Canada Law Journal.

VOL. LIII. TORONTO, OCTOBER, 1917. No. 10

INTERNATIONAL ARBITRATION VINDICATED.

Where it is remembered that the ostensible cause of the present dreadful war was the determination of Austria to be both judge and executioner in its own cause, the reply of the present Austrian Emperor to the Pope's proposals for peace reads like a naive, but none the less pregnant, condemnation of the action of his predecessor on the throne.

The murder of the Archduke Ferdinand was no doubt a grievous and inexcusable act, and a cause for which in olden times war by one monarch on another who was believed to have connived at such a deed would be considered justifiable. But in the present stage of the world's civilization the really enlightened nations of the world have arrived at the conclusion that there is a more just and reasonable method of obtaining satisfaction even for such a wrong. France, Italy, England and the United States have for years past favoured the idea that international quarrels should be submitted to arbitration, but the less advanced nations, of which Germany and Austria are conspicuous instances, have favoured the old "might is right" idea, and one of them at all events has demonstrated beyond the possibility of contradiction, that in spite of all its much vaunted Kultur it has only arrived at the position of being a nation of scientific savages.

To such nations the rough and ready methods of a barbarous age naturally approve themselves, and it is by such a people regarded as the right of the stronger nations to regard with contempt the rights of smaller nations. Servia was a little nation and Austria a big one, and to the rulers of both Germany and Austria it seemed the most proper and natural thing for the big nation to inflict such chastisement on the smaller one as it might see fit, and that it was no one else's business; and to interfere in such

a matter was nothing but a piece of international impertinence; and the suggestion that proof should be at least given of the alleged offence before some impartial tribunal was rejected. In like manner Belgium had been resolved on by the German military authorities to be the best route by which a German invasion of France could be made; the fact that it had given no cause of offence, and was in fact in no sense an enemy, went for nothing and the country was invaded and desolated and its people killed, robbed and outraged by an overwhelming force for no cause save such as the wolf alleged against the lamb whom he sought to devour.

With Austrians and Germans the mere fact that the accusation of complicity in the murder of Ferdinand was made was regarded as equivalent to proof that the charge was well founded, but even had it been so, the mere fact that some Servians had been guilty of such a deed was really no reason why all Servians should be visited with the horrors of war: and even Austrians can never have believed that all Servians, or even the majority of Servians, were implicated. Justice and humanity demanded that the accusation should first be made good before some impartial tribunal, justice also demanded that those who should be found guilty of complicity in the deed should suffer punishment in some measure commensurate with their offence. This is the course indeed which the present Austrian Emperor now practically admits is the proper one, but all these considerations proved of no avail to Francis Joseph, his predecessor. He and his fellow conspirator against the peace of Europe believed that they were ready for a fight as no other nations were, and that by rapid action they might strike down all opponents before they could properly prepare themselves to resist the onslaught. All thoughts of justice and humanity were cast to the winds in order that the bloodthirsty and cruel monsters whose selfish policy has devastated Europe might satisfy their thirst for gore.

It is therefore like the return of an insane man to reason to read the following passage from the Austrian Emperor's reply to the Pope.

"With deep-rooted conviction we agree to the leading ide

of your Holiness that the future arrangement of the world must be based on the elimination of armed forces, and on the moral force of right, and on the rule of justice and legality."

That is the principle his cruel and wicked predecessor refused to give effect to, and out of the mouth of his successor he is thus broadly and implicitly condemned. If he had listened to the eminently just advice, nay, the entreaties of his really enlightened and civilized contemporaries, and not to the selfish and designing and unscrupulous monarch who sways, and will probably prove to have destroyed, the German Empire there would have been no war.

But His Imperial Majesty goes even further and says: "Fully conscious of the importance of the promotion of peace on the method proposed by your Holiness, namely, to submit international disputes to compulsory arbitration, we are also prepared to enter into negotiations regarding this proposal." It may be observed that this proposal did not originate with the Pope. It had long before the war been the subject of discussion among the really enlightened nations of the world, but it is needless to say that among the scientific savages it found no favour.

JUDICIAL DEMEANOUR.

Nothing brings the administration of justice into greater contempt than uncalled for observations by Judges, and by the want of that judicial attitude which is appropriate to their position. It has almost become a habit with some Judges to express opinions on matters which are not before them, and for others to forget that they are Judges, and allow their temper or their feelings to get the better of them. An illustration of this occurred recently at a criminal trial in England. It appears that two boys, who were undefended, and who had pleaded guilty in a Police-court, but not guilty at the Quarter Sessions, were acquitted by the jury on the latter occasion. The Judge thereupon informed the jury that they had not found a verdict consistent with the oath of office which they had taken, and said he would report them to the Home Office. He also ordered the jury to stay for the rest of the

Sessions. A writer in one of our exchanges in commenting on this incident remarks: "Whether the verdict of the jury was right or wrong is no concern of ours, but browbeating a jury by the presiding Judge, however much he may differ from their verdict, is strongly to be deprecated. In a criminal trial it is for the jury and not for the Judge to be absolutely satisfied as to a prisoner's guilt, and incidents of this description do an incalculable amount of harm."

