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VENDOR AND PURCHASER—STIPULATIONS LIMITING THE OBLIGATON OF VENDORS OF REAL PROPERTY TO SHEW A GOOD TITLE.

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1. **Introductory.**—The general rule, as enunciated by Lord St. Leonards, is that,

"In contracts for the sale of real estate, an agreement to make a good title is always implied unless the liability is expressly excluded." See Sugden, Vendors and Purchasers, 14 ed., p. 16. This statement was quoted by Cotton, L.J., in *Ellis* v. *Rogers* (1885), 29 Ch. D. (C.A.) 661.

By other authorities it has been laid down that

"The right to a good title is a right not growing out of the agreement between the parties, but which is given by the law:" Grant, M.R., in *Ogilvie* v. *Foljambe* (1817), 3 Mer. 53.

This phraseology was adopted by Pollock, B., in *Want* v. *Stallibrass* (1873), L.R. 8 Exch. 175, 185.

In some instances the actual principle upon which the right rests might conceivably be a matter of essential importance. But

apparently no court has yet had occasion to determir whether it "depends on an implied term in the contract, or is a collateral right given by the law."

In *Ellis* v. *Rogers*, *supra*, Cotton, L.J., declined to express any opinion upon this point. See also the remarks of Fry, L.J.

A "good title," in the view of courts of equity, "is one which an unwilling purchaser can be compelled to take." Lindley, L.J., in *Scott* v. *Alvarey* (1895), 2 Ch. (C.A.) 603.

The operation of the ordinary rule as to the purchaser's right is excluded in the following situations:—

(1) Where the purchaser knows that he cannot get a good title.

This situation is referred to in *Ellis* v. *Rogers*, ubi supra, where no restrictive stipulation was involved.

Under this head reference may be made to a case in which it was held that when both the plaintiff and the defendant claim a leasehold interest under the same instruments, and the defendant purchases the plaintiff's share, he cannot object that the lessor's title is not shewn: *Phipps* v. *Child* (1857), 3 Drew. 709.

(2) Where the purchaser's waiver of objections is inferable from his conduct after the formation of the contract.

For a review of the cases decided upon this ground, see Sugden, Vendors and Purchasers 14th ed., pp. 342 *et seq.*, and Williams, Vendors and Purchasers 2nd ed., pp. 188 *et seq.*

(3) Where the purchaser is estopped from insisting on a perfect title.

In illustration of this class of cases reference may be made to *McMurray* v. *Spicer* (1868), L.R. 5 Eq. 541, where at the time when the contract in question (which was an open one), was signed, the purchaser verbally agreed to take a limited title, and negotiations went on for a long time on that footing. The Court at the hearing limited the inquiry as to title accordingly.

(4) Where the purchaser has expressly agreed to accept a qualified title.

"Every person who proposes an estate for sale without qualification asserts in fact that it his to sell, and consequently that he has a good title; but a vendor, if he thinks fit, may stipulate for the sale of an estate with such title only as he happens to have:" Leach, V.-C., in *Freme* v. *Wright* (1819), 4 Madd. 365.

"There can be no doubt that the vendor of a lease unconditionally undertakes to give a good title, but every person may enter into a qualified contract:" *Spratt* v. *Jeffrey* (1829), 10 B. & C. 249 (Parke, J.).

"There is no doubt that, upon the authorities, the parties may so contract and so bind themselves by conditions precluding inquiries into the title, as that the purchaser may be bound actually to accept and pay for a bad title:" Archibald, J., in *Waddell* v. *Wolfe* (1874), L.R. 9 Q.B. 515.

For the estate, whatever it be, that the purchaser has bargained for, he "has a right to a good title, unless he has expressly assumed the risk of the title, or agreed to take such title as the vendor is able to give:" *Lounsberry* v. *Locander* (1874), 25 N.J. Eq. 554.

The cases which illustrate the fourth of the situations thus enumerated form the subject-matter of the present article.

2. Footing upon which restrictive stipulations are construed.—The primary rule of construction with reference to which the enforceability of restrictive stipulations is determined is indicated by the following statements:—

"If a vendor means to exclude a purchaser from that which is matter of common right, he is bound to express himself in terms, the most clear and unambiguous. And if there be any chance of reasonable doubt or reasonable misapprehension of his meaning, I think that the construction must be that which is rather favourable to the purchaser than to the vendor:" Shadwell, V.-C., in *Symons* v. *James* (1842), 1 Y. & C. C.C. 490.

In *Seaton* v. *Mapp* (1846), 2 Coll. 556, one of the conditions of the sale of a leasehold property provided thus: "The purchaser shall not be entitled to inquire into, or take any objections to, the title to the premises prior to the lease by which the premises are held." A suit for specific performance was dismissed by Knight-Bruce, V.-C., who said: "The word 'lease' may be construed differently by different persons. I think, as that word is here used, that there is sufficient to raise a doubt—a question. I think that as between vendor and purchaser, the purchaser has a right to construe it as meaning something else than it meant four times before in the same conditions of sale—as meaning, in short, what he has construed it to mean—the original lease."

For other explicit affirmation of the rule that ambiguous stipulations will not be enforced against the purchaser, see *Hay* v. *Smythie* (1856), 22 Beav. 510; *Greaves* v. *Wilson* (1858), 25 Beav. 290, 27 L.J. Ch. 546.

A vendor who intends to bind the purchaser to take such title as he himself has, must "make the stipulation plain to the purchaser:" Lord Cottenham, in *South* v. *Hutt* (1837), 2 My. & Cr. 207.

"It is the duty of a vendor to make his conditions clear." Turner, L.J., in *Drysdale* v. *Mace* (1854: C.A.), 5 DeG. M. & G. 103, affirming 2 Sm. & Giff. 225.

A special condition "ought to be expressed in such language as to shew clearly what it was:" Kindersley, V.-C., in *Cruse* v. *Nowell* (1856), 2 Jur. N.S. 536.

"If the vendor meant to express that, whatever the title was, the vendee was bound to accept it he should have said in clear and unambiguous words:" Blackburn, J., in *Waddell* v. *Wolfe* (1874), L.R. 9 Q.B. 515.

The rights and liabilities of the vendor and the purchaser under a restrictive stipulation are determined upon the same footing, irrespective of whether it is one of the conditions prepared by the vendor alone, with a view to a public sale, or forms a part of a contract drawn up after private negotiations between him and the purchaser.

For cases in which this doctrine was explicitly affirmed, see *Rhodes* v. *Ibbotson* (1853), 4 DeG. M. & G. 787, 793; *In re Marsh and Earl Grenville* (1883), 24 Ch. D. (C.A.) 11 (Cotton, L.J.).

3. Stipulations binding the purchaser to take the same title as the vendor's.—From the cases cited below it is clear that a stipulation of which the essential purport is, that the purchaser shall accept the same title as that of the vendor or a third person specified will be enforced according to its terms, both by courts of equity and by courts of law, unless it is open to objection, on the score of ambiguity, or for some other special reason.

In *Freme* v. *Wright* (1819), 4 Madd. 365, the assignees of a bankrupt put up to sale his interest in an estate "under such title as he lately held the same, and abstract of which may be seen at the office of Messrs. T. & Co." *Held*, that this condition imported that the assignees meant only to sell such title as the bankrupt had. Specific performance was decreed by Leach, V.-C.

In *Wilmot* v. *Wilkinson* (1827), 6 B. & C. 506, the plaintiff was held entitled to maintain an action for a part of the money which was to be paid for the next presentation of a benefice, under an agreement which purported to convey "such title as the vendor had received" from a third party specified. "It is contended," said Lord Tenderden, "that the vendors did not exhibit a good title, and did not tender any conveyance. If they did all that their contract required, and more was demanded, that exonerated them from the necessity of taking any further steps. Now I know not what language a man is to use who intends to sell such title as he has, and nothing more, if the words of the agreement in question will not suffice to limit his undertaking. If a purchaser unwisely bargains to pay for such title as another has, it is his own fault if his money is placed in hazard by the insufficiency of the title."

In *Molloy* v. *Sterne* (1830), 1 Dr. & Wal. 585, it was stipulated that the plaintiff should "set by lease to the defendants, or assign, if preferred, for the longest term he could grant," a certain brewery. Lord Plunkett, Ch. (Ir.), held that the defendants were bound to take such title as the plaintiff had at the time when the contract was made, and that under its terms they were not entitled to call upon the plaintiff to shew his lessor's title. But, as there was some uncertainty regarding the exact nature of the leases involved, an order of reference for inquiry on this point was made, final judgment being reserved.

In *Duke* v. *Barnett* (1846), 2 Coll. 337, where the purchaser agreed to accept the vendor's title, it appeared that an incumbrancer of K., a former tenant in fee simple of the property had executed a release or re-conveyance, defective in point of its not covering the whole property; the consequence being that a legal estate in a portion of the property was left outstanding, and constituted a flaw in the title under which it was held by the vendor, a subsequent grantee. Knight-Bruce, V.-C., being of opinion that the purchaser was precluded by his stipulation from objecting to the vendor's title on the ground of this flaw, decreed specific performance of the contract.

In *Leathem* v. *Allen* (1850), 1 Ir. Ch. Rep. 683, the conclusion of Brady, Ch. (Ir.), was that an agreement by the vendors to let to the vendees for the term of sixty-one years the premises then occupied by the vendors "as held under A. B." did not relieve the vendors from the duty of proving the title of the lessor, A. B. The *ratio decidendi* was that, as the words, "as held under A. B." were ambiguous, the purchaser was at liberty to put his own construction upon them. The learned Judge distinguished *Spratt* v. *Jeffrey* (see § 6, *post*), on the ground that it had been decided upon the whole contract and not upon the words of the stipulation "as he holds the same." He considered that, if he were to enforce the contract, he would be going further than that case.

In *Keyse* v. *Haden* (1853), 20 L.T. O.S. 244, where a contract for the sale of a leasehold estate provided that the purchaser was to "take such title as the vendor had," Page-Wood, V.-C., thus stated his conclusions: "If the stipulation is clear and intelligible, and the title, when produced, is bonâ fide the best title the vendor can make, the purchaser will be bound by it. I think the words, 'shall take such title as the vendor has,' mean such title as the vendor can make from the documents in his possession."

In *Ashworth* v. *Mounsey* (1853), 9 Exch. 175, one of the conditions of sale stated that, as the vendor had only an equitable interest in a certain portion of the property sold, the purchaser should accept as to that portion such title as the vendor was able to deduce and convey. The right of the purchaser to maintain an action for the return of his deposit on the ground of a failure of consideration was denied. Parke, B., said that *primâ facie* every vendor contracts to sell the legal estate, but that this rule is not controlling where the obligation of the vendor is cut down by the terms of conditions of sale, which set forth that he has

only an equitable interest, and engages to sell nothing more than such an interest.

