has apparently surrendered office, honour, and troops of political friends for the sake of a principle. As a lawyer his success was rapid and triumphant. It is always said that, like many others who have achieved distinction in the law, he began his career without "a sixpence to jingle on a tombstone." The late Home Secretary soon left his contemporaries far behind in the legal race. In the very early days he acted as "devil" to Sir Robert Finlay, but he did not long retain that post. Perhaps the field was too narrow. Whatever the reason he soon launched out on his own; acquired a large practice, and when, in a very few years' time, he became Solicitor-General, he held the general retainer of a number of the most important railways in the Kingdom.

It is anticipated that he will now resume his practice at the Bar. In former years it was not considered "the thing" for any ex-Cabinet Minister, unless he had been a law officer, to

appear as an advocate in the courts. The present Prime Minister, however, having served as Home Secretary in a Liberal administration, held many briefs as Mr. Asquith, Q.C., when his party went out of office. But one who was Colonial Secretary under Mr. Balfour did not follow this example. The late Rt. Hon. Alfred Lyttelton, K.C., M.P., never appeared in court after surrendering the seals of office. He did, however, frequently sit as arbitrator in heavy cases. If Sir John Simon does come back to the courts he will receive a cordial welcome from his professional brethren. Nor it is likely that the solicitors will be slow to avail themselves of his powers as an advocate.

## Animals on Highways.

Two cases illustrating the law of *scienter* in its relation to animals have recently been reported. One is English; the other Scotch. That the principle of *scienter* should be part of the general law of Great Britain need excite no wonder when one remembers that it is even recognized in Holy Writ! In the Book of Exodus, ch. xxi., it is written:—

"35. And if one man's ox hurt another's; that he die; then they shall sell the live ox, and divide the money of it; and the dead ox also shall they divide.

"36. Or if it be known that the ox hath used to push in time past, and his owner hath not kept him in; he shall surely pay ox for ox; and the dead shall be his own."

Note that the penalty is increased if the owner of the ox had knowledge of the animal's wicked propensities.

So it is well recognized law that a dog shall have his first bite; but if he bite a second time his master is in peril. The principle seems to apply to cases where a dog is charged with offences, other than that of attacking and biting mankind.

In the Scotch case above-mentioned (*Milligan* v. *Henderson*, 1915, S.C. 1030), a lady, bicycling on a public road, was about to pass a waggonette, which was coming towards her, when a dog, belonging to the owner of the vehicle, ran out from behind

it in front of the bicycle, causing the lady to fall and sustain injuries. In an action for damages against the owner of the dog, it was held that as the dog had never shewn, and as the defender accordingly could not have knowledge of, any vicious or dangerous propensities, he was not liable in damages for the result of its behaviour on the occasion of the accident. The English case, *Heath's Garage (Ltd.)* v. *Hodges*, 1915, 31 T.L.R. 134, which came before the High Court on appeal from a county, related to the conduct of certain sheep. It appears that certain sheep strayed through an open fence from the defendant's field on to a highway. The plaintiff was driving along the highway in broad daylight at 16 to 20 miles an hour. One of the sheep dashed out suddenly from the side of the road and collided with the steering apparatus, the result being that the car was overturned and damaged. In an action for damages, it was held that, assuming there to have been evidence of negligence on the part of the farmer in leaving a gap in his fence, nevertheless it was not the proximate or effective cause of the damage, and the damage was not its natural consequence, but the cause was either the driver's failure to avoid the sheep or an act of the sheep which the defendant, as a reasonable man, would not anticipate.

### Women as Advocates.

A lady litigant in person, desiring, apparently, either to impress the judge or to strike a blow in support of woman's rights, recently appeared in Mr. Justice Neville's court clad in wig and gown. To the question from the Bench, "Are you a barrister?" she made the somewhat equivocal reply: "I am and I am not: I am appearing as a barrister for myself." The learned judge then ordered her ignominiously out of court, saying that no one had the right to put on the robes of counsel save those who had been called to the Bar by one of the Inns of Court. Whether the Benchers will hold out much longer against the demand of women to be admitted to the senior branch of the legal profession it is difficult to say. It is probable that little will be heard in assertion of this or any other woman's right

during the progress of the war. But one thing is certain: legislation will be necessary if woman is to be admitted to the Bar. When a woman did apply for admission to the Bar she was refused by the Benchers. An appeal lay, as of right, to a committee of the judges. To this committee she presented, in person, a formidable argument, but in vain. The appeal was disallowed for the reason that "there was no precedent for admitting a woman to the English Bar." Volumes could not have said more!

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## *NEWSPAPER CRITICISM OF PUBLIC MEN.*

At no time in the world's history, probably, have the words and works of public men been so discussed and criticized in public as they have been since this great war began. It is well that this should be, within, of course, reasonable and patriotic limits. The subject of newspaper criticism of public men has recently been discussed by the House of Lords in the case of *Levy & Company* v. *Langlands*, reported in the *Times* of January 22nd. A writer in the *Solicitors' Journal*, in referring to this case, says that in no previous case has any Court expressed in such emphatic terms the distinction between the public and private life of a citizen as a legitimate subject of criticism in the press as has just been done in the above case. The law on the subject as laid down by the trial judge, and confirmed by the House of Lords, is, that in the case of an attack on a man's private character, any words apparently imputing improper motives will be, *primâ facie*, construed to shew malice in law, and to be actionable, so that the defendant is called upon to rebut this inference, and prove his plea of fair comment. But where a man's public character alone is the subject of attack, there is an implied right to comment on it in the public interest, and such criticism is presumed to be intended for the public benefit; malice in law will not therefore be presumed, and evidence must be given of malice in fact.

## *A COUNTRY COUNTY CROWN ATTORNEY'S RANDOM REMINISCENCES.**

People living in large cities are frequently startled by reading accounts of strange and mysterious crimes committed near their own doors. These crimes shew the depravity of criminals, the great risks they take in committing offences, often without the prospect of any substantial benefit from their crimes, and that murder and grevious bodily injury is often committed with slight provocation. And many people suppose that these city crimes are owing to the gathering together of hardened and habitual criminals, schooled in crime, in large cities.

The County Crown Attornies who have spent years in endeavouring to keep the peace of their counties often find that tragedies are not peculiar to cities, and that in well ordered rural districts depraved human nature is very much in evidence, at times. They have frequently to deal as best they can in the absence of a trained police force, with cases which shew that the congested population of cities have no monopoly of crime. Forty-four years of experience as a country Crown Attorney has convinced me that there is urgent need of legislation requiring, in each county, the services of one or more well-trained and properly paid police officers, not only for the detecting of crime but for the instruction of rural constables.

In the administration of justice in criminal cases some strange rulings have been made by County Court and even by Superior Court judges, through which criminals escape punishment. In the disposal of civil business, numerous cases occur which furnish ground for a strong suspicion that the law is not yet an exact science.

At the request of the Association, I propose to refer to a few cases in which I have been concerned, or of which I have been an observer, which it is hoped will be of some interest to the profession.

*This was a paper read by Mr. J. E. Farewell, K.C., the present President of the Ontario Bar Association, at its annual meeting recently held.