BRITISH WAR LEGISLATION.

Any person desirous of realizing the extent of British Emergency Legislation during the present war cannot do better than read the lecture under that title delivered at the University of California last April, which appears in the September number of the *California Law Review*, the Editor of which adds some later developments in footnotes. The lecturer very justly remarks:" If there were any need of proving that England did not provoke or desire the present war, no proof could be more conclusive than the general state of unpreparedness when the war was actually declared. The number of measures which had to be taken immediately at the outbreak of the war, though large in itself, is small as compared with the additions which experience proved to be necessary in order that the war might be prosecuted to a successful finish. The need for new measures arose, first, as the Government became aware of the insufficiency of the existing rules; and, secondly, as modern warfare brought with it the necessity of providing for new emergencies."

The lecturer refers to the condition of things under the common law and then proceeds to group the war legislation under appropriate headings such as "Organization of and supplies for the forces," "Protection of the country," "Weakening the economic power of the enemy" and "Strengthening the economic power of the Empire." The information in this article will be of much interest at the present time.

NOTES FROM THE ENGLISH INNS OF COURT.

New King's Counsel.

At the close of the summer term, the English Bar was thrown into a state of mild excitement by the announcement that certain new King's Counsel had been appointed. Robert Alderson Wright and Douglas McGarel Hogg have both been called within the Bar, together with three other gentlemen who are better known in India than in England. In making these appointments during the period of the war, the present Lord Chancellor has departed from the rule laid down by his predecessor. When it was thought that peace would be declared within a short period of time, Lord Buckmaster announced that he would not advise the King to create any more silks until the end of the war, lest the juniors who are now serving with His Majesty's Forces should be deprived of the opportunity of picking up some of the work set free. The prolongation of hostilities, however, has altered all this, and has made promotion necessary in the public interest. It was impossible to keep men like those whose names are mentioned above from reaching the forefront of the profession. It is a matter for surprise that Lord Finlay did not make his list a little longer. It is interesting to notice that prior to the recent appointments the junior of those who have seats within the Bar was Mr. William Finlay, the Lord Chancellor's only son and heir.

His Majesty's Counsel.

To look back, for a moment, to normal times, application for silk is not to be lightly made. Many a man with a flourishing junior practice has failed utterly when called within the Bar.

Occasionally a man takes silk with a view to retiring from the profession, but as a general rule it is regarded as a stepping-stone to higher things. If he practises on the equity side he must announce within a short time the name of the judge in whose Court he proposes to practise.

On the common law side a King's Counsel can accept a brief in any Court on his own circuit or in London. If he is retained

to appear at assizes on a "foreign" circuit, he must insist upon a special fee.

The Appointment of a King's Counsel.

A King's Counsel is appointed by letters patent to be "one of His Majesty's Counsel learned in the law."

The appointment rests with the Lord Chancellor, to whom the barrister desiring a silk gown makes application. There is no definite time required to elapse between "call" and the application for silk, but it is generally understood that the barrister must be of at least ten years' standing before he is appointed a King's Counsel.

The first King's Counsel was Sir Francis Bacon, who was appointed by Queen Elizabeth "Queen's Counsel Extraordinary" and received a payment by way of "pledge and fee" of £40 a year, payable half yearly. Succeeding King's Counsel received a similar payment until its abolition in 1831. There was no other appointment of a King's Counsel until 1668, when Lord Chancellor Francis North was so honoured. From 1775, King's Counsel may be said to have become a regular order. Their number was very small so late as the middle of the 19th Century (20 in 1789; 30 in 1810; 28 in 1850) but at the beginning of the 20th Century there were over 250.

Lord Finlay.

In departing from the practice of his predecessor, Lord Finlay has shown himself to be what everyone hoped and expected he would be—a strong Lord Chancellor. Appointed by a non-party Government, he has every right to assert his independence. Too often in the past has the keeper of King's Conscience been a mere party man content to do the bidding of those who gave him office. In other respects, too, has the present Lord Chancellor manifested his single mindedness. He refused office except on the terms that the Government should *not* be obliged to make him a retiring allowance of £5,000 a year. Again, as a judge, he was not afraid, in a recent case decided by the House of Lords, to differ from all his noble learned brethren, and to hold (contrary

to their views), that Christianity is part of the law of "England"—an assertion which Lord Sumner, one of his colleagues, had dismissed as mere rhetoric. Lord Finlay made no enemies when he was at the Bar; he will certainly lose no friends while he retains his seat on the Woolsack.

Appeals to the House of Lords.

A much needed reform has recently been introduced to modify the practice on appeals to the House of Lords. Formerly an appellant had a year within which to make up his mind whether he would appeal or not. This period has now been reduced to six months. Why the period was never curtailed before is one of those problems in legal practice which it is difficult to solve. An appeal is presented to the House of Lords very much as an appeal from a colonial court is presented to the Privy Council. Everything is printed; the scale of costs is enormous. Nor does it by any means follow that because all the judges of the inferior courts have decided in favour of the respondent, that the Law Lords will follow suit. In fact, the case is so presented both in print and by word of mouth to the appeal Committee that the odds seem to be against the respondent.