In *Cole* v. *Cross* (1912: Man. K.B.), 1 D.L.R. 127, an agreement for the sale of lands in Saskatchewan provided for a transfer under the Sask. Real Property Act, or for a deed without covenants other than as against incumbrances, and also provided that the purchaser "accepted the title of the vendor, and should not be entitled to call for the production of any abstract of title, or proof or evidence of title, or any deeds, papers, or documents relating to the property, other than those which were then in the possession of the vendor." Before the completion of the sale, a caveat was filed by a third party against the land. *Held*, that the purchaser was not entitled to demand a transfer free from this caveat, for which the vendor was in no way responsible.

4. Stipulations circumscribing the purchaser's right to make inquiries or requisitions in respect of the title. Generally.—The substance of another type of restrictive stipulations is that the purchaser shall not make inquiries or requisitions with regard to certain specified matters which affect the quality of the title.

In some of the cases in which these stipulations were considered, the only points discussed were, the extent to which, the manner in which, or the time within which, the vendor was bound to comply with the purchaser's demands for information concerning the title.

In *Ogilvie* v. *Foljambe* (1817), 3 Mer. 53, one of the conditions of a sale of leasehold property was that the title was to "originate and be derived from the lease under which the premises were held by the vendor, and that the purchaser should not be entitled to call for the production of, or inquire into, the title of the lessor." Grant, M.R., held that the vendor was not bound to shew the title of the lessor, and decreed specific performance of the contract by the purchaser. A reference was directed as to whether the vendor could make good title under the lease. In Sugden, on Vendors and Purchasers, 14th ed., p. 345, the rule said to be deducible from this case is stated thus: "If a purchaser having full notice that he is not to expect a title beyond a limited period concludes an agreement for purchase, he will be held to have waived his right. This is by matter of notice, and not of contract."

In *South* v. *Hutt* (1837), 2 My. & Cr. 207, by two of the conditions of the sale of an estate which was sold in lots it was stipulated (1) that the vendor should deliver an abstract of the title to the purchaser, but that, as to a certain specified parcel of the estate, which had been acquired under an award by inclosure commissioners, he should not be bound to show any title thereto prior to the award; and (2) that the vendor should deliver up to the purchaser of the greater part in value of the estate all

the title deeds, and copies of other documents in his custody, but should "not be bound or required to produce any original deed, or other documents than those in his possession and set forth in the abstract, or which relate to other property." It was contended that these stipulations, when read together, imported that the purchaser had no right to have the abstract of title verified, except in so far as the vendor could verify it by the production of "the deeds, or other documents in his possession." But Lord Cottenham was of opinion that the first of the conditions was not in any way limited by the second, and that the vendor was consequently bound to verify the title shewn upon the abstract, either by producing the title deeds themselves, or, if any of them were not in his possession, by other satisfactory evidence. A reference to the Master was directed for the purpose of inquiring whether the vendor could fulfil this obligation.

In *Osborn* v. *Osborn* (1870), 18 W.R. 420, it was held by Malins, V.-C., that a condition of sale, which merely stipulates that the title shall commence with a certain indenture leaves it open to the purchaser to shew that the vendors were not competent to convey; but that, if their incompetency to do so is not shewn, they must be assumed to have been competent.

In *Geoghega* v. *Connolly* (1858), 8 Ir. Ch. Rep. 598, it was provided by the condition in question that the purchaser should deduce a good title to the premises sold, from a date specified to the time when the contract was made; that the title of the vendor's lessor should not be questioned, nor the vendor be bound to go behind the same; and that certain copies of previous searches and judgments affecting the property, and an abstract of title were to be handed to the purchaser. By Trevor, M.R. (Ir.), the concluding clause was construed as shewing that the provision as to not questioning the lessor's title could only mean that the vendor was not to prove it further than in the manner so pointed out. But the condition was deemed to be too ambiguous to justify a court in decreeing specific performance.

In *McIntosh* v. *Rogers* (1887), 14 Ont. R. 97, by an agreement it was provided: "No title deeds, abstracts or evidences of title are to be required other than those in the vendor's possession, nor shall the vendor be required to give a covenant for the production of the same." *Held*, that under this stipulation, the vendor was relieved from the absolute obligation to make a good title to the land. Boyd, Ch., observed: "If the evidences of title coupled with the abstract—and it may be the public register—do not disclose and prove a good title, I would say, as at present advised, that the purchaser was not bound to complete: but in such case the vendor may not be liable in damages, because by the condition he is relieved from the obligation of making out the title to be good."

In other cases the question upon which the rights of the parties depended was this:—whether the given stipulations operated merely so as to debar the purchaser from making inquries or requisitions from the vendor, or as to disable him from avail-

ing himself of information obtained without a resort to such inquiries or requisition. In § 1329 of the treatise of Lord Justice Fry on Specific Performance (5th ed.), we find the following statement:—

"The cases on the question whether and how far the inquiry into title has been limited fall into two categories; first, where the stipulations of the contract preclude the purchaser from making requisitions upon or inquiries from the vendor as to his title which relieves the vendor from the necessity of complying with or answering any such requisition or inquiry, but does not prevent the purchaser from shewing, by any means in his own power, that the vendor's title is defective; and secondly, cases in which the stipulations preclude the purchaser, not only from making such requisitions upon and inquiries from the vendor, but from making any inquiry or investigation about the title anywhere; which may quite validly be stipulated, and will generally, provided that the stipulation be clear, altogether preclude inquiry and investigation for every purpose."

The above passage is somewhat expanded from that which was printed in the first edition of the work (dated 1858), and which, though not specifically referred to, was presumably in the mind of Hall, V.-C., when he made the following statement: "The cases are divisible into two classes: first, cases in which the terms of the contract preclude the purchaser from making requisitions upon the vendor for his title; and secondly, cases in which they preclude him not only from making inquiries from the vendor as to his title, but from making any investigation anywhere about the title:" *Jones* v. *Clifford* (1876), 3 Ch. D. 790.

5. Same subject. Stipulations construed as entitling the purchaser to avail himself of information obtained aliunde.—Of the cases assignable to the first of the categories enumerated in the preceding section, some have been concerned with the purchaser's right to take advantage of defects disclosed by the abstract of title.

In *Waddell* v. *Wolfe* (1874), L.R. 9 Q.B. 515, one of the conditions of a sale by auction of certain leasehold premises was as follows:—"The abstract of title shall commence with an indenture of underlease" of a specified date, "being an underlease from W. S. to W. B. S., and it shall form no objection to the title that such indenture is an underlease; and no requisition or inquiry shall be made respecting the title of the lessor or his superior landlord, or his right to grant such underlease." The defendant having agreed to purchase the premises ascertained from the abstract of title that W. S. had, before the execution of the underlease, mortgaged the premises. *Held*, that the defendant was not precluded by the condition from taking the objection that, as the legal estate was outstanding, W. S. had no power to grant the underlease, Blackburn, J., said: "Does it sufficiently appear that the parties have, by their agree-

ment stipulated that the title, though bad, shall be accepted without objection, or does it mean that the vendor is merely relieved from answering requisitions on title?" A distinction appears to me to be made in the condition between 'objection' to the title, and 'requisitions' on title. The construction I put upon the condition is that no objection is to be made to the title, that the indenture is an underlease, and that no requisitions on title shall be made. . . . That being the construction of this condition, and the vendee, having discovered the defect in the title of the vendor, without having made any requisition of the vendor, he is entitled to insist on the objection." Quam, J., said: "The condition points to the usual requisitions which are made by the purchaser calling on the vendor to give further evidence, produce further deeds or documents. The word 'inquiry' there is not used for the purpose of precluding all inquiry aliunde, but is used as a convertible expression with the word 'requisition.'"

In *Darlington* v. *Hamilton* (1854), 1 Kay 550, it was stipulated upon the sale of an underlease, that "the purchaser should not require proof or production of the lessor's title or any title prior to such lease." By the abstract of title it was disclosed that the vendor was selling an estate which was included with other property in a lease which he had previously granted to a third person, the result being that the title furnished was not plain and simple, but embarrassed with the title to the other property covered by the lease. On account of the flaw thus revealed Page-Wood, V.-C., refused to decree specific performance, saying, "I decide this case upon the ground of the description of the property as a lease without any information of the title of the lessor, and an objection to that title having been discovered by the purchaser, which I think material."

In *Want* v. *Stallibrass* (1873), L.R. 8 Ex. 175, a stipulation that, in default of requisitions or objections made within the time limited, the purchaser should be taken to have accepted the title was held to be applicable only to objections or requisitions which might have been properly enforced against a vendor who had a valid title. In this point of view it was considered that, even though his objections were not taken before the expiration of the time specified, he was not bound to take the property, because on the face of the abstract the vendor shewed no title at all to convey the same. An action for the return of his deposit was accordingly held to be maintainable.

In other cases, belonging to the same category, the point presented for determination was, whether the purchaser was entitled to take advantage of objections ascertained through statements made, or documents produced, by the vendor, during the course of the negotiations prior to the final completion of the sale.

In *Smith* v. *Robinson* (1879), 13 Ch. D. 148, certain freehold property was sold, subject to a condition that the title should commence with a

deed of a specified date and that "no other or earlier title should be required or inquired into" by the purchaser. *Held*, in a suit for specific performance, that this condition did not preclude the purchaser from insisting on an objection which was accidentally disclosed by the vendor, viz., that there was nothing to shew that a certain lease was not still subsisting. It was, however, considered by Fry, L.J., that the purchaser was only entitled to an inquiry as to whether the vendor could make a good holding title.

In *Rhodes* v. *Ibbotson* (1853), 4 DeG. M. & G. 787, it was stipulated, in a contract for the sale of leasehold hereditaments, that the vendor should produce a good and marketable title commencing from the freehold, but that no title should be called for prior to the lease. In the course of the investigation it was stated that the lease had been granted in pursuance of a prior contract, the benefit of which had been the subject of a security, which was by the same statement represented as having been satisfied. *Held*, that the purchaser was entitled to investigate the dealings in respect of this earlier contract.

Reference may also be made in this connection to a case which has frequently been cited by the Courts as a precedent bearing upon the effect of conditions of sale, although it did not involve any stipulation of that character: *Warren* v. *Richardson* (1830), 1 Younge 1 There specific performance of an agreement to accept a lease, was decreed, the Court being of opinion that the defendant had by his conduct waived all objections to the vendor's title. But subsequently, when the lease was being settled, it became necessary for the vendor, in order to identify the premises, to produce before the Master the original lease under which the plaintiff was entitled to the property, and as that production shewed that a sufficient lease could not be made to the defendant according to the agreement, the Court declined to decree specific performance.