Some thirty years ago, at the Cobourg Assizes, a man was tried for murder. Two raftsmen had a physical discussion, which ended in the murderer being defeated. Matters seemed to end satisfactorily. After a short time one of the men, who was in such good health that he got the better of his burly opponent, arose and started away from the camp. He was followed by the other, who had in his hands an iron-shod handspike. The pursuer overtook his opponent and struck him on the head one or more blows with this dangerous weapon, shattering his skull so that a large part of his brain was knocked out of it. The one receiving the blows died instantly. The evidence clearly proved that the murderer was the aggressor all through, and that he had no reason to fear any injury from the man he followed. There was evidence, by a doctor of standing, that death resulted instantaneously from the blows on the skull. I was sitting beside Mr. Hector Cameron, K.C., who acted for the prisoner, when Mr. Justice Gwynne called for "the defence." Mr. Cameron said to me in a *sotto voice*, "Yes, defence, what the devil is the defence?" He decided as his only chance, to raise the objection that there had been no post mortem examination to shew that the murdered man had not died of some organic disease. The presiding judge said: "If I were a juryman I would not hang a dog on such evidence," and straight way withdrew the case from the jury because no post mortem had been made. I have frequently wondered what the judge would have said if a man had been tried for throwing a man into a lime kiln or a furnace where the body had been so burned that a post mortem examination could have been of no service.

Every time a man is charged with murder, a County Attorney ought to stay by the job and see that every vital organ is examined, and where poison is suspected, that the proper disposition is made, then and there, for preserving organs for examination. In the somewhat recent case of Archie McLachlan, of Uxbridge, tried for the murder of his wife and two children, the crime was so heinous and the supposed character of

McLachlan such that it was thought at first that an inquest was unnecessary.

The mayor of the town and his wife going to their home passed the house of McLachlan about midnight and noticed smoke from the upper part of the building. They called at the kitchen door where a light was burning and McLachlan was asked if his house was on fire. He said he did not know. He appeared dazed and came out with his little girl. He said he could give no account as to where his wife and two boys were. He pretended to be unable to say in what rooms they slept. The fire company arrived, and after an hour's work put out the fire, before the body of the wife was burned up. The floor of the room had been saturated with coal oil to secure this result. Two days after, an examination of the books of a local druggist shewed that the husband had purchased strychnine on the morning of the murder, and strychnine in large quantities was found in the stomach of the wife. It was a close race between the fire and the strychnine, and had the mayor passed a half an hour later, the body would have been so consumed that all traces of poison would have been destroyed.

If so, and the ruling of the judge in the Cobourg case had been followed, there could have been no conviction. Fortunately the man was convicted and was the first person to be hanged in the county of Ontario.

This case shews the necessity of strictly enforcing, by druggists, statutory provisions as to the registry of poisons, and also the necessity for an inquiry by inquest in all such cases. The examination of the records of poisons sold by druggists should be frequently and carefully made by some detective peace officer.

The large number of statutes as to the various crimes and the number of amendments to the same which experience has shewn were necessary, rendered it very desirable that there should be a criminal code in which the criminal laws and their amendments should be consolidated. In these latter days, the

professional criminal has sought out many inventions for committing crimes, and ingenious devices for preventing their discovery, and ever since Sir John Thompson's Criminal Code was compiled, a large number of amendments have been found necessary, by way of addition to it, and as well as amendments to the Evidence Act and as to presumptive evidence of crime.

Notwithstanding the care bestowed upon the preparation of the code, it is most unfortunate that it did not by a few strokes of the pen sweep away offences which were punishable under the common law. The good judgment and learning of the judges in olden times when statutes were few should ever be held in grateful remembrance. There are frequently cases where offences cannot be punished under any provisions of the code or its amendments, but are punishable under the common law.

For example, in the early morning at Oshawa two years ago the nightwatchman was going off duty and on his way home he met a livery-stable keeper coming from a small coal yard office, accompanied by one of his young employees. Knowing the character of the man, he had his suspicions as to what brought him to that neighbourhood so early in the morning in such company. After passing the coal office he saw a young girl under seventeen years of age and a young man of about the same age going towards the railway station. The watchman quickened his pace and hailed them. The young man made off. The watchman caught up to the girl and her answers to his questions being unsatisfactory, he took her to the children's shelter and notified me. Inquiry at the shelter showed that the girl was the daughter of a respectable farmer in Pickering township and employed in a respectable family in Whitby as a servant. After a good deal of difficulty, it was learned that she had, while under sixteen years of age, been seduced at a time so long before that date that the seducer could not be prosecuted; Also that she had gone to the coal office willingly and consented to three men having connection with her. She was feeble minded, yet possessed of such an amount of intelligence

that, unless well acquainted with her history, a stranger might not know she was feeble minded.

I could find no provision in the criminal code for punishing any of the men. The age limit having been passed, her not being a person of chaste character, her consent and her intelligence, the persons implicated in this disgraceful offence being strangers to her, taken in connection with the statutory exemptions in such cases, securely closed every avenue to a successful prosecution. Under these circumstances I betook myself to the common law and found there provisions as to conspiracy to defile women. Proceedings were commenced against all three men for this common law offence. Dr. Bruce Smith, after examination, pronounced this girl as a high grade imbecile, possessed of such ability as would protect a stranger from conviction for having connection with her though an imbecile.

At the trial the three men were defended by one of the cleverest criminal lawyers at our Bar. All three were convicted of the common law offence.

The young fellows, having been unable to find bail, had spent six months in gaol awaiting trial. The livery-stable keeper was glad to pay a fine of one thousand dollars and costs of the prosecution. Prosecutions upon procuring girls for prostitution could, under the common law, secure punishment more adequate for the offence than can be imposed under the code.

At the Whitby Assizes in September last before Sir William Mulock, an Austrian was convicted of using seditious language against the King, tending to promote a breach of the peace. I could find no means of convicting him under the code, but, by resorting to the common law, was able to do so. He served a term of imprisonment and is now interned.

If, however, the practitioner wishes to prosecute any person for gaming, and the statutes do not cover the case, it is hopeless to refer to the common law. The English people prior to Henry VIII. were dead game sports. Gaming was so common in the mother country in its early history that there is no record to be

found of any prosecutions under the common law. It was not until the 33rd year of King Henry VIII. that any means was provided for prosecuting persons for gambling, playing games of chance or betting with cards and dice. There was passed in the reign of Edward 4th, a law against sports which might cause a breach of the peace.

### Idiosyncracy of Criminals.

The Toronto papers recently made mention of "Jack the Ripper," whose reputation was achieved in London, England, for ripping up the bodies of females, without taking the shortest and easiest way of killing them. The Toronto "Jack the Ripper" contented himself with cutting and slashing the garments of females hanging upon clothes lines, etc. Some years ago a man living in Beaverton was convicted of destroying valuable dresses and ladies' fur coats by the use of a syringe filled with sulphuric acid. This man was a woman-hater. Little could be learned of his previous history. He seemed to think he had a mission to prevent extravagance in female dress, or to suppress pride and social ambition.

In the Birk and McPherson case, a trial for rape and murder, the defendants were convicted and sentenced to be hanged, but the sentence was afterwards commuted, and the prisoners were, in a few years discharged from custody. One was subsequently lynched in Montana for an offence. The other returned home and was subsequently charged with rape and escaped to the United States and has never been found.

In the investigation before the Coroner's jury, the inquest was adjourned many times. From the first, the evidence pointed strongly to one of these men as guilty, but no trace could be found as to the second man. The detective who was employed on the case strongly opposed arresting one of them until the other was found. And his opinion was found to be correct. In the course of the investigation, it was very desirable to procure the trousers worn by McPherson on the night of the assault on the woman. The ingenuity of the constable and the common

sense of Dr. Gunn, local magistrate, solved the problem. An information was laid and a search warrant issued, and the trousers were captured. The late Chief Justice Cameron, for the defence, scored the magistrate and constable as there was then no provision in law authorizing such a proceeding. The Parliament recognized the value of some means for obtaining evidence that would be useful in prosecutions, provisions to which are now embodied in the Criminal Code section 629. Although the trousers had been very carefully washed, Professor Ellis discovered what he thought were traces of blood, and after a long investigation was able to establish the fact, but the trial had to be postponed for 6 months until this was found to be blood. But in the then state of chemical and microscopical investigation he was unable to say that this was human blood. The counsel for the prisoner, fearing the effect of the doctor's evidence, put a witness in the box to account for the presence of the blood which had come from McPherson's fingers, by having previously met with an accident on a reaping machine. The witness was subsequently discredited as to his veracity, but the impression satisfied the jury that the blood was human blood and was the blood of the woman at the time of the criminal assault.