Uncertainty of Appeals.

In former days there was a Chancery Judge whose decisions were constantly reversed on appeal. Indeed it used to be said that "to go to the Court of Appeal with a judgment of Mr. Justice Blank in your favour was like going to sea on a Friday—dangerous but not necessarily fatal." The same thing might be said of the position of a respondent who is taken "to the Lords" in a certain type of commercial case although he has several judgments below in his favor.

In actions for breach of contract it is frequently necessary for the court to say whether there was any contract, and to ascertain its terms and conditions from letters passing between the parties. It is obvious that the advocate who has the first opportunity of reading the correspondence to the court has an

enormous advantage. He can dismiss one letter as irrelevant, read the portion of another which suits him, and surround the whole with an atmosphere favourable to his client. Of course a vigilant judge, having the letters before him, may see through the wiles of the advocate, and opposing counsel will endeavour to expose the failacies by judicious interruption. But judges even in the House of Lords are only human. Although the letters are all printed and in front of them, they do not always read everything. Nor do they brook interruption of the counsel who is addressing them. A first impression easily formed may be difficult to dislodge. So in a case of this character he who has the first word has an enormous advantage.

The appellant can open the case in his own way. He is not called upon to read the judgments of the Courts of Appeal until his own good time; and he reads them in the appellant's atmosphere which he has himself created. The writer is to some extent talking of his own experience. He was recently concerned in a case on the above lines. It lasted three weeks in the Court of first instance and was then passed through three Courts of Appeal, the last being the House of Lords. In each case the side which had the first word came off victorious. No doubt justice was done in the long run but the moral is clear. Let not the litigant who is successful in the Court of Appeal begin to rejoice until the time within which an appeal to the Lords may be brought has passed by.

The report of the Inspector of Legal Offices for Ontario for last year has been issued. It contains matters of interest to the profession, who will be glad in this time of dearth of legal business to be reminded that the legal machine is still grinding out law, although so many of the profession have gone overseas. No class in the community has more bravely responded to the call of King and country than has the legal profession and, in proportion to their numbers, more lawyers have gone than any other class; and none have been so hard hit, not only financially but also in the sacrifices, even to the death, which they have made for their country.

REVIEW OF CURRENT ENGLISH CASES.

ALIEN ENEMY—OUTBREAK OF WAR—PARTNERSHIP—DISSOLUTION.

Stevenson v. *Aktiengesselchaft &c.* (1917) 1 K.B. 842. This was an appeal from the decision of Atkin, J. (1916) 1 K.B. 763 (noted ante vol. 52, p. 222). The plaintiffs, and defendants, a German firm, were, prior to the outbreak of the war, carrying on business in partnership in England, and the action was brought by the plaintiffs claiming a declaration that, by reason of the war, the partnership was dissolved, and that the defendants were only entitled to such sum as might be found due to them on the date of dissolution, and that defendants were not entitled to any profits made after the declaration of war. Bray, J., held that the partnership was dissolved as of the date of the outbreak of the war, and that the provisions of the Partnership Act of 1890 were not applicable, but that the defendants were entitled to the value of their share in the partnership, including the goodwill, at the date of the dissolution, and to be paid that amount when payment became legally possible, but were not entitled to any share of profits made after the commencement of the war. The Court of Appeal (Eady & Bankes, L.JJ., and Lawrence, J.) agreed with Atkin, J., that the partnership became dissolved by the outbreak of the war, but held that the provisions of the Partnership Act as to the winding-up of a partnership were applicable in such a case and that the English partner was not entitled to purchase the enemy partner's share, or to take it himself upon paying its value, and that the enemy partner was entitled to a share of the profits made out of the partnership assets after the dissolution. Lawrence, J., however dissented on the latter point, and considered that the enemy partner was not entitled to any share of the profits accruing after the partnership had become illegal.

INSURANCE (MARINE)—VESSEL TORPEDOED—SUBSEQUENT LOSS THROUGH SINKING AT DOCK—PROXIMATE CAUSE OF LOSS.

Leyland Shipping Co. v. *Norwich Union F. I. Co.* (1917) 1 K.B. 873. In this case the Court of Appeal (Eady, Bankes and Scrutton, L.JJ.), affirming Rowlatt, J., held that where a vessel was torpedoed by a German submarine and damaged, but was towed into a port, and subsequently sank owing to the damage received,

the proximate cause of loss was the torpedoing of the vessel, and that the policy under which the plaintiffs sued having excepted "all consequences of hostilities or warlike operations," the plaintiffs' action failed.

HUSBAND AND WIFE—WIFE'S TORT ARISING OUT OF CONTRACT—MASTER AND SERVANT—EMPLOYMENT BY WIFE—DANGEROUS PREMISES—LIABILITY FOR WIFE'S TORT.