In another group of cases the discussion had reference to the right of the purchaser to take advantage of information derived from sources wholly extraneous.

In *Shepherd* v. *Keatley* (1834), 1 Cr. M. & R. 117, an action by the vendor for failure to complete the purchase, it appeared that on a sale by auction of leasehold property, one of the conditions was, that the vendor "should not be obliged to produce the lessor's title." Subsequently the solicitor of a third person sent to the purchaser's solicitor notice of an adverse interest claimed by that person in the property. *Held*, that, notwithstanding the above condition, he was entitled to insist in those defects. Alderson, B., said: "The 'not being obliged to produce the lessor's title' merely confers upon the vendor the power of enforcing the contract without producing or giving evidence of that title; but that expression cannot prevent the purchaser from taking objections discovered by himself." Bolland, B., said: "The clause here has a sufficient operation in protecting the vendor from the inconvenience, or perhaps the impossibility of produc-

ing the lessor's title. But it does not protect him from defects in the title, which come to the knowledge of the vendee."

The decisions above cited are in harmony with the following statement of Page Wood, V.-C. (afterwards Lord Hatherley) :—

It is quite clear . . . that whatever may be the term of the conditions of sale, if the purchaser obtains information *aliunde* that the title of the vendor is not clear and distinct, he has a "right to insist on his objection:" *Darlington* v. *Hamilton* (1854), Kay 550.

But the doctrine thus laid down is inconsistent with the cases cited in the following sub-section, and cannot be maintained in the unqualified shape in which it was enunciated, unless the authority of those cases is repudiated.

In *In re National, etc., Bank* (1895), 1 Ch. 190, North, J., expressed the opinion that the statement of the Vice-Chancellor went too far, and that the cases upon which it purported to be founded, viz., *Warren* v. *Richardson*, *Younge* 1, and *Shepherd* v. *Keatley*, 1 C. M. & R. 117, did not warrant it. But with all deference it is submitted that the latter of these cases, at all events, is a clear authority for the statement criticised.

6. Same subject. Stipulations construed as precluding the purchaser from availing himself of information obtained aliunde.—In several cases stipulations of the kind now under discussion have been construed as debarring the purchaser from relying upon defects which had come to his knowledge without resorting to the "inquiries" or "requisitions" which were specifically excluded.

In *Spratt* v. *Jeffrey* (1829), 10 B. & C. 249, the contract in question was one by which A. agreed to sell to B. the two leases and goodwill in trade of a shop, "as he holds the same" for terms of twenty-eight years from a specified date. B. agreed to accept a proper assignment of the leases and premises "without requiring the lessor's title." An examination of a will mentioned in the abstract of title shewed that the lease was defective in that it had not been granted in conformity with the terms of the power under which it purported to have been granted. *Held*, that the vendee could not refuse to complete his purchase, nor recover back his deposit, on account of an objection to that title which was thus disclosed. Referring to the restrictive clause concerning the lessor's title, Bayley, J., said: "The fair and reasonable construction of these words is, that he (the purchaser) shall not be at liberty to raise any objection to the lessor's title." Littledale, J., made the following remarks: "The next question is as to the meaning of the words, 'as he now holds the same.' Do they describe the premises or the defendant's interest? I think they

were meant to describe the interest, viz., twenty-eight years, without reference to and without affecting the questions of title. It could exclude all enquiry as to title. It could not be intended to exclude all enquiry as to title, for the defendant was not the original lessee. Some of the mesne assignments might be defective, and the plaintiff might clearly enquire into any defects except those in the title of the original lessor. Taking the agreement altogether, I am disposed to say that the defendant contracted to sell a qualified title only." Parke, J., stated his conclusion as follows: "There can be no doubt that the vendor of a lease, unconditionally, undertakes to give a good title, but every person may enter into a qualified contract. This certainly was so to some extent. The question is, to what extent the qualification goes, and I think that depends upon the words as to not requiring the lessor's title. They could not mean that the vendor should simply assign such interest as he had, for an objection arising after the original grant might have been made. The words, 'as he now holds the same,' are ambiguous, but the plaintiff contracted to pay for an assignment without requiring the lessor's title. For the plaintiff it is contended that he is nevertheless at liberty to object to the lessor's title, though the contract does not bind the defendant to produce it; but this is an unreasonable construction, and cannot be sustained." This decision has frequently been commented upon in later cases. In *Shepherd* v. *Keatley*, (1834), 1 C. M. & R. 117, it was distinguished on the ground that it was decided with reference to a contract of an essentially different tenor—one which was construed as involving "not merely a waiver of producing the lessor's title, but a waiver of that title altogether." (Alderson, B.) But from the language used by the judges it is apparent that, even when allowance was made for the different form of the contract, they regarded it as being scarcely consistent with the decision which they were giving. Their criticism led Lord St. Leonards, in his character of text-writer, to express the opinion that it "would not be followed as an authority." See Sugden, Vendors and Purchasers, 13th ed., p. 392. This statement presumably embodies the view which he would have adopted if he had been called upon to determine the point in his judicial capacity. His opinion was mentioned with approval in two Irish cases: *Leathem* v. *Allen* (1850), 1 Ir. Ch. Rep. 683 (Brady, Ch.); *Geoghegan* v. *Connolly* (1858), 8 Ir. Ch. Rep. 598 (Trevor, M.R.). Another unfavourable criticism made by an eminent judge in an extra-judicial capacity will be found in Fry, on Specific Performance, 5th ed., § 1331, note 3, where it is asserted that the decision in *Spratt* v. *Jeffrey* had been in effect overruled by later cases. That the same view was held by Malins, V.-C., seems to be a necessary inference from his language in *Harnett* v. *Baker* (1875), L.R. 20 Eq. 50. That the decision was based upon an erroneous construction of the contract in question was suggested by Parker, V.-C., in *Hume* v. *Bentley* (1852), 5 DeG. & Sm. 520; and by North, J., in *In re National Provincial Bank, etc.* (1895), 1 Ch. 190. On the other hand *Spratt* v. *Jeffrey* was considered by Shadwell, V.-C., to have been well decided: *Duke* v. *Barnett* (1846), 2 Coll. 337. It has also been referred to as a valid pre-

cedent in the following case: ***Phillips* v. *Caldcleugh*** (1868), L.R. 4 Q.B. 159; ***Waddell* v. *Wolfe*** (1878), L.R. 9 Q.B. 515; ***In re Hardwicke and Lipski's Contract*** (1901), 2 Ch. 266. In view of the remarkable conflict of views which the foregoing criticisms disclose with regard to the case, only a court of error can now settle definitely the question of its correctness.

In ***Hume* v. *Bentley*** (1852), 5 DeG. & Sm. 520, upon a sale by auction of leasehold premises, one of the conditions was to this effect: "The lessor's title will not be shewn and shall not be inquired into." In a suit by the vendor to enforce specific performance by the purchaser, the defendant objected that the lease, which had been granted by a canal company, was void, because it appeared from the Act of Parliament incorporating the company that it had no power to acquire land or grant leases. Parker, V.-C., decreed performance, being of opinion that the only reasonable meaning of the stipulation was that inquiry was altogether precluded for every purpose, and that the purchaser was consequently bound to accept the lessor's title such as it was.

In *Hume* v. *Pocock* (1866), 1 Ch. App. 379, affirming L.R. 1 Eq. 423, it was stipulated in the contract that the vendor should be called upon to produce only the title from A. B. (the last owner), to himself. The evidence shewed that, to the knowledge of the vendee, A. B. was one of four supposed owners of the land in question, and that the vendee was anxious to buy up such title as he had in order to get rid of his opposition to a private Act of Parliament for the reclamation of the land. *Held*, that the purchaser was not at liberty to shew *aliunde* that A.B. had no title, and that the vendor was entitled to a decree for specific performance of the contract.

In *Harnett* v. *Baker* (1875), L.R. 20 Eq. 50, one of the conditions of sale was that the legal title should commence with a certain settlement, and that purchasers should not require the production of, or investigate, or make any objection or requisition in respect of any matter affecting the legal title prior to such commencement thereof, whether appearing in the abstract or not. Malins, V.-C., held that a condition of this tenor was binding. But the case went off on another point. See § 9, *post*.

It was apparently to the doctrine applied in the above cases that North, J., referred in the following statement:—

"There is no doubt if the vendor had said, 'the purchaser shall take my estate, and shall not ask any question whatsoever about my title,' that is a perfectly good condition, and if a man chooses to buy under those terms, it is open to him to do so." In *Nash* v. *Wooderson* (1885), Ch. D., 5 T.L.T.N.S. 49. (As to the actual point decided in this case, see §9, *post*.)

But, having regard to the cases cited in the preceding section, and the general trend of modern decisions, which is distinctly in

favour of the purchaser, it seems not unlikely that stipulations which by their terms are applicable merely to inquiries and requisitions would not now be treated, either in law or equity, as being restrictive to the extent of cutting off the right of the purchaser to avail himself of information obtained aliunde, and that, in order to produce this consequence, they must be supplemented by one of the more strongly expressed provisions noticed in the following sections.

7. Stipulations binding purchasers to make certain assumptions or admissions.—The essence of another kind of stipulation, often conjoined with one of the type discussed in the preceding section, is, that a certain assumption or admission shall be made by the purchaser with regard to the validity of a document or transaction, the occurrence of a particular event, or some other matter which affects the quality of the title. Such a stipulation is often conjoined with one or both of the limiting clauses discussed in the preceding and the following sections. But, whether it is or is not so conjoined, it is deemed, for the purpose both of legal and equitable remedies, to preclude the purchaser absolutely from taking advantage of the defect to which it relates.

In *Cruse* v. *Nowell* (1856), 2 Jur. N.S. 536, it was stipulated thus: "The purchasers shall admit that the sale was well made under the power in a certain mortgage deed, although the mortgagor did not concur therein." *Held*, by Kindersley, V.-C., that this stipulation did not bind the purchaser to admit that there was, in point of fact, a good and valid power of sale.

In *Musgrave* v. *McCullagh* (1864), 14 Ir. Ch. R. 496, one of the conditions of sale was as follows: "The purchaser shall not be at liberty to require any evidence of the title of the lessors in the said lease, or any of them, or object, by reason of incumbrances, if any, affecting the title of such lessors; nor require the production of any title deeds connected with the premises prior to said lease; but shall admit that said lease has been duly executed and acknowledged by all the parties thereto, and be satisfied with same being handed over to them, and the title deduced therefrom to the vendor." *Held*, that the purchaser was not precluded from inquiring into the title of the lessor, but merely from requiring the vendor to furnish him evidence of title. The court was of opinion that the case was not controlled by the decision in *Hume* v. *Bentley* (1852), 5 DeG. & Sm. 520. See § 6, *ante*.