The difficulties that arose in those days have been mastered by recent discoveries in testing for human blood. It so happened that Dr. Ellis was dangerously ill when the case was to tried after the adjournment, and there was a second adjournment for 6 weeks of the assize. Sir Æmilius Irving was to have taken the Crown business at the time of the first adjournment and had a great amount of work in preparing for it. The Hon. Mr. Justice Britton prosecuted when the prisoners were convicted.

A very trying and much tried case tells of the vagaries of jurors. In the early sixties, Dr. J. V. Ham, the first deputy Clerk of the Crown and County and Surrogate Court Clerk for the County of Ontario, commenced an action on behalf of himself and wife against one Lasher and others, to recover some lands of which Mrs. Ham had a patent.

Sir Henry Smith, Q.C., at one time Speaker of the old Parliament of Upper and Lower Canada, was counsel for the defendants. The evidence at the trial was strongly in favour of the plaintiff as was also the judge's charge, but Sir Henry Smith was so popular with the jurors that he obtained a verdict for the defendants. The verdict was set aside and a new trial ordered with the same results. On the third trial of the action a juror who was so obnoxious to the plaintiff that he would have been challenged if he had been called by his right name took his place in the jury-box when another juror was called, and he was sworn on the jury. The fraud was not discovered till the second day of the trial, the plaintiff let the trial go on, after he discovered the fraud and speculated upon the chance of a verdict. But Sir Henry Smith again prevailed, and the defendants had a third verdict. The court, while refusing to grant a new trial on the ground of the irregularity in constituting the jury, set aside the verdict and granted a new trial on the evidence. The trial judge for Frontenac Assizes refused to try the action in the county of Frontenac on account of the three perverse verdicts that had already been rendered.

Application was then made to change the venue to Toronto. The defendants opposed this and claimed that the trial should take place in Hastings, the adjoining county. The Order was made for changing the place of trial to Toronto although the venue was local, but subject as to terms as to expense. See *Ham* v. *Lasher,* 10 U.C.L.J., p. 74, also 24 U.C.Q.B. p. 533, in a note to *Widder* v. *Buffalo and Lake Huron Ry. Co.,* a somewhat similar case. The case came on at Toronto. The jury was called and after being sworn, counsel for the plaintiff addressed the jury. After he had been speaking for about half of an hour in the old Adelaide St. Court-room, the room being warm and close, one of the jurymen who had been slumbering suddenly awoke; and immediately he requested the learned counsel to cease his talk and sit down, saying that the jury "had had enough of it." There was some excitement when it was discovered

that the juryman was intoxicated, counsel offered to go on with the trial with eleven jurors if the services of the erring juror were dispensed with. The counsel for the defence said if the juror was withdrawn by the plaintiffs he could not help it, but it must be with the usual consequence: *Gibbs* v. *Talph*, 14 M. & W. 804.

Under these trying circumstances, the plaintiff had to go on with a much disgruntled juror as one of the twelve. My recollection is, that the jury was adverse, and the court subsequently refused to grant another trial, although satisfied that the plaintiffs were entitled to a verdict.

Perverse juries are not uncommon in criminal cases. One L. was charged with forgery of two notes for one thousand dollars each. Prisoner had applied to a maiden lady for a loan of two thousand dollars. She referred him to a neighbour who was supposed to be a good business man and he advised if the prisoner's father and brother, both substantial men, would join in the note that the loan would be safe. The prisoner returned in a day or two with two notes purporting to bear the signature of his father and brother, and the money was advanced. On the maturity of the note, defendant could not pay. The father and brother repudiated all knowledge or liability on the notes. Prisoner was arrested. Evidence sufficient to commit him for trial was given, and, on the statutory caution being read to him, prisoner signed a statement that he had forged the names of his father and brother. The trial came on before Sir W. B. Richards, C.J. The forgery was proved by the father and brother and by expert witnesses on comparison of signatures. The prisoner's signed statement of guilt before the magistrate was proved. Evidence of insolvency at the time he obtained the money was given. The only pretence for a defence which the late M. C. Cameron, afterwards Chief Justice Cameron, could offer was, that the man hoped to be able to pay the money. Chief Justice Richards said to me that he did not think it necessary that I should address the jury for the Crown and charged

the jury in his characteristic way. After two hours they returned and asked if there was any evidence of intention to defraud. The judge explained the law, clearly and forcibly and in a short time, to the surprise of everybody, the jury returned a verdict of not guilty. The Chief Justice said: "Mr. Crown Attorney you have another indictment on another note have you not? and if you have, for Heaven's sake don't bring it before such jurors as these." The only reason for the acquittal of the prisoner that I could imagine was that his father was a leading and influential "Grit," and his father-in-law an equally strong "Tory." Politics were very many to the square acre in Ontario county in those days, and the acquittal of the prisoner was the only matter these jurymen had been able to agree upon for some time and they agreed to acquit the prisoner accordingly.

No bail was offered, and the trial upon the other note came on at the following Assizes before Mr. Justice Gwynne. In addition to the former evidence, the clerk and bailiff of the Division Court at Orangeville produced a large number of judgments and executions on which nothing could be made at the time the man applied for the loan. The Judge took great pains to instruct the jury, but, to the surprise of every person, including the prisoner, the jury returned a verdict of not guilty. I asked the jury, after they were discharged, whether the prisoner forged the note or not. They said "he did," and said they did not find him guilty because they did not want the poor woman to lose her money, and if they found him guilty the woman could not have sued the father and brother. They thought it was strange that neither the Judge or myself had sense enough to see this.

Many years ago at Whitby Assizes, during a day and a half, there was a continuous battle as to the reception of evidence, proving documents, and secondary evidence before the plaintiff was nonsuited. The last witness as to the execution of the conveyance, under which the plaintiff claimed title, was under examination. He swore to being present when the deed pro-

duced was signed by the plaintiff's predecessor in title, and that he was a subscribing witness thereto and made his affidavit of the execution of the conveyance Mr. Justice Patterson of the Supreme Court was counsel for the defendant. He asked the witness to read the document carefully and state whether he really was a witness to the conveyance of the land to the present plaintiff. Then followed a good deal of hedging. The witness said he knew he saw the man sign the deed. He could not be sure who was present. He was asked then to read the conveyance from the beginning and interrogated as each of the earlier statements as to the date of the conveyance, where made, who was the grantor and as to whether the grantee was present at the time. He said he was unable to remember all the details except that he was positive that he saw the former owner sign the deed, and that he put his name to it as a witness, and he made the affidavit of execution. The witness was, however, at last compelled to admit that the grantee was not present, and that there was no person named as grantee in the conveyance when it was signed, and that the deed was taken about the country until a purchaser was found, and when one was found his name was inserted as grantee in the deed. There was a nonsuit, and what the result of the action finally was, this deponent knoweth not.