Cole v. *De Trafford* (1917) 1 K.B. 911. This was an action against husband and wife to recover damages for the alleged tort of the wife, in the following circumstances: The plaintiff was a chauffeur employed by the wife in and about her garage, and, owing to the defective condition of the garage, he sustained injuries in respect of which the action was brought. The Divisional Court (Bray and Horridge, JJ.), on appeal from a County Court Judge, held that the alleged tort arising out of the contract of the wife with the plaintiff, her husband was not liable therefor, and as against him the action must be dismissed.

MASTER AND SERVANT—DISMISSAL—ARREARS OF SALARY.

Healey v. *Societé Anonyme Française Rubastic* (1917) 1 K.B. 946. In this case the short point decided by Avory, J., was, that where a servant is dismissed by his employer for misconduct, the latter is, nevertheless, entitled to be paid the arrears of salary due to him, but not his pay for the current month in which he was dismissed.

CONTRACT—CONSTRUCTION OF RESERVOIR—TIME FIXED FOR COMPLETION—STOPPAGE OF WORKS BY MINISTER OF MUNITIONS—WHETHER CONTRACT TERMINATED OR SUSPENDED—DEFENCE OF THE REALM REGULATIONS, REG. 8A (*b*).

Metropolitan Water Board v. *Dick* (1917) 2 K.B. 1. The defendants in July 1914, contracted to construct a reservoir for the plaintiffs to be completed in six years, subject to a proviso that if, by reason of any impediment, the defendants were delayed in the completion of the work, the plaintiffs might extend the time. By the terms of the contract all plant brought on the premises by the defendants was to become the property of the plaintiffs and was to so continue until the completion of the work. The Minister of Munitions, in pursuance of the powers conferred by Defence of the Realm Regulations, Reg. 8A (*b*), ordered the defendants to cease work on the reservoir, and directed the plant

to be sold to th owners of munition factories, which was accordingly done. In these circumstances, the defendants claimed that the contract was at an end, and the plaintiffs brought the action for a declaration that it was only suspended. They also claimed that the sale of the plant was without authority, and that they were entitled to the proceeds. Bray, J., who tried the action, held that the contract was not terminated but only suspended, but on this point he was reversed by the Court of Appeal (Cozens-Hardy, M.R., and Scrutton and Warrington, L.JJ.). Bray J., also held that the power of the Minister of Munitions to order the removal of the plant under Reg. 8A (*b*), with a view to increasing the production of war material in other factories, involved a power to sell it to such other factories, and the plaintiffs were consequently not entitled to the proceeds. This question was not discussed on the appeal, and the decision of the Appellate Court on the other point is without prejudice to the rights of the parties to the proceeds of the sale.

HUSBAND AND WIFE—DISPUTES AS TO PROPERTY—MARRIED WOMEN'S PROPERTY ACT 1882 (45-46 VICT. C. 75) S. 17 — (R.S.O. c. 149, s. 70)—REFERENCE TO REFEREE FOR TRIAL.

Re Humphrey (1917) 2 K.B. 72. An originating summons was issued under the Married Women's Property Act 1882, s. 17 (R.S.O. c. 149, s. 70), for the purpose of determining certain questions in dispute as to property, arising between husband and wife. Ridley, J., on the return of the summons, referred the whole question for trial before a Referee. The Court of Appeal (Lord Cozens-Hardy, M.R., and Scrutton, L.J.) held that in so doing he had exceeded his jurisdiction, as the Act contemplated that the judge himself should decide such questions, and gave him no power to delegate that duty to any other tribunal.

CHARTERPARTY—REQUISITION OF SHIP BY ADMIRALTY—TERMINATION OF CONTRACT.

Anglo Northern Trading Co. v. *Emlyn Jones* (1917) 2 K.B. 78. In this case Bailhache, J., held, on a case stated by an arbitrator, that a time charterparty is put an end to, where the vessel in question is requisitioned by the Admiralty.

PRINCIPAL AND AGENT—TRAVELLER—RIGHT TO COMMISSION AFTER AGENCY DETERMINED—CONTRACT.

Marshall v. *Glanvill* (1917) 2 K.B. 87. In this case the defendants engaged the plaintiff as a traveller for the sale of their

goods in a certain district and his remuneration was to be a commission of 7½ per cent. on the net amount of trade. The agreement was terminable on six months' notice. On July 12, the defendant joined the Royal Flying Corps. Four days later he would have been compelled to join the forces by virtue of the Military Service Act. The plaintiff contended that his joining the forces did not put an end to his contract, but merely suspended it, and that he was entitled to a commission on accounts actually opened by him, even after he had ceased to work for the defendants, but a Divisional Court (Rowlatt and McCardie, JJ.), overruling a County Court Judge, held that the defendant's enlistment put an end to the contract, and that thereafter he ceased to be entitled to remuneration.

CHOSE IN ACTION—ASSIGNMENT—JUDGMENT FOR COSTS—ASSIGNMENT OF JUDGMENT FOR COSTS—COSTS TAXED, BUT NOT ENTERED ON RECORD—CONSIDERATION.