In *Jackson* v. *Whitehead* (1860), 28 Beav. 154, a testator bequeathed

certain leasehold property impressed with a trust for sale, which finally vested in the vendor (plaintiff), who was not the legal representative of the testator, but the executrix of the surviving trustee. One of the stipulations of the contract for the sale of this property was as follow :—"The purchaser shall not be entitled to require any further evidence of the assent of the testator's executors to the bequest of the leasehold, and the fact of such assent shall be admitted by him." Specific performance of the contract was decreed by Lord Romilly, who said: "The purchaser, might, in the absence of a special condition reasonably object that it must be shewn that the legal personal representative of the testator ought to be induced to assent, or to be shewn to have assented to this bequest. But in order to guard against this, the vendor introduced a special condition by which he states that one of the executors and the legatee for life of the property were in possession of it, in strict conformity with the trusts of the will for twenty-three years, and that this must be treated as conclusive evidence that the executors assented to the bequest. The defendant buys subject to this condition, and I am of opinion that he cannot afterwards say that he is not bound by it, and that he is now entitled to require that the consent of the legal personal representative shall be obtained or expressed by joining in the conveyance."

In *Best* v. *Hamand* (1879), 12 Ch. D. (C.A.) 1, it was stipulated in a contract for the sale of " surplus land" of a railway company, which had been conveyed by the company to the vendor, that the purchaser should "assume and admit" that everything (if anything was necessary) was done by the company to enable them to sell the land as surplus land, and should not call for or require further evidence to that effect. It was also stipulated that, if the purchaser should fail to comply with the terms of the agreement, the deposit should be forfeited to the vendor. The abstract of title shewed that the prior owners had not waived their right of pre-emption; and, as the vendor refused to remedy the defect, the purchaser brought an action claiming a return of the deposit and damages. *Held*, (reversing the decision of Hall, V.-C.), that the purchaser was bound by the stipulations to admit the title of the company to sell to the vendor, and that as he had refused to abide by that stipulation, he had broken the contract, and could not maintain the action, or claim a return of the deposit. Baggallay, L.J., said: "The purchaser has full notice given him that the land to be sold is surplus land of a railway company. Then the contract contains a stipulation that the purchaser is to require no earlier title than the conveyance to the company; and then it goes on to provide that the right of the company to sell the land shall not be inquired into. That is the sense, I take it, of the clause in question in this action. I can hardly conceive any words bringing the case more clearly within the second class. If so, the purchaser has been insisting upon what he has no right to insist on, and the present action cannot be maintained."

In *In re McVickar's Contract* (1890), L.R. Ir. 307, it was held that a condition of sale which provided that the purchaser should assume that

the vendor derived a good title under a will did not preclude him from shewing that, upon the true construction of the will, a good title did not pass. Chatterton, V.-C., refused to decree specific performance.

In *Small* v. *Torley* (1890), 25 Ir. R. 388, it was stipulated that, on tender of a declaration by the vendor that a certain post-nuptial settlement of the property was voluntary, the purchaser should be bound to assume that the settlement was voluntary in respect of the vendor, his wife, and children, and should not be entitled to require the consent of the grantee to the sale. *Held*, by Porter, M.R., that the purchaser, though precluded by this condition from objecting to the vendor's title on the ground that the settlement had been executed, was entitled to proof that the settlement, though voluntary in its inception, had not been set up by condition subsequent.

Under a contract of this tenor, the obligations of the purchaser may, of course, be modified by his dealings with the vendor prior to the final completion of the sale.

In *English* v. *Murray* (1883), 49 L.T.N.S. 35, one of the articles in an agreement for the sale of seventeen undivided shares of a coal mine stated two conveyances by which six undivided shares of the land underneath which the coal lay had been conveyed to the vendor's predecessor in title, and required that the purchasers should assume that six undivided shares of the minerals passed by two conveyances of the land, and thereby became absolutely vested in the vendors' predecessor in title. In the course of the subsequent negotiations, it was found that the vendors could not furnish demonstrative evidence as to these six shares, and after a full discussion of the question, at which the professional advisers of the parties were present, the purchasers completed the contract, and paid the deposit money. Subsequently an indenture was discovered from which it appeared that the vendors were not the owners of the six shares, either at the time when the agreement was made or previously. *Held*, that, as there had been no fraud in the matter, and the purchasers, after having ascertained the defect in the title to the shares, had thought fit to run the risk of taking the property without having had the point cleared up, the vendors were entitled to a decree of specific performance. But a deduction was made from the purchase money as compensation for the loss of the shares. Bacon, V.-C., distinguished the case from those which had been decided simply upon the terms of the contracts.

8. Stipulations precluding objections on the part of the purchaser.—Another form of stipulation, which is sometimes employed without the addition of any other restrictive clause, and sometimes in combination with one or other of those discussed in the preceding sections, purports to bind the purchaser to make no objection concerning some particular element which renders the

title defective. It is clear from the authorities that, in an action at law for the rescission of the contract, or for the return of the deposit, a purchaser is precluded by a stipulation of this tenor from obtaining any relief in respect of the matter to which it relates.

In *Corrall* v. *Cattell* (1839), 4 M. & W. 734, 3 Y. & C. 413, the conditions of sale represented that in view of the facts that a deed under which M. C. claimed an interest in the estate was a forgery, that the vendor had made his affidavit to that effect, and that certain counsel, (whose opinions might be seen), and also a judge of assize had stated that the concurrence of M. C. was not necessary to make a good title, it was stipulated that the purchaser should not make any objection to the title on accoun of the deed. The purchaser afterwards refused to complete his purchase, and, having brought an action for his deposit, obtained a verdict, the jury declaring the deed to be genuine. *Held*, by the Court of Exchequer, sitting as in court of law, that, having regard to this stipulation, the purchaser was not entitled to rescind the contract, and recover his deposit, on the ground that the vendor's statement was not true. *Held*, also, by the same court sitting in equity, that the vendor, in the event of his being able to shew a good title apart from the deed, was entitled to a decree for specific performance.

In *Phillips* v. *Caldcleugh* (1868), L.R. 4 Q.B. 159, the plaintiff contracted to purchase a house described as "freehold," subject to these conditions among others:—"5. The abstract of title will commence with a conveyance of April 17, 1860, and no purchaser shall investigate, or take any objection in respect of the title prior to the commencement of the abstract. 9. If any error or misstatement shall be made in the particulars of sale, it is not to annul the sale, but shall entitle the purchaser to compensation." The abstract of the specific deed shewed a freehold encumbered by certain covenants the nature of which was not stated; and of these the vendor refused to give any account. *Held*, that the purchaser was entitled to have a clear freehold title shewn on this deed, and that the 5th condition consequently afforded the vendors no protection. *Held*, also, that the 9th condition did not enure to their advantage, the objection to the title not being such an "error or misstatement" as came within its meaning. The purchaser was, therefore, entitled to maintain an action for the rescission of the contract and the return of his deposit.

In *Lethbridge* v. *Kirkman* (1856), 4 W.R. 90, 25 L.J.Q.B. 89, a condition of sale stipulated that, as the vendor had no beneficial interest, they could only covenant that the property was not encumbered. It was also stipulated that no objection should be taken on the ground of any covenants, or for the want thereof, or to the right of the vendors to hold, sell, or convey the property. *Held*, that this stipulation precluded the purchaser from maintaining an action to recover his deposit, on the ground that the consent of the *cestuis que trust* had not been obtained.

In re National, etc., Bank (1895), 1 Ch. 190. Upon a sale of land owned by the vendor in fee simple, one of the conditions of sale provided that the title should commence with a conveyance, dated in 1869, and that the prior title should "not be required, investigated or objected to." The purchaser discovered from the abstract of title that, by reason of the will of a testator who died prior to 1869, the grantor in the conveyance of that year had only a life estate in the property. Upon the ground that, under these circumstances, the vendor could not shew a title to the fee, he refused to complete the purchase, and took out a summons under the Vendors and Purchasers Act, 1874, for the return of his deposit. North, J., dismissed the summons on the ground that the condition was binding on the purchaser, and precluded him from raising the objection to the title. He declined to express any opinion regarding the effect of such a condition in a case where a suit is brought against the purchaser for specific performance.

How far a stipulation of this character warrants a court of equity in compelling a purchaser to accept a defective title, is a question which the cases, as they stand, leave in some uncertainty. In two instances the courts apparently proceeded upon the theory that the purchaser was debarred in equity, no less than in law, from escaping the obligation of the contract.

This seems to have been the view of the Court of Exchequer in *Corrall* v. *Cuttell*, cited *supra*.

In *Nicholls* v. *Corbett* (1865: C.A.) 3 De G. J. & S. 18, the conditions of a trustee's sale of real property stated that certain leases to which it was subject were made by the trustees in excess of their authority, and provided that the purchaser should make no objections in respect of them. *Held*, that the purchaser was precluded from objecting to the title on the ground of the existence of the lease, and the vendor was entitled to a decree of specific performance. Knight Bruce, L.J., was of opinion that "this condition met any possible objection that might have arisen on the ground that a sale subject to the leases was a breach of trust, and the purchaser who bought subject to that condition must be considered as having taken upon himself the risk of the sale's being impeached on that ground." Turner, L.J., declined to express a definitive opinion with regard to the general question thus indicated, because he considered that any objection which might have been raised in this point of view had been removed by the decree in *Nicholls* v. *Nickolls*, 34 Beav. 376, to which the cestuis que trust had been parties.

But a decision of the Court of Appeal seems to indicate the adoption of the doctrine, that specific performan should not be decreed in any case where the title is found, upon examina-

tion, to be so defective, that the purchaser would be liable to be dispossessed at any moment.

In *Scott* v. *Alvarez* (1895), 2 Ch. (C.A.) 603 [a judgment which varied, upon new evidence produced by the purchaser, the decree in (1895) 1 Ch. (C.A.) 596, and reversed in part a decision, reported in (1895) 1 Ch. 621, which was rendered by Kekewich, J., subsequently to that decree], a condition of sale, provided that the purchaser should not make any objection to the intermediate title between a certain lease and the assignment of it, but should assume that the assignment vested a good title in the assignee. The abstract of title shewed that there was a vital defect in the intermediate title, and that the assignees had no title to the property. *Held*, (1) that the purchaser was bound at law by the condition, and therefore could not recover his deposit; but (2) that as the title was bad in the sense that, as the purchaser could be exposed to the risk of immediate eviction the court should refuse to decree specific performance and leave the parties to their legal remedies.