Early one forenoon some years ago an old Englishman named Hall, and his wife, who had driven in from one of the back townships, consulted me as to what they called "a very providential case," as follows: The daughter of a Mrs. Hall had a farm of one hundred acres. She married a man named Acton and there were two daughters as issue of such marriage. Acton and his wife lived on this farm. Shortly after the birth of the younger of the daughters the husband was greatly troubled as to why his wife should or could own the land, *he* being still alive. He frequently told his wife what he thought of her wickedness in wanting to hold the land while he, her husband, was living. Determining to correct this anomaly he went

to a solicitor and had a conveyance drawn to vest the lands in himself in fee simple. He had been ill-treating her for some time, and one day brought her into town and took her to the solicitor's office where she executed the deed to him. She died in about three years and the grandmother took the children to her home. Now this grandmother was very much troubled as to why her daughter's land should belong to the husband. Three years afterwards she came to me to take proceedings to get the land back for the grandchildren. To my suggestion that it was rather a late day to try and do this the old man said it did not make any difference as this was a "pravidential case." I asked him to explain what Providence had to do with it. His answer was: "Wasn't it 'Im as sent the old man who was sellin' specks to us and when he see the children there didn't he punch me in the ribs and say, 'Aint you and the Missus keeping this 'aving children up perty late?' An' I teld 'im, 'They wasn't ours, and all about their father 'aving took the land away from their mother, and the poor dear did fret away her life about it, and how her fainted away so soon as she got away from her 'usband and teld the woman who was with 'er 'ow 'er 'ad wronged the children, by deeding away 'er land to 'im and 'ow 'er was neglected, and on the night 'er died 'er was left alone sick to death with no one in the 'ouse but the 'ired man and 'ow 'er got up and kneeled down by the bed-side and axed God to forgive 'er for being so cowardly and give up 'er land to 'er 'usband.' And then the old man with the specks, said: 'Go right to a lawyer, get the deed set aside, and git the lands for the children.'" The grandfather said to me then: "That's what we come for."

An action was commenced, and on the trial evidence as to the husband's conduct to the wife, and the evidence of the wife's immediate statements after the signing of the deed and those made by her before her death were received in evidence. The deed was ordered to be delivered up to be cancelled as fraudulent and void against the children.

While the old man Hall was being examined for discovery the defendant's counsel asked why he brought this action after so long a time. He answered, "It was along of the old man with the specks who told me to have the deed set aside." Counsel said, "So the old man with the specks is responsible for this trumped-up action?" The grandfather replied, "Yes, 'im and the Lord was the principal ring leaders to it."

Many dwellers of Toronto visiting one of the largest stores on Yonge Street have no doubt met the chief bookkeeper, who, through the setting aside of this deed, was enabled to attend a commercial college and is now in receipt of a very respectable salary and means of independent support.

## *EMERGENCY AS A JUSTIFICATION FOR TRESPASS.*

In these troubled times, when all kinds of unforeseen emergencies arise through causes connected with the war, which have seldom arisen during recent times, it will be found instructive and useful to consider the question how far emergency and the exigencies of the case can be relied on as a justification for trespass. This question may arise in many different ways nowadays. It may be that some house is struck by a missile or bomb and set on fire in the absence of its owner or occupier, or that, for reasons which the reader will have in mind, it becomes exceedingly desirable to extinguish the lights in a neighbour's house when that neighbour may be away or deterred from taking those steps himself. Again, it may happen that it becomes exceedingly desirable to take charge of some person's effects. A horse in a field may be thrown into such a state of terror from the sound of explosion that, to save it from destruction, it becomes necessary to enter the field and secure the animal. These are mere incidents taken at random. The reader himself—if gifted with an average power of imagination—can, no doubt, supply many possible occasions when trespass becomes almost a moral duty to the good citizen.

In this article it is proposed to review some of the authorities which throw light upon this question of justification for trespass. That necessity is a good defence to many torts—or, rather, to acts which would amount to torts were it not for the defensive plea—is clearly shewn by the cases and the dicta of many duly qualified writers on our judicial system and our laws generally. This underlying principle outcrops in many places in our law. Speaking broadly, however, the authorities on the point which we propose to consider are not very numerous. Possibly this is a subject for congratulating ourselves as implying that our national character has a very large element of fairness in its composition—that the average British subject abhors the bringing of an action or even the raising of a complaint against some person who, with all the best intentions in the world, has caused the party whom the former intended to benefit some material harm.

Succour may be rendered on the spur of the moment in a way which, had there been an opportunity for maturer reflection, would have been discarded in favour of some other method of assistance. At the time, the party assisted will, no doubt, willingly recognize the good intentions with which the acts of assistance were proffered. Later, when he reflects on other methods which might have been taken by the party who came to his assistance, and finds that had those methods been adopted the benefits to himself would have been greater and the harm done less, his gratitude disappears and in place of it he fosters a feeling of annoyance which may culminate in his eventually suing his would-be benefactor for the damage. This leads to the question which is very far from having been clearly decided —how far the human element is to be taken into consideration in such a case, and how far the would-be benefactor is to be punished for negligence in applying the modes of assistance prompted by the spur of the moment.

In an old case tried at the beginning of the seventeenth century a ferryman had "surcharged" his barge. He had, presum-

ably, overloaded it both with passengers and goods. The barge was to sail from Gravesend to London, but in the course of the passage a gale of wind sprung up which so frightened one of the passengers that he seized a large hogshead of wine and pushed it overboard. This barrel was not his property, and he was subsequently sued for trespass. His defence was that in the circumstances it was necessary to lighten the barge to save the passengers and the craft herself. It does not transpire whether the plaintiff, who was the owner of the jettisoned goods, was on board at the time. Possibly if he had been he would not have brought the action. However that may have been, the court decided in favour of the defendant, holding that, as the act was done for the safety of the passengers, he was not liable: (see *Mouse's* case, 1608, 12 Co Rep. 63).

In the last-mentioned case the court seems to have taken the view that the act of the defendant was in fact necessary to save the passengers. It seems quite clear, however, that such a justification for trespass may be sufficient where it is a question of saving property only. In a case where a member of a volunteer fire brigade had sought forcibly to enter a burning house which was already in the rightful possession of another brigade, Mr. Justice Kennedy (as he then was) said: "I can conceive circumstances under which such an act might be justifiable; as, for instance, if it were necessary in order to save life, or perhaps also if there were an insufficient force on the premises for the purposes of extinguishing the fire, or if the duty of the persons employed in doing so were being neglected, and danger to life *or property* was the result:" (see *Carter* v. *Thomas* (1893), 1 Q.B. 673, at p. 678).

There are a larger number of maritime cases which shew that danger to property alone may justify trespass. In maritime cases no doubt there is usually the additional element of danger to life. But the comparatively recent case of *Cope* v. *Sharpe* (No. 2) (106 L.T. Rep. 56; (1912), 1 K.B. 496), to which we shall have occasion to allude more fully, has put the matter

beyond doubt, and we may now lay it down as a sound proposition of law that danger to property alone may be a good justification for trespass.

It is conceived that the most important question in relation to the matter we have in hand is the question of the degree of necessity which must subsist to justify a stranger in entering upon the premises of another and doing some act to prevent further damage. This was the point that was very fully considered by the Court of Appeal in the last-mentioned case. It must be remembered that the slightest interference with the property of another amounts to a trespass, which must be justified if the party interfering is to escape the consequences of his acts. "Scratching the panel of a carriage," said Baron Alderson in the case of *Fouldes* v. *Willoughby* (8 M. & W. 540, at p. 549), "would be a trespass." Ordinarily speaking, a man would be well advised to avoid interfering with any other person's effects, however slight the act of interference may be.

It is stated in Williams on Executors (10th ed., p. 187) that there are many acts which a stranger may perform without incurring the hazard of being involved as an executor *de son tort*. As instances of such acts, the locking up of the deceased's goods for preservation purposes, the feeding of the deceased's cattle, and the repairing of his house are given. In *Kirk* v. *Gregory* (1 Ex. Div. 55) a near relative of a deceased person who was in the house at the time of the death removed some jewellery of the deceased from one room to another. The executors brought an action for trespass, and the jury found that the defendant had removed the jewellery *bonâ fide* for its preservation. But the court held that this was not a sufficient answer to the action, although, had a reasonable necessity for such interference been shewn, the case would have been different. In the opinion of the court the defendant ought to have shewn that the interference was reasonably necessary and that the articles were in such a position as to require the interference, and, further, that such interference was reasonably carried out.