Hambleton v. *Brown* (1917) 2 K.B. 93. This was an action to recover costs in the following circumstances: One Hope recovered a judgment for possession of land and for costs. After the costs were taxed, but before the amount was entered on the record, Hope by deed, made without consideration, assigned the judgment to the plaintiff, and notice in writing of the assignment was given to the defendant. The defendant contended that until the costs were entered on the record the assignment only amounted to an assignment of a future debt, therefore that the assignment was not a legal assignment, but a mere equitable assignment, and as such void for want of consideration. It was also contended that the amount of the costs was not recoverable because at the time of trial the amount had not been entered on the record. But Atkin, J., overruled all these objections but directed, as a preliminary to the entry of judgment in the plaintiff's favour, that the amount of the costs should be entered on the record, which entry he held to be a mere ministerial act.

SHIP—ABANDONMENT OF SHIP AT SEA—SHIP AND CARGO—SUBSEQUENTLY SALVED—RIGHT TO FREIGHT.

Newsum v. *Bradley* (1917) 2 K.B. 112. The facts in this case were that a ship and cargo had been abandoned at sea, but were subsequently salved, and the simple question was; whether, in such circumstances, the shipowner was entitled to freight and Sankey, J., held that he was not.

LANDLORD AND TENANT—FURNISHED LODGINGS—IMPLIED WARRANTY AS TO FITNESS OF TENANT.

Humphreys v. *Miller* (1917) 2 K.B. 122. This was an action by a landlord to recover damages for breach of warranty, fraudulent misrepresentation and concealment, against the executors of a deceased tenant, and his medical attendant, in the following circumstances. The daughter of the deceased had engaged furnished lodgings in the plaintiff's house for her father and herself. Her father was then suffering from leprosy, which fact was not disclosed. He was attended by his doctor until his death. The jury answered, among other questions, that the daughter and doctor misrepresented that the deceased was a fit and proper person to occupy the plaintiff's rooms, and that the doctor concealed from the plaintiff that the deceased was a leper, and that he stated to the plaintiff, as agent for the deceased, that he was not suffering from any infectious disease, and they found a verdict for the plaintiff for £250; but Darling, J., who tried the action, held that there was no implied warranty in the contract of tenancy, that the deceased was a fit and proper person to occupy the plaintiff's lodgings; and further that there was no evidence that the daughter knew that her father was suffering from leprosy, or that the doctor did more than express his honest professional opinion as to the non-infectious nature of leprosy in England. He therefore gave judgment for the defendants, which was affirmed by the Court of Appeal (Eady and Bankes, L.JJ., and Lawrence, J.)

EXHIBITION—VISITOR—RIGHT TO PHOTOGRAPH EXHIBITS.

Sports and General Press Agency v. *"Our Dogs"* (1917) 2 K.B. 125. This was an appeal from the decision of Horridge, J. (1916) 2 K.B. 880 (noted ante p. 48) and the Court of Appeal (Eady and Bankes, L.JJ., and Lush, J.) have affirmed the decision, that a visitor to an exhibition has a right to photograph exhibits, unless he is by contract prohibited from so doing.

PRINCIPAL AND AGENT—FOREIGN PRINCIPAL—LIABILITY OF AGENT—NAME OF PRINCIPAL NOT DISCLOSED—CUSTOM OF MERCHANTS—PRESUMPTION—REBUTTAL.

Miller v. *Smith* (1917) 2 K.B. 141. Where an agent made a contract on behalf of foreign principals whose names he did not disclose, it was contended in this case that by the custom of merchants the agent assumes a personal liability on the contract. But the Court of Appeal (Eady and Bankes, L.JJ., and Bray, J.)

came to the conclusion, overruling Avory, J., that assuming the custom existed, it was only applicable where the contract rendered the agent alone liable to the exclusion of the foreign principal, and that it was not applicable where by the terms of the contract in question the foreign principal was directly liable to the plaintiffs, because in such a case the custom was inconsistent with the contract.

NEGLIGENCE—DEFECT IN ROOF OF HOUSE—LOOSE CORNICE—LIABILITY OF OWNER AND OCCUPIER OF HOUSE FOR DEFECTS OCCASIONING INJURY TO THIRD PERSON—INJURY TO INVITEE BY FALL OF CORNICE.

Pritchard v. *Peto* (1917) 2 K.B. 173. This was an action to recover damages for injury sustained by the plaintiff through the alleged negligence of the defendant, in the following circumstances: The defendant was the owner and occupier of a dwelling house, and the plaintiff went to the house to collect a debt due to him from the defendant. While he was standing on the doorstep, a piece of the projecting cornice of the house fell on his head and injured him. The house was apparently in good repair, and the defendant did not know of the defect, which was due to the action of the weather upon the cement. Bailhache, J., who tried the action, held that the plaintiff was not entitled to recover in the absence of proof that the defendant knew of the defect, or ought, by the exercise of reasonable care, to have known it.

SHIP—CHARTERPARTY—DEMURRAGE—PERIOD OF DEMURRAGE NOT SPECIFIED—DETENTION OF SHIP BEYOND A REASONABLE TIME.