9. Some special grounds for refusing to enforce stipulations against purchasers.—Stipulations which would otherwise have been construed as precluding objections to the title will obviously not debar the purchaser from obtaining a release from his obligations, if his claim for relief can be made good on any of the general grounds which render contracts non-enforceable.

(1) One of those grounds is illustrated by the decisions which have proceeded on the doctrine that a purchaser is not bound by a contract which contains a material statement which is positively untrue. The courts have refused to enforce contracts both in cases where the misrepresentation was innocent, and in cases where it was of such a nature that the vendor would have been liable to an action for deceit.

In *Drysdale* v. *Mace* (1854: C.A.) 5 De G. M. & G. 103, aff'g 2 Sm. & Giff. 225, one of the conditions in an agreement for the sale of a reversionary estate in fee, was as follows:—"A statement in a deed of 1836, that a life annuity granted to G. M. had not been paid or claimed for eight years previously,—and which will be supported by a declaration by the vendor that no claim has been made on him since 1841, and that he believes the same has not been claimed for the last twenty years,—shall be conclusive evidence that the annuity has determined." A suit for specific performance was dismissed, on the ground that, where an annuity issuing out of the estate sold is described in one of the conditions of sale as a life annuity granted to a specified person, the purchaser cannot collect

from such a description that the annuity was granted for four lives. "I think," said Turner, L.J., "that there is considerable doubt whether the purchaser did not contract to buy the estate, whether the annuity was subsisting or not, but I am disposed to think that the true construction of the contract is, that the purchaser, although not entitled under the conditions to require the vendor to furnish further evidence that the annuity had determined, bought, nevertheless, on the footing that the annuity was not subsisting."

In *Harnett* v. *Baker* (1875), L.R. 20 Eq. 50, one of the conditions was that the title to the beneficial ownership of the property should commence with the will of A. C., and that the purchaser must assume that A. C. was at his death beneficially entitled to the property in fee simple free from incumbrances. The purchaser alleged that the suggestion in this condition with respect to the beneficial ownership of H. C. was untrue and misleading; because it appeared from one of the later deeds stated in the abstract, that A. C. had attempted to purchase the property from trustees of the will of one G. W.—persons who had no title to sell, either at law or equity,—that in fact the purchase-money had not been paid by A. C. to his vendors during his lifetime; and that the greater part of such money was not paid until the date at which the plaintiff pretended that the legal title became vested in him. *Held*, that the purchaser was not bound by the condition of sale; and that, as the vendor declined an open reference of title, his bill for specific performance should be dismissed. Malins, V.-C., said: "Although a vendor is at liberty to introduce special conditions of sale, he must not make them the means of entrapping the purchaser, and they must not be founded on any erroneous statement of fact. There must be fair and honest dealing in the transaction, and on that principle only special conditions are sanctioned."

In *In re Banister, Broad* v. *Munton* (1879), 12 Ch. D. (C.A.) 131, at a judicial sale of the fee simple of a farm, it was stipulated in one of the conditions in the deed drawn by the conveyancing counsel of the court that a declaration by the tenant to the effect that the farm had been taken by him from E., in October, 1831, and had since then been held by him of E., and those claiming under E. in succession, should be produced to the purchaser. In another condition it was provided that the purchaser should be satisfied with the title so made, without the production of any document previous to the will of E. in 1860, who should be assumed to "be seised of the whole property in fee simple in possession, free from incumbrances," in October, 1835, and up to and at her death. The condition also stated that "it was not accurately known, and could not be satisfactorily explained, how she acquired the property," and it was further stipulated that "no other title than as above should be required or inquired into." From the abstract of title the vendee discovered that E. was a mortgagee in possession and had no title against the mortgagor except under the Statute of Limitations, by adverse possession commencing in 1844. *Held*, that the conditions must be taken as having "inferentially represented to the purchaser that, at all events, so far as the

vendor knew, E. B. was seised in fee simple, and that a vendor is not entitled to say that the purchaser shall assume that which vendor knows not to be true. The case was treated as one which did not involve any want of good, but merely an erroneous representation as to a part of the facts. Brett, L.J., said: "If the condition of sale had been in contest before a court of common law, under the old state of the law, the purchaser would have had everything he was entitled to, and could not have asked for more; but I think that the authorities shew that, in court of equity, requirement or insistence that a certain state of things shall be assumed does by implication contain an assertion that no facts are known to the persons who require it which would make that assumption a wrong one according to the facts." Cotton, L.J., said: "A title was shewn to the purchaser in accordance with the conditions of sale, but, on making inquiries as to matters which were open to him under those conditions as to the title shewn, he ascertained a fact which he contended raised a doubt as to the title being in accordance with what was stated in the conditions of sale, and he required further information; that is to say, he required the vendor to make a further abstract of title, or to have a further investigation of title to clear up the doubt. If the purchaser is not concluded by the conditions of sale, it must be admitted that he is entitled to further information and further investigation of title than that which he has already got. He has not got such a title as the court can force upon him. " . . . I take it that the conditions of sale must be fair, and for the purposes of the present case, I think one may lay down this,—that in conditions of sale there must not be made any representation or condition which can mislead the purchaser as to the facts within the knowledge of the vendor, and that the vendor is not at liberty to require the purchaser to assume as the root of his title that which documents in his possession shew not to be the fact, even though those documents may shew a perfectly good title on another ground."

In *Nash* v. *Wooderson* (1885:Ch.D.) 52 L.T.N.S. 49, an agreement for the sale of leasehold property stated that it was let for a term of fifty years from a specified date. One of the conditions of the sale was that the title should commence with two specified underleases, and that the purchaser should not call for the production of, or investigate, or make any objection or requisition respecting the title prior to the underleases on any ground whatever, by whatever means such ground of objection or requisition should come to his knowledge. Four years after the completion of the sale, the fact that third persons claimed interests in the property adverse to a right which the underleases purported to confer upon him was brought to his notice through a statement in one of the particulars of an auction sale which had been ordered by the court in a certain suit. *Held*, by North, J., that, as the statement in the contract to the effect that the property was held for a term of fifty years was untrue, the purchaser was not bound to complete the sale. The standpoint of the learned judge as indicated by the following remarks: "If the vendor said, I am owner in fee of the property and then added a condition, 'the purchaser shall accept my title, and shall not go behind the conveyance from me to him, or ask any question,

or make any requisition whatever,' it appears to me that he would be precluded from making those objections if that statement was true; but that, if the statement which accompanied the condition was in itself an untrue statement, then he would not be bound by the condition at all, and would have a right to say, 'Although taking you at your word, taking your statement of title, I may not ask questions, yet, if it turns out that that statement upon the faith of which I was content to ask no questions is an untrue and an incorrect statement, I am not bound any longer by the condition not to ask questions.'" The statement in question was viewed as fraudulent in respect of its having been made by the vendor without knowing whether it was true or false. As to the quality of such a statement, see generally *Reese River, etc., Co.* v. *Smith*, L.R. 4 H.L. 79.

(2) In another group of cases the ground upon which the purchaser was held to be entitled to withdraw from the contract was, that the stipulation itself, or some other clause of the contract contained a statement which, although it was not positively untrue so far as its actual words were concerned, was misleading.

In *In re Marsh & Earl Granville* (1882), 24 Ch.D. (C.A.) 11, the contract provided that the title should, as to the freehold portion of the property, commence with an indenture of a certain date, and that the earlier title, whether appearing by recital, covenant for production or otherwise, or not appearing at all, should not be investigated or objected to. From the abstract of title it appeared that this indenture was in part a settlement on the grantor himself and in part a voluntary conveyance to trustees, in trust for sale, and that a power to revoke the trusts was reserved. *Held*, that the stipulation was not expressed in those clear and explicit terms in which it ought to be expressed, if the purchaser was to be bound by it. Cotton, L.J., said: "The principle in this, that the court will not compel a purchaser to take an estate with less than the ordinary title which the law gives him, unless the stipulation on which the vendor relies for the purpose of excluding what could otherwise be the purchaser's legal right is fair and explicit. I think the test of its being fair and explicit is whether it discloses all facts within the knowledge of the vendor which are material to enable the purchaser to determine whether or not he will buy the property subject to the stipulation limiting his right to the ordinary length of title." In the lower court it was laid down, by Fry, J., that the general nature of the instrument which was specified as the root of the title should have been intimated, because this was an element which would influence to some extent a person who was contemplating the purchase of the property.

In *In re Davis & Cavey* (1888), 40 Ch. D. 601, 607, at an auction sale certain property, described in the particulars as "leasehold business premises," was put up under conditions providing that the title should commence with the conveyance to the vendors, and that no objection should be made in respect of anything contained in the lease. After the abstract

was delivered to the purchaser he discovered that the lease contained a covenant imposing a serious restriction upon the use of the property as business premises. *Held*, by Sterling, J., (1) that, as the property was put up for sale as business premises the purchaser was entitled to have property conveyed to him on which he could carry on business, subject only to the restrictions imposed by the general law of the land, and to such statutory restrictions as might be in force with regard to any particular trade; and (2) that he was entitled to a declaration that title was not such as he ought to be compelled to take.

In *Hædicke & Lepskis Contract* (1901), 2 Ch. 666, the contract, which was for the sale of leasehold premises contained this stipulation: "The vendor's title is accepted by the purchasers." In an action brought by the purchaser for a return of his deposit and a rescission of the contract, on the ground that a good title was not shewn, the applicants relied upon the consideration that the property was subject to onerous and unusual covenants contained in the leases under which they were held, and to provisos for re-entry on breach of any of the covenants. The right of the purchaser to the relief sought was affirmed by North, J., who said: "I am of opinion that the lease do contain covenants which, in the absence of special stipulation or condition in the contract, would entitle a purchaser to say that a good title has not been shewn, inasmuch as the applicants were not informed and did not know that the leases contained any unusual covenants, nor were they afforded any opportunity of seeing the leases prior to signing the contract. It is, I think, now well established that, whether the sale be by private contract or public auction, it is the duty of the vendor to disclose the existence of onerous and unusual covenants contained in the leases of the leasehold property sold, or at least to afford the purchaser an opportunity of inspecting the leases: *Reeve* v. *Berridge*, 20 Q.B.D. 523; *In re White & Smith's Contract* (1896), 1 Ch. 637." The learned judge's conclusion was that, having regard to this rule, it required more than a condition couched in such general terms as in the case before him to bind the purchaser to take the title.