The whole law on this point was dealt with both by Lord Wrenbury (then a Lord Justice of Appeal) and the late Lord Justice Kennedy in the case of *Cope* v. *Sharpe* (No. 2), to which we have already referred. The facts in that case may be briefly stated as follows: The plaintiff was the owner of land the shooting over which was let. The defendant was the head gamekeeper and bailiff of the lessee of the shooting. A fire broke out on a part of the land. At some distance there was a covert affording shelter to nesting pheasants. Some fifty persons were engaged in beating out the fire, when the plaintiff set fire to some strips of heather between the main fire and the covert, with the view of preventing the main fire reaching and destroying the nesting pheasants. The fire was eventually put out by the fifty persons alluded to. An action was brought by the owner of the land against the defendant for trespass. The important point to note is that the setting fire to the heather between the main fire and the covert proved, as events turned out, to be unnecessary, however expedient it may have been to burn the heather.

Mr. Justice Phillimore and Mr. Justice Hamilton took the view that the defendant had not justified his trespass. In the court below, the judge had put these two questions to the jury: "Was the method adopted by the defendant in fact necessary for the protection of his master's property? If not, was it reasonably necessary in the circumstances?" The jury answered the first question in the negative, and the second in the affirmative. "The question we have to decide," said Mr. Justice Phillimore, "is whether a defendant relying on necessity as a justification of a trespass to land or goods, and possibly also of a trespass to the person, can be justified by anything short of actual necessity." His Lordship expressed the opinion that actual, not merely apparent, necessity for interference must be shewn in justification. Mr. Justice Hamilton was of a like opinion.

The Court of Appeal, however, took a different view. It is true that Lord Justice Vaughan Williams dissented from the

other Lords Justices, but the decision of the majority of the court is clearly more in accord with the authorities, and certainly more in accord with the dictates of justice than the opposing view. The majority held that, on the findings of the jury, the defendant was entitled to judgment. The basis of their Lordships' decision was that where there is imminent danger to property and it is reasonably necessary to interfere, interference is justifiable.

The judgment of the late Lord Justice Kennedy is particularly illuminating. He took the case of a house on fire, where the direction of wind creates an imminent danger for the occupant of the adjoining house, and he, to prevent the danger, pours water on the burning house. Then the wind changes, so that, as events turn out, the discharge of water into the burning house was not really actually necessary to preserve the adjoining building. His Lordship indicated that in such a case an action for damage caused by the water could not be maintained. After reviewing the authorities, the same learned Lord Justice said: "These cases do shew that the law requires, in order to make good a defence in an action of trespass for interference with the property of another for the purpose of averting an imminent danger, that the defendant shall prove that such a danger existed actually and not merely in the belief of the defendant. They do not shew that, even if the existence of such an imminent danger as to vindicate the reasonableness of the interference in order to preserve property exposed to the danger is proved, the defence must still fail, unless it is also proved that the interference was, in the circumstances, as they eventually happened, actually necessary—that is to say, that the property sought to be preserved must, but for the interference complained of, have suffered injury or destruction."

We have given the words of Lord Justice Kennedy in the last-mentioned case at some length, as they seem to give the true effect of all the prior cases. It only remains to add that his Lordship and Lord Justice Buckley (as he then was) set up as

the test in all these cases the reasonableness of the act done. The question must now always be whether the acts complained of were reasonably necessary, whether the acts were such as a reasonable man would properly do in the circumstances to meet a real danger.—*Law Times.*

The cases which come before the Judicial Committee of the Privy Council tell an expressive tale of the extent and diversity of the British possessions. In one number of the *Law Times* Reports we have appeals from the following courts: the Supreme Court of Jamaica; the Court of Appeal of New Zealand; the Supreme Court of New South Wales; the Supreme Court of South Africa; the Court of King's Bench in the Province of Quebec; the Supreme Court of Ceylon, and the Court of Appeal of British Columbia. The systems of law are more or less dissimilar in all these places. It is a matter of surprise and admiration that the judgments delivered of this august body give general satisfaction.

## *REVIEW OF CURRENT ENGLISH CASES.*



SHIP—FIRE—FIRE CAUSED BY UNSEAWORTHINESS—"ACTUAL FAULT OR PRIVITY"—MERCHANT SHIPPING ACT, 1894 (57 & 58 VICT. c. 60), s. 502.

*Lennard's Carrying Co.* v. *Asiatic Petroleum Co.* (1914) A.C. 705. In this case the House of Lords (Lords Haldane, Atkinson, Parker and Parmoor) have affirmed the judgment of the Court of Appeal (1914) 1 K.B. 419 (noted *ante* vol. 50, p. 227). The action was by owners of cargo against the shipowners for loss of cargo by fire. The defendants claimed exemption from liability under s. 502 of the Merchant Shipping Act, 1894, which protects a shipowner from liability for losses by fire happening without his actual fault or privity. The vessel in question put to sea with its boilers in a defective condition, with the knowledge of the managing owner of the vessel, and the fire was occasioned by the unseaworthiness of the vessel in this respect. The Court of Appeal held that s. 502 afforded the defendants no protection in these circumstances, (1914) 1 K.B. 419 (noted *ante* vol. 50, p. 227), and the House of Lords was of the same opinion.

CONTRACT—CONSTRUCTION—JURISDICTION OF COURT—DUTY OF EXECUTIVE GOVERNMENT TO ASCERTAIN LAW—INJUNCTION TO RESTRAIN RECEIPT OF MONEY—PAYMENT BY EXECUTIVE—CONTEMPT OF COURT—DECLARATORY JUDGMENT AS AGAINST CROWN.

*The Eastern Trust Co.* v. *Mackenzie Mann & Co.* (1915) A.C. 750. This was an appeal from the Supreme Court of Canada, in which some important observations are to be found on questions of great constitutional importance. The appeal arose out of a contract made by Mackenzie & Mann with the Hervey Trust Co. in 1902 for the purchase of certain bonds and stock of the Nova Scotia Southern Ry. Co. The price to be paid was $195,000, which, however, was subject to the right to deduct therefrom payments to be made by the Nova Scotia Government for "labour and supplies" furnished in connection with the construction of the railway. James Irvine, who claimed to be a partner of R. G. Hervey and the Hervey Trust Co., commenced an action for an account of the partnership and the appointment of a receiver. In that action an injunction against Hervey and the Hervey Trust Co., receiving any money of the

partnership, was granted, and the Eastern Trust Co. was, in 1904, appointed receiver. A reference was directed to take the partnership accounts, including an account of what was due from Mackenzie & Mann on the above-mentioned contract. The Provincial Treasurer had been made a party to the action, but it was dismissed, as against him, on the ground that the Court had no jurisdiction over him. Subsequently and with full knowledge of the injunction and receiver, the Provincial Government paid to Hervey or the Hervey Trust Co. and others certain claims which did not come under the head of "labour or supplies," which Mackenzie & Mann claimed to deduct from their purchase money. The Supreme Court of Canada thought such payments were in the discretion of the Crown and could not be interfered with. Their Lordships of the Privy Council, however, were unable to agree with the view of the Supreme Court as to the powers of the Government and to the presumption to be drawn as to the nature of the payments. In their Lordships' view the question whether the claims in question came under the head of "labour and supplies" was a question of construction, which the Government should have submitted to the Court before making the payments. Their Lordships do not agree to the view that, as no injunction could be granted against the Crown, no one but the parties to the suit were bound by the injunction or the appointment of the receiver. In the present case the Government had paid moneys in respect of claims which, by no latitude of construction, could come within the words "labour or supplies," and had also paid a large sum to Hervey, who was restrained from receiving it. If an individual had done this, the wrongful payment would have been a contempt of Court, and their Lordships of the Privy Council say: "In the case of the Crown, there is no ground for Idington, J.'s, proposition that the Government may fairly say that they were given such power by the legislature over the subject matter, and that the Courts have no ground for interfering at all, directly or indirectly, with the exercise of such discretion. There is nothing on which to found the existence of the alleged discretion or to support a decision which pronounces the Executive Government free to dispose of money the right to which is *sub judice inter parties*, and held *in medio* by the order of the Court." This is, we need hardly say, a very important deliverance in the interests of justice. Their Lordships, moreover, say: "The second point taken by Idington, J., is equally noticeable and even more important. The non-existence of any right to bring the Crown into Court, such as exists in England by petition of right and in many of the colonies by the appointment of an officer to sue and