Inverkip S. S. Co. v. *Bunge* (1917) 2 K.B. 193. The Court of Appeal (Lord Cozens-Hardy, M.R., and Warrington, and Scrutton, L.JJ.) have affirmed the decision of Sankey, J., noted ante page 138.

LANDLORD AND TENANT—POWER TO DETERMINE LEASE—CONDITION PRECEDENT—COVENANT TO REPAIR—NOTICE TO DETERMINE LEASE—BREACH OF COVENANT TO REPAIR.

Burch v. *Farrows Bank* (1917) 1 Ch. 606. This was an action by a landlord against his tenants for a declaration that the lease was still subsisting, and the case turns on whether or not the lease had been effectually determined. By a provision contained in the lease, the lessees were empowered to determine the lease at

the end of the third, seventh, or fourteenth year of the term, on giving six months' previous notice, and paying all rent, and observing all covenants; and that upon such notice the term should cease without prejudice to the remedies of either party in respect of any antecedent breach of covenant. The lease contained the usual covenant by the lessee to repair and deliver up in good and substantial repair. Under the provision in the lease the defendants gave notice six months prior to the end of the seventh year of the term of their intention to terminate the lease. At the time the notice was given the demised premises were out of repair, and the lessees commenced repairs shortly before, and completed them a few days after, the date for the determination of the lease. Neville, J., who tried the action, held that the performance of the covenant to repair was a condition precedent to giving the notice, and that the lessees being in default in respect of their covenant to repair, the notice was invalid, and the lease was still subsisting, notwithstanding the qualifying words "without prejudice, &c."

VENDOR AND PURCHASER—GROUND RENTS—CONTRACT—CONSTRUCTION — MISDESCRIPTION — RESCISSION — "MISSTATEMENT" OR ERROR IN DESCRIPTION OF PREMISES."

Lee v. *Rayson* (1917) 1 Ch. 613. This was an action by a purchaser of land for a rescission of the contract on the ground of material misrepresentation as to the property agreed to be sold. By the agreement in question the vendor agreed to sell 13 freehold houses let on six leases for a term of 99 years at ground rents amounting in the aggregate to £72. One pair of houses were described as rented at one entire rent of £11:10:0. Each of the next four pairs at one rent of £11 and the last three at one rent of £16:10:0. The title shown was for 12 houses rented at £5:10:0. each; and one at £6. The contract contained a provision that if there be "any misstatement or error in the description of the premises" no compensation should be allowed, or the sale annulled. Eve, J., who tried the action, held that the property which the vendor offered to convey was substantially different from that which he had contracted to sell, and that the clause providing as to misstatements did not apply and the purchaser was entitled to a rescission of the contract, and a return of his deposit.

POWER OF APPOINTMENT—SPECIAL POWER TO APPOINT BY WILL—DONEE WITH ITALIAN DOMICILE—EXERCISE OF POWER BY UNATTESTED WILL—CONFLICT OF LAWS—WILLS ACT 1837 (1 VICT. C. 26) SS. 9, 10, 27—(R.S.O. 1914, C. 120, SS. 12, 13, 30).

In *Re Wilkinson, Butler* v. *Wilkinson* (1917) 1 Ch 620. This

was an application by originating summons to determine the question whether or not a power had been validly exercised. The power was conferred by a marriage settlement of personal property, made in 1855, whereby the property was vested in trustees "in trust for such of the children of the marriage" as the wife by will should appoint. Prior to the death of the husband, he and his wife had been residing in Italy for twenty-four years, and the wife continued to reside there until her death in 1914. By her will made in Italy which, though unattested, was valid according to Italian law, and which had been admitted to probate in England, she expressed her desire that four of her children of the marriage who were unmarried would "have equal shares in the money that is left," naming the items of the settled property subject to the power, "and any other property which I can and have a right to dispose of." Sargant, J., who heard the application, came to the conclusion that the will in question was a valid execution of the power notwithstanding ss. 9 and 10 of the Wills Act (see R.S.O. 1914, c. 120 ss. 12 and 13), which require wills made in execution of powers to be executed in conformity with its provisions; the will in question being a legal will according to Italian law, and recognized as such by English law; and he considered that the provisions of s. 27 of the Wills Act (see R.S.O. c. 120 s. 30), in effect made any will recognized by English law (though not executed according to the Wills Act) a sufficient will for exercising a power.

COMPANY—WINDING-UP—TWO INSOLVENT COMPANIES—CROSS CLAIMS—DUTY OF EACH COMPANY TO SATISFY ITS INDEBTEDNESS BEFORE SHARING IN ASSETS OF CREDITOR COMPANY—DISTRIBUTION OF ASSETS WITHOUT REGARD TO CROSS CLAIMS.

In *Re National Life Insurance Co.* (1917) 1 Ch. 628. This was an application in liquidation proceedings in which two insolvent companies were concerned, each company being indebted to the other, the one in respect of arrears of calls, the other in respect of an account for money lent. It was established by evidence that there was no prospect of either company receiving a cash dividend in the liquidation of the other, neither of them being able to satisfy its indebtedness to the other. In these circumstances Astbury, J., made an order authorizing the liquidator of each company to distribute the assets to the other creditors of each company without regard to the claims of the creditor company.