In *Lyons & Carroll's Contract* (1896), 1 Ir. Rep. 383, 387, one of the conditions of sale bound the purchaser to admit that, after the tenant for life of the estate, and one of his sisters, had died, the entire interest in the premises became vested in the surviving sisters, and that a conveyance by two of these sisters to the third (the vendor) vested in her a good title in fee simple. The condition did not state, though the fact was so, that one of the surviving sisters who had joined in the conveyance had children living; nor did it state that it was the contention of the vendor that the conveyance by her sisters operated as a release of the testamentary power of appointment given them by the will of their deceased brother. *Held*, by the majority of the Court of Appeal that the condition was misleading, and therefore not binding on the purchaser.

It has been held that a condition of sale requiring the purchaser to assume certain facts is not misleading in such a sense

as to render the contract non-enforceable, if the vendor believes the facts to be true, even though the condition is intended to cover a flaw which goes to the root of the title. In such a case it is not necessary to explain in the condition the specific defect in the title which the condition is intended to cover.

In re Sandbach & Edmondson's Contract (1891), 1 Ch. (C.A.) 97. There the conditions of sale were (1) that the title should commence with a certain settlement; and (2) that the purchaser should assume that the settlor died intestate and without an heir before a specified date. *Held*, that the vendor was entitled to a declaration that the purchaser was precluded by the conditions from making an objection to the title on the ground that the nature of the settlor's estate did not appear. Lord Halsbury said: "I should quite agree that, if there were an actual misstatement or such an imperfect statement of the facts as in the result makes what is stated untrue, the conditions would be so tainted with falsehood, that it could not be insisted on as against the purchaser misled by such taint of falsehood. But now that the facts are all known, the condition appears to have been aptly and properly framed to prevent the purchaser insisting on proof of what was then and there believed to be the fact, but which the vendor is not in a position to establish by legal proof." . . . It appears to me that an opposite view would establish the principle, that, apart from intentional misleading, and apart from any knowledge by the vendor that the facts required to be assumed were not true, a condition requiring assumptions as to the title could only be supported where the specific objection to the title was pointed out. For that proposition I can find no authority, and it certainly would make every title in which there was not only defect as a matter of fact, but absence of proof of soundness, absolutely unsaleable." The doctrinal limits of the decision are indicated by the following observation. "We cannot go into any question of fraud which might avoid the contract. This is a proceeding under the Vendors and Purchasers Act, which binds the parties to admit the contract."

(3) In one case the contract was held to be non-obligatory on the ground that, before the completion of the sale, the purchaser ascertained that he and the vendor contracted under a common mistake regarding the ownership of the property or some other material fact.

In *Jones* v. *Clifford* (1876), 3 Ch. D. 779, the defendants contracted to buy from the plaintiff freeholds and leaseholds under the condition that he should assume that E. M., who died in 1841, was seised in fee of the freeholds, and should not require the production of or investigate or make any objection in respect of the prior title. He accepted the title, but before the completion of the contract a sub-purchaser to whom he had

agreed to sell the lands, discovered that the freeholds really belonged at the date of the contract to the defendant himself, subject to a leasehold interest in the vendor. This fact so discovered was communicated to the defendant. *Held*, that the purchaser was not precluded by the condition, from taking on the objection, to the title on the ground thus ascertained, and that the vendor was not entitled to a declaration that he could make a title, but merely to an order directing an inquiry as to title. A decree of specific performance was refused. After referring to the two classes of restrictive stipulations specified in § 4, ante, Hall, V.-C., proceeded thus: "A condition of the latter class is no doubt valid but the court has never yet gone so far as to hold that such a condition precludes a purchaser from saying to the vendor, at any rate before the completion of the contract. 'We have both been proceeding under a common mistake You said the property was yours, but I find by some document which I have seen that it is mine, and the contract you are asking me to complete is one without consideration, for I shall be paying the purchase-money and getting nothing for it.' . . . Where there has been such a common mistake, and there is no fraud, the court will not, in a suit for specific performance, compel the purchaser to complete such a contract."

In *Hume* v. *Pocock* (1866), 1 Ch. App. 379, aff'g L.R. 1 Eq. 423, it was laid down that the mere assertion by the vendor or his agent that he has a good title, on the faith of which the purchaser relies without investigating the title, is not necessarily such a misrepresentation as will preclude the vendor from enforcing the contract specifically.

10. Special conditions framed in pursuance of a judicial order.— In an Irish case where a court was settling the conditions of a judicial sale, it sanctioned a condition limiting the right of the purchaser to insist on the vendor's producing the title of the lessor in a specified lease, but refused that part of the motion which asked that the purchaser should be required to admit the title of the lessor, and that he should be precluded from investigating the title.

Lahey v. *Bell* (1844), 6 Ir. Eq. 122.

But there is no general rule of practice to the effect that conditions of the latter description should not be imposed on persons purchasing at judicial sales. All that is required under such circumstances is that the conveyancing counsel appointed by the court shall "not insert anything which may mislead or deceive an innocent, *bonâ fide* purchaser."

So laid down in *Else* v. *Else* (1871), L.R. 13 Eq. 196. There a sale was made by the Court of Chancery under conditions which precluded the purchaser from objecting to the title prior to the document chosen as the root of title, and made recitals in deeds more than twenty years old conclusive. A recital covered by this condition was so framed as to conceal a defect of title prior to the date fixed for commencement of title. The purchaser having inquired into the prior title, refused to complete on the ground that it was bad. *Held*, that, as the sale was by the court, the purchaser was not precluded by the conditions from raising the objection, and ought to be discharged from his purchase. Lord Romilly said: "Conditions of sale are quite fair, even where framed by the court, if they will still, in the opinion of the court, leave the purchaser in possession of the thing he has bought, even though he does not get what is called a marketable title." . . . In a sale under the authority of the court; which, above all things, ought to teach others, and set them the example of straightforward dealing, and telling the truth, and the whole truth, such a condition under the circumstances of this case is binding on no one."

See also *Banister, Broad* v. *Munton* (1879), 12 Ch. D. (C.A.) 13, the effect of which is stated in the preceding section.

11. Difference between remedial rights of purchaser in legal and equitable actions.—It is well established that "conditions of sale may be so framed as to entitle a vendor to retain the deposit, although he cannot enforce the contract against the vendee."

So laid down by Pollock, B., *arguendo*, in *Want v. Stallibrass* (1875), L.R. 8 Exch. 175. For decisions which illustrate this statement, see *Corrall* v. *Cattell* (1839), 4 M. & W. 734, 3 Y. & C. 413, (§ 2'; *In re National, etc., Bank* (1895), 1 Ch. 190 (§ 8); *In re Banister, Broad* v. *Munton* (1879, 12 Ch. D. (C.A.) 13 (§ 9); *Scott* v. *Alvarez* (1895), 2 Ch. (C.A.) 603 (§ 8).

C. B. LABATT.

THE HEBERT CASE.

As our readers are doubtless aware, the cause celebre of *Hebert* v. *Hebert* came before Mr. Justice Charbonneau on appeal from Judge Laurendeau. The former holds that the Ne temere decree of the Roman Catholic Church has no civil effect whatever in relation to marriages, and has no control over the civil law of the province of Quebec; and that any person, authorised by the Code Civil to solemnize marriage between parties capable of entering into the bonds of matrimony, can legally and effectually perform the ceremony no matter what the religious faith of either of the parties may be. The formal judgment is as follows:—

"Basing itself on the motives above given in detail, the court annuls the judgment of March 23, 1911, declares the marriage of the said Eugene Hebert and Dame E. Cloutre, celebrated on July 14, 1908, before the Rev. Wm. Timberlake, upon production of a license, dated July 3, 1908, good and valid; declares that the decree proclaimed by the Congregation of the the Council of the Roman Catholic Church on August 2, 1907, beginning with these words, 'Ne Temere inirentuur,' has no civil effect on said marriage, that the decree of the Archbishop of the Diocese of Montreal, dated November 12, 1909, produced in this case by the plaintiff, has no judicial effect in said case, and rejects the opposition of the defendant opposant and of the tierce opposant es qualite as to the other conclusions therein taken, each party paying his own costs from the date of the two inscriptions of the defendant opposant, and of the tierce opposante es qualite respectively. Dated December 5, 1911."

This conclusion meets generally with the approval of the profession as a legal proposition; while from the wider standpoint it commends itself to the intelligence and spirit of a free country; for, surely, it cannot be that any ecclesiastical body can at will bastardise children who are the fruit of a de facto marriage, solemnised between persons who innocently think themselves to have been made man and wife according to the law of the land. However, the whole question will soon be settled by the Supreme Court of Canada.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Board of Railway Commrs.] [Dec. 6, 1911.

CLOVER BAR COAL CO. *v.* HUMBERSTONE.

Board of Railway Commissioners—Jurisdiction—Private siding—Construction of statute—Railway Act, R.S.C. 1906, *c.* 37, *ss.* 26*a*, 226—8 *&* 9 *Edw. VII. c.* 32, *s.* 1 *(D.).*

Notwithstanding provisions in an agreement under which a private industrial spur or siding has been constructed entitling the railway company to make use of it for the purpose of affording shipping facilities for themselves and persons other than the owners of the land upon which it has been built, the Board of Railway Commissioners for Canada, except on expropriation and compensation, has not the power, on an application under section 226 of the Railway Act (R.S.C. 1906, c. 37), to order the construction and operation of an extension of such spur or siding as a branch of the railway with which it is connected. *Blackwoods Limited* v. *The Canadian Northern Railway Co.*, 44 Can. S.C.R. 92, applied, DUFF, J., dissenting. Appeal allowed with costs.

J. H. Leech, K.C., and *W. L. Scott*, for appellants. *Chrysler*, K.C., for respondents.

Sask.] MARCH BROS. & WELLS *v.* BANTON. [Dec. 6, 1911.

Vendor and purchaser—Condition of agreement—Sale of land—Payment on account of price—Cancellation—Notice—Return of money paid—Rescission—Form of action—Practice.

An agreement for the sale of lands acknowledged receipt of $600 on account of the price and provided, in the event of default in the payment of deferred instalments, that the vendor might, on giving a certain notice, declare the agreement null and void and retain the moneys paid by the purchaser. On default by the purchaser to make payments according to the terms

of the agreement the vendor served him with a notice for cancellation which incorrectly recited that the contract contained a stipulation for its cancellation, in case of default, "without notice," and concluded by declaring the contract null and void "in accordance with the terms thereof as above recited." The vendor, subsequently, refused a tender of the unpaid balance of the price and re-entered into possession of the lands. In an action by the purchaser for specific performance or the return of the amount paid, rescission was not asked for.