be sued on behalf of the Crown, does not give the Crown immunity from all law or authorize the interference by the Crown with private rights at its own mere will. There is a well-established practice in England, in certain cases where no petition of right will lie, under which the Crown can be sued by the Attorney-General, and a declaratory order obtained, as has been recently explained by the Court of Appeal in *Dyson* v. *Attorney-General* (1911) 1 K.B. 410, and in *Burghes* v. *Attorney-General* (1912) 1 Ch. 173. It is the duty of the Crown and every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it, the Courts are open to the Crown to sue, and it is the duty of the Executive, in cases of doubt, to ascertain the law, in order to obey it, and not to disregard it. The proper course in the present case would have been either to apply to the Court to determine the question of construction of the contract, and to pay accordingly, or to pay the whole amount over to the receiver, and to obtain from the Court an order on the receiver to pay the sums properly payable for labour and supplies. . . ." The decision of the Supreme Court was, therefore, reversed. We have dwelt on this case at more than usual length because of its very great importance in defining the duty of the Executive Government, in regard to the rights of parties, in matters in litigation. It affords another striking instance of the value of the right of appeal to His Majesty in Council.

TRADE UNION—CONSPIRACY—PROCURING BREACH OF CONTRACT BY EMPLOYER—DISPUTE BETWEEN EMPLOYER AND OTHER EMPLOYERS—INTERVENTION OF TRADE UNION.

*Larkin* v. *Long* (1915) A.C. 814. This was an action brought by the plaintiff Long against Larkin and others for conspiracy to induce the plaintiff's employees to break their contracts for service with the plaintiff. The plaintiff was a stevedore, and, in the transaction of his business, hired dock labourers, all of whom were members of a trade union called the Irish Transport Union. The other stevedores of the port agreed to form an employers' association for the purpose of obtaining higher rates from the shipowners, but the plaintiff refused to join it. The association was promoted by the secretary of the Irish Transport Union, and he promised the association that he would see that no member of the Transport Union worked for any stevedore who was not a member of the association. Three officials of the union and three members of the Stevedores' Association agreed to force the plaintiff to join the association, and, in pursuance of

the agreement, procured dock labourers who were working for the plaintiff to break their contracts and leave his employment, causing thereby pecuniary loss to the plaintiff, although at the time there was no dispute between the plaintiff and his employees. It was attempted to justify the action of the defendants as being in furtherance of a trades dispute within the meaning of the Trades Disputes Act (6 Edw. 7 c. 47), s. 3; s. 5 (3), but the House of Lords (Lord Haldane, L.C., and Lords Dunedin, Atkinson, Parker, Sumner, and Parmoor) held that the acts complained of could not be justified under that Act, because there was no such dispute between the plaintiff and his employees, and a judgment in favour of the plaintiff was therefore affirmed.

CONTRACT — CONSTRUCTION — PRINCIPAL AND AGENT — UNDISCLOSED PRINCIPAL—WANT OF CONSIDERATION MOVING FROM PRINCIPAL—ENFORCING CONTRACT MADE WITH THIRD PARTY—NUDUM PACTUM.

*Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (1915) A.C. 847. This case is important to the mercantile community. The plaintiff company was a manufacturer of pneumatic tyres, and as such entered into an agreement with a firm of Dew & Co. whereby the latter firm agreed to take a certain quantity of the plaintiff's goods within a specified time, in consideration of the plaintiffs allowing them certain discounts from their list prices, Dew & Co. agreeing not to sell or offer the plaintiffs' goods at less than the list prices, except a limited discount to genuine trade customers; and in case of any sale to trade customers Dew & Co. agreed to take from them a similar undertaking and to forward such undertaking to the plaintiff. The plaintiff company exacted similar agreements from all their other customers, and this was known to the defendants. In January, 1912, the defendants purchased tyres of the plaintiffs' make from Dew & Co., and entered into the required undertaking, which was forwarded by Dew & Co. to the plaintiffs; and the action was brought for breach of the undertaking. It was attempted to be supported on the ground that, in taking the undertaking, Dew & Co. were acting as agents for an undisclosed principal; but the House of Lords (Lord Haldane, L.C., and Lords Dunedin, Atkinson, Parker, Sumner, and Parmoor), affirming the decision of the Court of Appeal, held that, even if the plaintiff company was entitled to the benefit of the contract as the undisclosed principal, yet it was, nevertheless, *nudum pactum*, no consideration moving therefor from the plaintiff to the defendants. Lord Parmoor

considered that the claim of the plaintiff company to be treated as an undisclosed principal was inconsistent with the terms of the contract. Some of the learned Lords express doubts as to the possibility of .. man making a contract both as principal and agent; but why may not a man say "I agree as principal to sell you this article, but as agent for A. B. I give you this 'canary, tomtit or other rubbish' and require you to enter into an agreement not to resell it except on specified ter ns"?

SPECIFIC PERFORMANCE—VENDOR AND PURCHASER—DECREE WITH COMPENSATION — DEFICIENCY IN SUBJECT MATTER — MISREPRESENTATION.

*Rutherford* v. *Acton-Adams* (1915) A.C. 866. This was an action for recovery of £3,750, the balance of purchase money due on a contract for the purchase of lands. The defendant set up that, in the course of negotiations, it had been represented by the plaintiffs' agent that there were 232 miles of fencing on the property, whereas there were in fact only 164 miles, and he claimed a deduction from the purchase money of £3,570. The New Zealand Court of Appeal gave judgment for the plaintiff, and dismissed the defendant's counterclaim. The Judicial Committee of the Privy Council (Lords Haldane, Parker and Sumner) affirmed the judgment on the ground that the representations as to the fencing were collateral to the contract, and that the claim in respect thereof did not entitle the purchaser to a decree for specific performance with compensation, and therefore the claim could not be allowed in this action. Their lordships intimate that the defendant's remedy was for rescission of the contract, or for damages for breach of the collateral contract, if there was one, or for damages for deceit if there was fraud. The defendant may have put his claim on a wrong basis, but it would seem that he had in fact a substantial claim against the plaintiff, and it would appear to be an imperfect carrying out of the principles of the Judicature Act that he failed to get relief.

VENDOR AND PURCHASER — CONVEYANCE — PARCELS — PLAN — FALSA DEMONSTRATIO—IMPLIED COVENANTS FOR TITLE—OMISSION TO PREVENT ACQUISITION OF TITLE UNDER STATUTE OF LIMITATIONS—CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (44-45 VICT. C. 41), S. 7, SUB-S. 1 (4) (R.S.O. 109, S. 22 (1) *a*).

*Eastwood* v. *Ashton* (1915) A.C. 900. In this case the House of Lords (Lords Loreburn, Parker, Sumner, Parmoor and Wren-

bury) have reversed the judgment of the Court of Appeal (1914) 1 Ch. 68 (noted ante vol. 50, p. 149), and restored the judgment of Sargant, J. (1913) 2 Ch. 39 (noted ante vol. 49, p. 494). The plaintiff was the purchaser from the defendant of a farm of 84 ac. 3 r. 4 p., subject to a condition that any incorrect statement should not entitle him to compensation. The property was conveyed according to a plan indorsed on the deed. This plan included in the property shewn thereon a strip of 100 feet by 36 feet as to which, to the vendor's knowledge, a third party had acquired a title by possession. Sargant, J., held that this plan could not be treated as *falsa demonstratio*, and the defendant, having no title thereto, was liable in damages. The Court of Appeal held that it was a case of *falsa demonstratio*, and reversed the judgment of Sargant, J., but the House of Lords have now restored the judgment of Sargant, J., and hold that the defendant, having suffered an adverse title to be acquired to the strip in question, that constituted a breach of his implied covenant that he had a right to convey (see R.S.O. c. 109, sec. 22 (1*a*)).