EXCESS PROFITS DUTY—SALE OF BUSINESS—PURCHASE MONEY PAYABLE BY INSTALMENTS—"ONE-THIRD OF THE NETT PROFITS" OF EACH YEAR—DEDUCTION OF EXCESS PROFITS DUTY.

In *Re Condran, Condran* v. *Stark* (1917) 1 Ch. 639. This was a summary application to determine the meaning of a contract for the sale of a business made in April, 1914. By the contract the purchase money was to be paid in annual instalments, such instalments being equal "to one-third part of the nett profits" for the year, and the question was whether or not for the purpose of ascertaining the amount of the annual "nett profits" the excess profit duty should be deducted. Peterson, J., following *Collins* v. *Ledgwick* (1917) 1 Ch. 179, held that the duty should be first deducted.

LIMITED COMPANY—ARTICLE AUTHORIZING BOARD OF DIRECTORS TO FORFEIT SHARES FOR NON-PAYMENT OF DEBT DUE BY HOLDER—LIEN ON SHARES—ULTRA VIRES—ILLEGAL REDUCTION OF CAPITAL—CLOG ON REDEMPTION.

Hopkinson v. *Mortimer Harley & Co.* (1917) 1 Ch. 646. This was an action by the shareholder of a limited company for a declaration that an article of the defendant company authorizing the board of directors to forfeit the shares held by debtors of the company in default of payment of their debts was invalid. Eve, J., who tried the action, held that the article in question was invalid, and *ultra vires* of the company, in that it might, if carried out, lead to an illegal reduction of the capital of the company, and moreover was in effect a clog on the redemption, assuming that the company might properly create a charge on its shares for debts due by the company to the holders thereof. He concedes it to be legal to forfeit shares for non-payment of calls, but he considers there is a difference where forfeiture is imposed for non-payment of other debts due to the company. It must be confessed that there seems to be some need for elucidating what a company can, and cannot do, in the way of forfeiting, or accepting a surrender of its own shares, and whether or not it can properly resell shares once forfeited or surrendered.

COMPANY—DEBENTURES—NO PLACE FIXED FOR PAYMENT—DEATH OF DEBENTURE HOLDER—DELAY IN REGISTRATION OF PROBATE—NO LEGAL TENDER—INTEREST—DUTY OF DEBTOR TO SEEK HIS CREDITOR.

Fowler v. *Midland* (1917) 1 Ch. 656. The Court of Appeal (Lord Cozens-Hardy, M.R., and Bankes, and Warrington, L.JJ.),

have affirmed the decision of Eve, J. (1917) 1 Ch. 527 (noted ante p. 267).

TRADE NAME—SIMILARITY—PROBABILITY OF CONFUSION—INJUNCTION.

Ewing v. *Buttercup Margarine Co.* (1917) 2 Ch. 1. The plaintiff carried on a large provision business, and had 150 shops where he sold butter, margarine, eggs, tea, cream, and condensed milk. This business was carried on under the name of the Buttercup Dairy Company. The business was well known to the buying public, and his business was popularly known as the Buttercup Company or the Buttercup. In 1916 the defendant company was incorporated as the Buttercup Margarine Co. The action was brought for an injunction restraining the defendants from using the name "Buttercup" or any other name colourably resembling the plaintiffs' trade name. Astbury, J., who tried the action, granted the injunction, and his judgment was affirmed by the Court of Appeal (Lord Cozens-Hardy, M.R., and Bankes, and Warrington, L.JJ.)

WILL—ANNUITY—CHARGE ON REALTY—PERPETUAL ANNUITY—GENERAL POWER OF APPOINTMENT OF ANNUITY.

Townsend v. *Acroft* (1917) 2 Ch. 14. In this case a will was in question whereby a testator gave his daughter an annuity of £30 for her life, with a general power of leaving it by her will. The annuity was charged on the testator's realty. The daughter exercised the power of appointment by giving the annuity to her daughter absolutely. The question was whether the daughter took a perpetual annuity or whether it was merely for her own life. Eve, J., held that the annuity was perpetual.

CO-OWNERSHIP—ASSOCIATION TO SECURE PARTICULAR BENEFITS TO MEMBERS—OBJECTS OF ASSOCIATION SATISFIED—SURPLUS FUNDS—RIGHT TO PARTICIPATE—RESULTING TRUST—BONA VACANTIA.

Re Customs Officers' Guarantee Fund, Robson v. *Attorney-General* (1917) 2 Ch. 18. The point discussed in this case is the ownership of certain surplus funds of an association. The association in question was formed of persons engaged as Excise Officers, to provide the necessary guarantee required to be given by them for the due performance of their official duties. The continuance of the association having became no longer necessary, the question

was, who was entitled to the surplus funds of the association which were vested in trustees. They were claimed by the existing, and also by past members of the association, and also by the Crown as being in the nature of *bona vacantia*. Astbury, J., who heard the matter, came to the conclusion that the members of the association existing at the time the purposes of the trust came to an end were alone entitled to participate in the surplus in proportion to the amounts respectively contributed by them, and that neither past members, nor the Crown, had any interest in the fund.