Held, that as the vendor had not given the notice required by the conditions of the agreement he could not retain the money as forfeited on account of the purchaser's default; that as the payment had not been made as earnest, but on account of the price, the purchaser was entitled to recover it back on the cancellation of the contract, and that, as the relief sought by the action could not be granted while the contract subsisted, a demand for rescission must necessarily be implied from the plaintiff's claim for the return of the money so paid.

Appeal dismissed with costs.

J. B. Coyne, for appellants. *C. D. Livingstone,* for respondent.

B.C.] [Dec. 6, 1911.

BRITISH COLUMBIA LAND & INVESTMENT AGENCY *v.* ISHITKA.

Chattel mortgage—Sale under powers—Notice—Offer to redeem—Tender—Equitable relief—Evidence—Proceedings taken in good faith.

To impeach a sale under powers in a chattel mortgage on the ground that an offer to redeem was made prior to the time fixed by the notice of sale, the person entitled to redeem is obliged to shew that the amount due under the mortgage was actually tendered or that the mortgagee was distinctly informed that the mortgagor was then and there ready and willing to pay what was so due and, being thus informed of the intention to redeem, refused to accept payment.

In the exercise of his power of sale, a mortgagee of chattels is bound merely to act in good faith and avoid conducting the sale proceedings in a recklessly improvident manner calculated to result in sacrifice of the goods.

Per DUFF, J., he is not obliged (regardless of his own interests as mortgagee) to take all the measures a prudent man might be expected to take in selling his own property.

Judgment appealed from reversed, the CHIEF JUSTICE and IDINGTON, J., dissenting.

Ewart, K.C., for appellants. *Travers Lewis*, K.C., and *Ladner*, for respondent.

Board of Railway Commrs.] [Dec. 6, 1911.

CANADIAN PACIFIC RAILWAY CO. AND CANADIAN NORTHERN RAILWAY CO. *v.* BOARD OF TRADE OF THE CITY OF REGINA.

Railways—Construction of statute—The Railway Act, R.S.C. 1906, c. 37, ss. 77, 315, 318(2), 323—1 Edw. VII. c. 53 (D.)—52 Vict. c. 2; 53 Vict. c. 17; 1 Edw. VII. c. 39 (Man.)—Board of Railway Commissioners—Complaints—Evidence—Agreement for special rates—Unjust discrimination—Practice—Form of order on reference.

In virtue of an agreement with the Government of Manitoba, validated by statutes of that province and of the Parliament of Canada, the Canadian Northern Railway Company established special rates for the carriage of freight, etc., to points in Manitoba, and the Canadian Pacific Railway Company reduced its rates, which had been in force prior to the agreement, in order to meet the competition resulting therefrom. The complaint made to the Board of Railway Commissioners for Canada by the respondents was in effect that as similar proportionate rates were not provided in respect of freight, etc., to points west of the Province of Manitoba there was unjust discrimination operating to the prejudice of shippers, etc., to and from the western points. On questions submitted for the consideration of the Supreme Court of Canada,

Held, that the facts mentioned are circumstances and conditions within the meaning of the Railway Act to be considered by the Board of Railway Commissioners in determining the question of unjust discrimination in regard to both railways; that such facts and circumstances are not, in law, conclusive of the question of unjust discrimination, but the effect, if any, to be given to them is a question of fact to be considered and decided by the Board in its discretion. (Cf. *The Montreal Park and Island Ry. Co.* v. *City of Montreal*, 43 S.C.R. 256.)

Appeal dismissed with costs.

Chrysler, K.C., for appellants, Canadian Pacific Ry. Co. *Ewart*, K.C., and *George F. MacDonell*, for appellants, Canadian Northern Ry. Co. *Wallace Nesbitt*, K.C., and *Orde*, K.C., for respondents.

Man.] [Dec. 6, 1911.

WEBSTER *v.* SNIDER.

Vendor and purchaser—Agreement to convey lands—Consideration—Price in money—Breach of contract—Recovery for "money had and received"—Sale or exchange—Damages.

S. sold his interest in certain lands to W. for a consideration, fixed at $19,000, of which $16,000 was to be satisfied by the conveyance of other lands, alleged to be owned by W. W. then executed a written agreement purporting to sell these other to S. for the sum of sixteen thousand dollars, acknowledged then and there to have been received by the vendor; bound himself to convey them to the purchaser, with a clear title, within one year from the date of the agreement, and time was stated to be of the essence of the contract. Upon default by the vendor to convey the lands, according to the agreement, the plaintiff sued to recover the $16,000, as money had and received for which no consideration had been given. In his defence, W. contended that the consideration mentioned in the agreement was not actually in cash but consisted merely of lands to be conveyed in exchange at a valuation fixed at that amount, and, consequently, that the plaintiff could recover only damages to be assessed according to the value of the lands which he had failed to convey.

Held, that, in the absence of evidence of any special purpose as the basis of the agreement, the terms of the contract in writing governed the rights of the parties that the consideration mentioned in the agreement should be regarded as a price paid in money and consequently, the plaintiff was entitled to the relief sought. Judgment appealed from (20 Man. R. 562) affirmed.

A. C. Galt, K.C., for appellant. *Hugh Phillipps,* for respondent.

Man.] [Dec. 6, 1911.

CITY OF WINNIPEG *v.* BROCK.

Municipal corporation—Closing streets—"Passage of by-law"—Coming into force of by-law—Time for appealing—3 and 4 Edw. VII. c. 64 *(Man.)—"Winnipeg City Charter"—Construction of statute.*

A municipal by-law for the diversion and closing of certain highways and the transfer of the land to a railway company provided that it should "come into force and effect" on the exe-

cution of a supplementary agreement between the municipal corporation and a railway company "duly ratified by council; it also determined the classes of persons and property entitled to compensation in consequence of being injuriously affected by the diversion and closing of the streets. The statute (3 & 4 Edw. VII. c. 64, s. 708, s.-s. c (1)), conferring these powers, gave persons dissatisfied with the determination the right to appeal to a judge "within ten days after the passage of the by-law." Another by-law was subsequently enacted by which the first by-law was "ratified and confirmed and declared to be now in force." The defendants, who had been excluded from the class of persons to receive compensation, appealed to a judge, under the section of the statute above referred to, within ten days after the enactment of the second by-law.

Held, that the terms "within ten days after the passage of the by-law" in the statute had reference to the date when the by-law affecting the streets and determining the classes entitled to compensation became effective; that the first by-law did not come into force and effect in such a manner as to injuriously affect the defendants until it was ratified and confirmed by the subsequent by-law, and consequently, the defendants' appeal came within the time limited by the statute.

Judgment appealed from (20 Man. R. 669) affirmed.

Wallace Nesbitt, K.C., *O. H. Clark*, K.C., and *Christopher C. Robinson*, for appellants. *Aikins*, K.C., and *C. P. Wilson*, K.C., for respondents.

B.C.] [Dec. 6, 1911.

BRITISH COLUMBIA ELECTRIC RY. CO. *v.* WILKINSON.

Negligence—Carriers—Operation of railway—Defective system —Gratuitous passenger—Free pass—Limitation of liability —Employer and employee—Fellow-servant — Evidence— Onus of proof.

The plaintiff's husband was an employee engaged as a mechanic in the company's workshops and was travelling thither to his work on one of the company's passenger cars, as a passenger, without payment of fare. A freight car became detached from a train, some distance ahead of the passenger car and proceeding in the same direction; it ran backwards down a grade, collided with the passenger car and the plaintiff's husband was killed. The manner in which the freight car became detached

was not shewn. On the body of the deceased there was found a permit or "pass," which was not produced, and there was no evidence to shew any conditions in it, nor over what portion of the company's lines, nor for what purposes it was to be honoured. On the close of the plaintiff's case the defendants adduced no evidence whatever, and the jury found that the company was at fault, owing to a defective system of operation of their trains, and assessed damages, at common law, for which judgment was entered for the plaintiff.

Held, that there was a presumption that deceased was lawfully on the passenger car and, in the exercise of their business as common carriers of passengers, the company were, therefore, obliged to use a high degree of care in order to avoid injury being caused to him through negligence; that there was nothing in the evidence to shew that deceased occupied the position of a fellow-servant with the employees engaged in the operation of the trains which were in collision; and that, in the absence of evidence shewing any agreement express or implied, or some relationship between the company and deceased which would exclude or limit liability, the plaintiff was entitled to recover damages at common law.

Judgment appealed from (16 B.S. Rep. 113) affirmed. *Nightingale* v. *Union Colliery Co.*, 35 Can. S.C.R. 65, distinguished.

Ewart, K.C., for appellant. *Chrysler*, K.C., for respondents.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] [Feb. 12.

GUNN *v.* CANADIAN PACIFIC RY. CO.

Negligence—Bailment—License to keep horses in stable for reward—Liability for injury to horse caused by defect in building—Landlord and tenant.

By an arrangement made with defendants the plaintiffs were permitted to use a stable of the defendants to keep and feed their horses in. The defendants supplied the feed and charged 50 cents per head per day for this and the stable accommoda-

tion. The plaintiffs' man looked after the horses and fed them, but there was no one on behalf of the plaintiffs in charge of the horses during the night. The stable was at the same time used by the defendants for horses in transit during shipment over the railway and no particular stalls were allotted for the plaintiffs' horses. One night one of the plaintiffs' horses, a heavy draft animal, broke through the flooring of the stall it occupied and was so injured that it died. The defendants' agent in charge of the stable had requested the plaintiffs' stableman to report to him any defects in the flooring he might notice and had several times made repairs on receiving such reports, but there was no agreement by the plaintiffs that they would make such reports.

Held, that the relationship of the parties was either that of bailor and bailee or licensor and licensee, and not that of landlord and tenant, and that the defendants were under a duty to have the stable reasonably fit for its purpose, and so were guilty of negligence in not keeping it in proper repair and were therefore liable to the plaintiffs in damages for the loss of their horse.

Searle v. *Laverick,* L.R. 9 Q.B. 122; *Brabant* v. *King,* [1895] A.C. 632; *Stewart* v. *Cobalt,* 19 O.L.R. 667, and *Francis* v. *Cockrell,* L.R. 5 Q.B. 501, followed.

RICHARDS, J.A., dissented.

W. L. Garland, for plaintiffs. *Curle,* for defendants.

KING'S BENCH.

Robson, J.] [Feb. 5.

RE ST. BONIFACE BY-LAW NO. 800.

Practice—Summons to quash by-law—Grounds of application should be stated—Amendment—St. Boniface Charter—Application by summons or notice of motion.

Held, 1. Under s. 517 of St. Boniface Charter, 7 & 8 Edw. VII. c. 57, an application to quash a by-law of the city for illegality is properly made by summons and not by notice of motion.