SHIP — CHARTER PARTY — DEMURRAGE — STRIKE CLAUSE—CONSTRUCTION.

*Central Argentine Ry.* v *Marwood* (1915) A.C. 981. This was an action to recover demurrage. Under a strike clause in the charter party the defendants claimed to be exonerated from payment. The charterers were also the consignees of the cargo of coal, and the charter party provided that the cargo should be taken from alongside by consignees at the port of discharge at the average rate of 200 tons per day, weather permitting, Sundays and holidays excepted, provided steamer could deliver at that rate; if longer detained, charterers to pay demurrage at the rate of fourpence a ton per running day. "Time to commence when steamer is ready to unload and written notice given, whether in berth or not. In case of strikes, lock-outs, civil commotions, or any other causes or accidents beyond the control of the consignees, which prevents or delays the discharging, such time is not to count, unless the steamer is already in demurrage." On the arrival at the port of discharge notice of readiness to discharge was given, but all the berths at the port were occupied and there was a strike of stokers at the port. For the first fortnight after her arrival no work of discharging was done at all, but for the next 19 days, after which the strike came to an end, there was a partial resumption of work, and there were dis-

charged from the other ships in port over 6,000 tons of coal, which was equal to six and a quarter days' normal work. The steamer was unable to get into berth until after the termination of the strike, owing to the delay in discharging the other ships by reason of the strike. The question was whether the shipowner was entitled to treat as lay days the 6¼ days' work performed during the progress of the strike, and the House of Lords (Lords Parker, Sumner, Parmoor and Wrenbury) held, affirming the Court of Appeal, that he was, because to the extent of 6¼ days the discharge of the cargo had not been delayed by the strike.

WILL — CONSTRUCTION — GIFT TO CHILDREN — PROPERTY TO REMAIN IN TESTATOR'S FAMILY—RESTRICTIONS AGAINST SELLING OR MORTGAGING—FEE SIMPLE.

*Gardiner* v. *Dessaix* (1915) A.C. 1096. This was an appeal from the Supreme Court of New South Wales, and turns upon the construction of a will whereby the testator gave his property to trustees and provided "as to my house and property in the city of Sidney, I direct that the same shall not be disposed of, mortgaged or incumbered in any way whatsoever, but shall remain for the benefit of my wife and children free from the control of their respective husbands and wives, so that the same shall remain in my family from time to time forever hereafter, the rents and profits arising out of the said property to be equally divided between my said children (naming seven children), also my said wife, Mary Erwin, for her life use only, and after her death same to revert back and her share to be equally divided among my aforesaid children or the issue thereof respectively." The problem the Court was called on to decide was what estate the children of the testator took under the foregoing devise? The Court below held that they took an estate in fee tail, but the Judicial Committee of the Privy Council (Lords Haldane, Parker, and Sumner) reversed the Colonial Court, and held that the children took in fee simple. The restriction as to sale and mortgaging, and the direction that the property was to remain in the testator's family, in their Lordships' opinion, were not necessarily inconsistent with the *prima facie* meaning of the words of gift, which, being a gift of the rents and profits for an undefined time, *prima facie* constituted a gift in fee.

# Reports and Notes of Cases.

## Dominion of Canada.

### SUPREME COURT OF CANADA.

Exch. Ct.] TWEEDIE v. THE KING. [Nov. 2, 1915.

*Title to land—Foreshore—Title by possession—Nature of possession—Disclaimer—Evidence of title—Nullum tempus Act.*

In proceedings by the Dominion Government for expropriation of land on the Miramichi River, the owner T. claimed compensation for the part of the adjoining foreshore of which he had no documentary title. It was proved that in 1818 the original grantee had leased a part of the land and the privilege of erecting a boom for securing timber on the river in front of it; that his successors in title had, by leasing and devising it, dealt with the foreshore as owners; that for over 40 years from about 1840, the boom in front of it was maintained and used by the owners of the land; and that at low tide the logs in the boom would rest on the solum.

*Held*, reversing the judgment of the Exchequer Court (15 Ex. C.R. 177), Davies, and Idington, JJ., dissenting, that there was sufficient evidence of adverse possession of the foreshore by the owners of the adjoining land for more than sixty years to give the present owner title thereto.

*Per* Anglin, J.—From a continuous user for more than forty years, which is proved, a prior like user may be inferred. Moreover, from the evidence of assertion of ownership and possession since 1818, a lost grant might, if necessary, be presumed.

*Per* Davies, and Idington, JJ.—The placing and use of the boom was only incidental to the lumber business carried on at this place, and the consent of the riparian owners thereto cannot be regarded as a claim of adverse possession. The presumption of lost grant was not pleaded and cannot be relied on; moreover, a lost grant could not be presumed in the circumstances.

On application by the Minister of Justice for a disclaimer of damages for the taking of the foreshore, the Government of

New Brunswick passed an order in council stating that the owner of the adjoining land taken claimed title to said foreshore; that it had been used by the owners for booming purposes and otherwise for more than sixty years; that the Attorney-General was of opinion that whatever rights the province may have, had been extinguished, and that no claim could be made by it to said foreshore.

*Held, per* Duff, J.:—This is an admission touching the title to the foreshore by the only authority competent to make it and is evidence against the Dominion Government in the expropriation proceedings: that it is *primâ facie* evidence of title by possession in T.; and that there is nothing in the record to impair the strength of this *primâ facie* case.

Appeal allowed with costs.

*Teed*, K.C., and *Laulor*, K.C., for appellant. *Baxter*, K.C., Attorney-General for New Brunswick, for respondent.

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Que.] LACHANCE v. CAUCHON. [Nov 26, 1915.

*Appeal—Jurisdiction—Injunction—Matter in controversy—Refusal of costs—Supreme Court Rule 4—"Supreme Court Act," s. 46.*

In an action for an injunction restraining the defendant from carrying on dangerous operations in a quarry and for $100 damages.

*Held*, that the Supreme Court of Canada had no jurisdiction to entertain an appeal.

*Price v. Tanguay*, 42 S.C.R. 133, and *City of Hamilton* v. *Hamilton Distillery Co.*, 38 S.C.R. 239, referred to; *Shawinigan Hydro-Electric Co.* v. *Shawinigan Water and Power Co.*, 42 S.C.R. 650, distinguished.

The appeal was quashed but without costs as the respondent had neglected to move for an order to quash the appeal within the time limited by Supreme Court Rule No. 4.

Appeal quashed without costs.

*Marchand*, for the appellant. *Gelly*, for the respondent.

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Alta.] RITCHIE v. JEFREY. [Nov. 20, 1915.

*Builders and contractors—Materials supplied—Assignment of money payable under contract—Evidence—Estoppel—Lien—Enforcing equitable assignment—Practice.*

A building contractor gave a written order upon the owner directing him to pay the sum of $800 to the plaintiff on account

of the price of materials supplied for use in the building which was being erected. The order was presented to the owner, but was not accepted in writing, although it was held over to await the time for making payments under the contract. The contractor failed to complete the work, and it was finished by the owner at an outlay which left the balance of the contract price insufficient to meet the full amount of the order.