2. Although the statute does not expressly provide that the grounds intended to be set up should be stated in the summons, yet, to avoid injustice, such requirement should be implied. In this case the omission to state the grounds in the summons was by inadvertence, and permission was given the applicant,

upon alleging plausible grounds and upon proper terms as to costs, to amend and re-serve the summons, making it returnable at such a date as would allow the ten clear days' notice required by the section.

Re Peck and Township of Ameliasburgh, 12 P.R. 664, followed.

A. Dubuc, for applicant. *Blackwood*, for City of St. Boniface.

Macdonald, J.] [Feb. 6.

ROGERS *v.* GRAND TRUNK PACIFIC RY. CO.

Negligence—Railway company—Animals straying on to railway track—Railway Act, R.S.C. 1906, *c.* 37, *s.* 294, *s.-s.* 4.

The plaintiff's claim was for the killing of four horses by a train of the defendants. The horses had been in an enclosure surrounded by a wire fence four feet high and about half a mile from the railway. There was an opening in the fence between a building and a tree which the plaintiff said he had closed with boards to the height of 50 inches on the night before the horses were killed. In the morning he discovered that the boards closing the gap had been broken down and that the horses were gone. He and his family made immediate and diligent search for them, but it appeared that, after wandering about, they had got on to the railway track at a road crossing where there were no cattleguards as required by the Railway Act, and were run into by a train near that point.

Held, that this evidence had not been displaced by that of the witnesses for the defence, and, upon it, the defendants had not satisfied the onus of proving that the horses had "got at large through the negligence or wilful act of the owner" cast upon them by sub-section 4 of section 294 of the Railway Act, R.S.C. 1906, c. 37, and were, therefore, liable under that subsection to the plaintiff for the damages caused to him.

Trueman, for plaintiff. *Auld*, for defendant.

Perdue, J.A.] [Feb. 7.

RE PROVENCHER ELECTION.

Election petition—Dominion election—Security for costs—Affidavit verifying petition—Payment of expense of publishing notice of the petition—Status of petitioner—Proof of list of voters—Provincial lists.

Held, 1. Only one sum of $1,000 need be deposited by the

petitioners as security for costs under section 14 of the Dominion Controverted Elections Act, although they have made the returning officer a party to the petition and claimed relief against him as well as against the respondent.

2. Unless the petitioner is shewn to have been completely ignorant of the contents of the petition which he has verified by his affidavit, the latter should be held to be sufficient: *Re Lunenburg Election*, 27 S.C.R. 226, and, in any event, where there are two petitioners and, as to one of them, no such objection is raised, the affidavit of that one is sufficient.

3. It is not incumbent on a petitioner to furnish the returning officer with money in advance to pay the expense of publishing the notice of the petition in a newspaper as required by section 16 of the Act, although the petitioner is liable for such expense.

4. As the Dominion Elections Act makes the Provincial lists the foundation of the Dominion lists, if the former are produced from the custody of the proper officer and proved to have been the official lists in force, no objections as to the regularity of these lists, by reason of alleged non-compliance with requirements of the Provincial statute, should be entertained or inquired into on the trial of a preliminary objection as to the status of a petitioner under the Dominion Controverted Elections Act.

The petitioners' names were on the certified lists of voters for the electoral district which were compiled and arranged by the committee of judges in Winnipeg to be transmitted by them to the clerk of the Crown in Chancery under sub-s. 10 of s. 9*a* of the Act. The clerk of the Crown in Chancery, however, in order to save time, requested the committee to hand the certified lists in Winnipeg to a Mr. McGrath who had been sent from Ottawa by the King's Printer to take charge of the printing of the lists in Winnipeg. The lists were then printed in Winnipeg under Mr. McGrath's supervision, and it was not until after the election was over that the certified lists reached the office of the clerk of the Crown in Chancery.

Held, notwithstanding this irregularity, that the certified list prepared by the County Court judges for transmission as above, and now produced from the custody of the clerk of the Crown in Chancery, was the original and legal list of voters for the electoral district, and that, as the names of the petitioners appeared upon it, they had established the fact of their right to vote at the election.

A. B. Hudson, for respondent. *Blackwood*, and *A. Bernier*, for petitioners.

Prendergast, J.] REX *v.* MALI. [Feb. 8.

Criminal law—Criminal Code, s. 778, s.-s. 3—Summary trial—Jurisdiction—Consent of prisoner to be tried summarily.

It is sufficient to shew jurisdiction in the magistrate at the summary trial of an indictable offence if the conviction contains the statement that the prisoner consented to be tried summarily, without setting out on the face of it, or anywhere on the record, the language used by the magistrate in informing the accused of his right to elect as prescribed by sub-section 3 of section 778 of the Criminal Code.

The consent to be tried summarily is the essential element in the jurisdiction and, if that is stated, it should be presumed that it was regularly and properly obtained in the absence of any evidence to the contrary.

P. E. Hagel, for prisoner. *Graham, D.A.-G.*, for the Crown.

Province of British Columbia.

COURT OF APPEAL.

Full Court.] REX *v.* DEAKIN. [Jan. 30.

Criminal law—Speedy trial—Procedure—New trial—Right of accused to re-elect—Evidence given by accused at first trial—Use of by prosecution on second trial—Evidence sufficient to convict—Refusal of judge to reserve a point upon.

An accused appealing from a conviction in a county judge's Criminal Court, and securing a new trial, is sent back to that court, and has not any right to re-elect whether he shall be tried speedily or go before a jury.

Where an accused submits himself to give evidence and be cross-examined upon such first trial, the evidence so given is admissible in the second trial.

In this case the trial judge refused to reserve a point that

there was no evidence warranting the finding of guilty arrived at; and the Court of Appeal refused to disturb the ruling.

Aikman, for the accused. *Maclean,* K.C., for the Crown.

Full Court.] [Jan. 30.

THE KING *v.* CHLOPEK FISH COMPANY.

Shipping—Foreign vessel—Seizure of within three mile limit—Customs and Fisheries Protection Act—Burden of proof on defendant ship.

In an action brought in the Supreme Court of British Columbia by His Majesty on the information of the Attorney-General for Canada for the forfeiture of the "Edrie" for contravention of the Customs and Fisheries Protection Act, the statement of claim alleged that the "Edrie" being a foreign vessel was on the 21st of February, 1911, found fishing within three marine miles of the coast of Canada, namely, within three marine miles of the shore of Cox Island, British Columbia, and that such ship was legally seized by an officer authorised by the Customs and Fisheries Protection Act and claimed the forfeiture of the "Edrie." The statement of defence denied these facts and alleged that the "Edrie" was lawfully on the high seas and was illegally seized by the Canadian cruiser, "Rainbow."

The burden of proving the illegality of any seizure, made for alleged violation of any of the provisions of this Act, or that the officer or person seizing was not by this Act authorised to seize, shall lie upon the owner of claimant.

The judgment on the trial determined that the defendant did not discharge the burden of proof resting upon defendant and adjudged that the "Edrie" be condemned as forfeited to His Majesty and be sold by public auction.

Held, on appeal, that the trial judge was right.

Reid, K.C., and *Ritchie,* K.C., for defendant, appellant. *Macdonell,* and *Armour,* for plaintiffs, respondents.

Full Court.] [Jan. 31.

KING LUMBER MILLS *v.* CANADIAN PACIFIC RY. CO.

Discovery—Officer of company.

A person in the employ of a railway company, in the capacity of a fire warden, with other persons under him to make

reports to him of fires in the district over which his jurisdiction extends, is an officer of the company within the meaning of Rule 370c examinable for discovery.

Bodwell, K.C., for motion. *Maclean,* K.C., contra.

Full Court.] [Jan. 31.

IN RE MUNICIPAL ELECTIONS ACT.

Statute—Construction of—Commissioners for taking affidavits—Limitation of powers to specific acts—Provincial elections—Municipal elections.

A commissioner appointed under the provisions of the Provincial Elections Act "for the purpose of acting under (the) Act in the electoral district in which he resides," is restricted in the scope of his duties to taking affidavits and declarations of persons claiming to vote under the Provincial Elections Act only. Where, therefore, certain persons, otherwise qualified, claiming to vote at a municipal election, but who made their declarations before such a commissioner, and whose names were repected by a court of revision it was

Held, that the names were properly struck off the list.

Maclean, K.C., in support of the application. *McDiarmid,* contra.

Full Court.] IN RE MABEL PENERY FRENCH. [Jan. 31.

Statute—Construction of—Legal Professions Act, s. 31, *s.-ss.* 3 (*b*), 4 (*b*)—*Interpretation Act, R.S.B.C.* 1897, *c.* 1, *s.* 10, *s.-ss.* 13 *and* 14—*Right of women to admission to legal profession.*

The legislature, when framing the Legal Professions Act, had not in mind the probability of women seeking to enter the profession, therefore any remedy for the omission lies with the legislature and not with the Benchers of the Law Society.

Judgment of MORRISON, J., affirmed.

J. A. Russell, for motion. *L. G. McPhillips,* K.C., contra.

Book Reviews.

Law Quarterly Review. Edited by Sir Frederick Pollock, Bart., D.C.L., LL.D. January, 1912. Stevens & Sons, 119, 120 Chancery Lane.

This number has its usual instructive and interesting Notes and Book Reviews, as also articles on The Report of the Land Transfer Commissioners; The reception of the Roman law in the sixteenth century; Principles of liability for interference with trade, profession, or calling; *Tulk* v. *Moxhay*, and Chattels; Moslem International law, etc., etc.

Law Magazine and Review. February, 1912. London: Jordan and Sons, 116 Chancery Lane. Canada: Canada Law Book Co., Toronto.

This number has several interesting articles, one of which —Marriage with foreigners—we will give our readers later, as being of interest at this time when this country has its own difficulties as to the marriage question.

An interesting subject is discussed at length, referring to all authorities, on the subject of lawful sports and the legality of a sparring match. This begins with a reference to Sir Michael Foster's remark in his learned treatise on Criminal law: "The manly diversions of the English people tend to give strength, skill and activity, and may fit the people for defence, public as well as personal, in time of need." This is true and bears on the fact that England alone of all the great powers does not resort to any form of compulsory military service.

Other articles are, Some characteristics of English Criminal law and procedure; Report of the Commissioners of prisons; The Inns of Chancery, their origin and constitution, etc., etc.

Bench and Bar.

JUDICIAL APPOINTMENTS.

James Johnstone Ritchie, of the city of Halifax, Nova Scotia, K.C., to be a puisne judge of the Supreme Court of Nova Scotia, vice Frederick Andrew Laurence, deceased.