*Held*, the Chief Justice and Idington, J., dissenting, that the order was effective as an assignment of money payable under the contract, but, as there was no evidence of a promise to pay the amount thereof out of the fund or of facts precluding the owner from denying the sufficiency of what ultimately was payable to the contractor, it could not be enforced against the owner as an equitable assignment.

*Per* Duff, J.:—As the equitable relief sought could be granted only upon evidence which was not to be found in the record and no claim therefor was made in the courts below, the claim came too late on an appeal to the Supreme Court of Canada.

*Per* Fitzpatrick, C.J., and Idington, J., dissenting.—As the equivocal conduct of the owner had the effect of inducing the materialman to abstain from filing a lien to protect himself, the owner ought to be held liable for the full amount of the order as an equitable assignment.

*Lafleur*, K.C., for appellant. *Gerald V. Pelton*, for respondent.

## Province of Ontario

### SUPREME COURT, HIGH COURT DIVISION.

Magee, J.A.] [Jan. 14.

BANK OF OTTAWA v. SHILLINGTON.

*Promissory note payable on demand—Interest—Effect of letter making demand.*

While a demand note may be sued without prior formal demand, a promissory note payable on demand for a fixed amount "with interest at seven per cent." will cease to carry interest at that rate when the holder makes a demand by letter for payment. The interest after demand so made is to be computed at the statutory rate of 5 per cent.

*H. H. Dewart*, K.C., for plaintiff. *W. J. Tremeear*, for defendant.

NOTE.—This case is not reported elsewhere.

# Province of Saskatchewan.

## SUPREME COURT.

Lamont, J.] [25 D.L.R. 432.

MONTREAL TRUST CO. v. BOGGS.

1. *Mortgage—Transfer of mortgaged premises—Assumption of debt—Grantee's liability to mortgagee.*

Where a mortgagor sells the mortgaged premises and the purchaser assumes the mortgage, or retains in his possession an amount of purchase money equivalent thereto, the purchaser is compelled, by sec. 63 of the Land Titles Act, ch. 41 (Sask.), to appropriate that money to the mortgage, just as formerly he was compelled in equity to hand it over to the mortgagor if the mortgagor was compelled to pay the mortgage.

2. *Mortgage — Transfer of interest in mortgaged premises — Assumption of debt—Implied covenant.*

Sec. 63 of the Land Titles Act, ch. 41 (Sask.), which implies a covenant to pay the mortgage debt by a purchaser of the mortgaged premises has no application to the purchase of only an interest in the mortgaged premises.

*Short* v. *Graham*, 7 W.L.R. 787, followed.

*Munro*, for plaintiff. *McLean*, for defendants.

### ANNOTATION OF ABOVE CASE.

A collection of the authorities on the equitable rights on sale subject to mortgage, and the assumption of the mortgage debt upon a transfer of the mortgaged premises, is contained in the annotation to the case of *Ross* v. *Schmitz*, 14 D.L.R. 648, at 652.

At common law, when property was sold subject to mortgage, the purchaser was held in equity bound to indemnify the vendor against his personal liability to the mortgagee under the covenant to pay contained in the mortgage. Hence, until the passage of the statutes enabling the mortgagee to proceed directly against the transferee of the mortgaged property, unless the mortgagee was fortunate enough to be able to obtain an assignment of the vendor's equitable right of indemnity, he could not sue the purchaser for the money due on the mortgage. *Short* v. *Graham* (Alta.), 7 W.L.R. at 790.

The application of the statute is restricted entirely to the case where there has been a *real* purchase by the transferee and a complete parting

with all his interest on the part of the transferor, and not to a conveyance intended by way of security although absolute in form: *Short* v. *Graham*, *supra*.

A similar view was taken in the recent Ontario case of *Campbell* v. *Douglas*, *infra*, p. 436, that the equitable obligation of the purchaser to indemnify the vendor when the amount of the mortgage is deducted from the purchase price arises only when the purchaser is actually one in fact and not when he is the mere nominee or agent of another. Furthermore, parol evidence is admissible in such case, where the deed fails to set out with precision, to explain the full extent and nature of the transaction.

In order to entitle the mortgagee to a personal judgment against the transferee of the land subject to the mortgage, the statement of claim must expressly allege that the transferee is liable by virtue of the implied statutory covenant under sec. 63 of the Land Titles Act (Sask.). He is entitled to be distinctly informed by what authority he is charged with personal liability: *Colonial Investment* v. *Foisie* (Sask.), 19 W.L.R. 748.

But such judgment is recoverable where the statement of claim sufficiently sets forth all facts necessary to entitle the plaintiff to judgment, and the prayer for relief distinctly states that the relief against the defendant is sought under the implied covenant contained in the Land Titles Act: *Assiniboia Land Co.* v. *Acres*, *infra*, p. 439.

The implied covenant to pay the mortgage debt takes effect notwithstanding that the mortgage or incumbrance is not noted upon the transfer; and the obligation thereunder is assignable by the implied covenantee to the original mortgagor: *Glenn* v. *Scott*, 2 Terr. L.R. 339.

Where land is conveyed subject to a mortgage, and the grantee assumes and covenants to pay and to indemnify the grantor against the mortgage, the grantor, if sued upon his covenant in the mortgage, is entitled, in third party proceedings against the grantee, to immediate judgment and execution for the amount of the judgment obtained against him by the mortgagee: *McMurtry* v. *Leushner* (Ont.), 3 D.L.R. 549.

Under secs. 114 and 126 of the Real Property Act, R.S.M. 1902, ch. 148, as they stood prior to the amendments of the Act 1 Geo. V. ch. 49, a mortgagee, even after foreclosure under the Act, may, if he still retains the property, sue the mortgagor on his covenant for payment; and, therefore, in such a case, a mortgagor who has transferred the property may call upon his purchaser to pay the mortgage money under the implied covenant to indemnify him under sec. 89 of the Act. And payment by the mortgagor in such case is not a condition precedent to his right of action on the purchaser's obligation to indemnify. However, protection may be afforded to the purchaser by payment into Court for the proper application of the money: *Noble* v. *Campbell*, 21 Man. L.R. 597.

It was also held, that in the absence of anything to the contrary in the agreement of sale, no liability is imposed upon a purchaser who assumes the payment of a mortgage upon the land, for interest accruing

on the assumed mortgage prior to the time fixed for the completion of the deferred payments to the vendor: *Miner* v. *Hinch*, 15 D.L.R. 1.

A mortgagor who is compelled to pay a mortgage debt after its assumption by an assignee of the equity of the redemption, either by express agreement or by virtue of statutory liability, is entitled to an assignment of the mortgage: *Ross* v. *Schmitz*, 14 D.L.R. 648.

## War Notes.

We gladly, at the request of Mr. Justice Hodgins, publish the following reference to the Lady Jellicoe Fund:—

This winter, owing to the tremendous increase in the number of small vessels, trawlers, motor yachts, etc., employed in patrol work and submarine hunting, there is great need for comforts for the sailors and others employed on them. The Commanding Officers on the Grand Fleet have also expressed the opinion that help, from those interested, to the disabled seamen and the stricken relatives of the fallen, would be very acceptable. Lady Jellicoe can still find use for any number of socks, vests, pants, stockings, mittens and jerseys for the Naval Hospitals, and will gladly receive money for supplying blankets for the smaller craft.

Up to April 23rd, 1915, $983.50, contributed by Canadians, was sent by Mr. Justice Hodgins to Lady Jellicoe, and over 6,000 articles were also forwarded to the Emergency Committee. A statement of the moneys, verified by the manager in Toronto of the Bank of Ottawa, was forwarded to Lady Jellicoe, and has been enclosed to the various papers throughout Canada. These figures do not include what was sent by others direct, in consequence of her letter. Any contributions in comforts or money sent to Mr. Justice Hodgins, 9 Dale Avenue, Toronto, will be forwarded by him free of expense to Lady Jellicoe.