COMPANY—MEETING—PROXIES—APPOINTMENT OF PROXIES TO BE LODGED TWO DAYS BEFORE MEETING—ADJOURNMENT OF MEETING—SUBSEQUENT LODGING OF APPOINTMENTS OF PROXIES.

McLaren v. *Thomson* (1917) 2 Ch. 41. By the articles of association of a limited company it was provided that members might vote by proxy, but that the appointment of a proxy must be deposited at the registered office of the company not less than two clear days before the day for holding the meeting at which the appointee proposed to vote. The question in this case was whether appointments of proxies deposited after the date of a meeting, but before the day to which it was adjourned, were deposited in time to enable the appointees to vote at the adjourned meeting. Astbury, J., on a motion for an injunction, held that the appointments lodged after the meeting were invalid, and were not available at the adjourned meeting, which was in law merely a continuation of the original meeting.

VENDOR AND PURCHASER—PURCHASE OF TWO LOTS—MISREPRESENTATION AS TO ONE OF TWO LOTS PURCHASED—RESCISSION—SPECIFIC PERFORMANCE.

Holliday v. *Lockwood* (1917) 2 Ch. 47. In this case the plaintiff had purchased at auction lots 2 and 3. As to lot 3 the vendor made an innocent misrepresentation, which entitled the plaintiff to a rescission of the contract as to that lot. Astbury, J., also found as a fact that, but for the misrepresentation as to lot 3, the plaintiff would not have bought lot 2. The plaintiff claimed a rescission of the contract as to lot 2, and a refund of the deposit, and the defendant counter-claimed for specific performance of the contract as to lot 2, or damages, as to this lot there was no misrepresentation. In these circumstances Astbury, J., held that the plaintiff was not entitled to rescission as to lot 2, because it

was not shown that it was known to both parties at the time of the sale, nor were circumstances shown from which the Court could properly infer that the two transactions were, to the knowledge of both parties, interdependent. But though he held that the contract as to lot 2 could not be rescinded, yet as he was satisfied that the plaintiff would not have purchased that lot without the other, he refused to grant specific performance. In the result, as it did not appear that the defendant had suffered any damages, both the action and counter-claim were dismissed without costs—the plaintiff losing his £200 deposit on lot 2.

SETTLEMENT—SPECIAL POWER OF APPOINTMENT—WILL—GENERAL BEQUEST OF PROPERTY UPON TRUST FOR OBJECTS OF POWER—GENERAL REFERENCE TO POWERS—CHARGE OF DEBTS—TRUSTEES ENTITLED TO RETAIN TRUST FUNDS—(R. S.O. c. 120, s. 30).

In re Mackenzie, Thornton v. *Huddleston* (1917) 2 Ch. 58. The principal question in this case was whether a power of appointment had been effectively exercised. A married woman, having a power by deed or will to appoint certain settled trust funds in favour of her issue, made a will whereby she did "give devise and bequeath all my property of any description including any property over which I have a power of appointment" unto trustees, upon trust for sale and conversion, and thereout to pay her debts, and to hold the residue upon trust for her daughter for life with remainder to her daughter's children at twenty-one, or marriage. The testatrix had no property of her own. The daughter was her only issue. An application by originating summons was made by the trustees of the settled funds to determine whether the power was well executed and also whether they ought to hand over the fund to the trustees of the will of the married woman. On behalf of the daughter who would be entitled to the fund absolutely in default of appointment it was contended that the will was ineffectual as an exercise of the power, because it was a gift of "my property" and the fund subject to the power was not her property; and secondly because a trust for sale or conversion was created, thirdly because the testatrix provided a narrower range of investments than that contained in the instrument creating the power; and fourthly she directed payment of her debts and funeral expenses. These facts it was claimed indicated that notwithstanding the reference to the power in the will, the testatrix did not intend to execute the special power. Neville, J., who heard the case, held that the power had been well executed, though

made in favour of trustees for the objects of the power, but that the trust for payment of debts out of the fund was ineffectual. He also held that the trustees, in whose hands the appointed fund was, ought to retain the fund subject to the appointment, and ought not to hand it over to the trustees of the will of the married woman.

SOLICITOR—TRUSTEE—CONTRACT FOR SALE OF TRUST PROPERTY —SOLICITOR ACTING FOR VENDOR AND PURCHASER—FIDUCIARY RELATIONSHIP—NON-DISCLOSURE TO CLIENT OF KNOWLEDGE AS TO VALUE—BRIBE GIVEN BY PURCHASER TO VENDOR'S AGENT—WAIVER—RESCISSION.

Moody v. *Cox* (1917) 2 Ch. 71. This was an action to set aside a contract entered into by the plaintiff with the defendants for the purchase of a house in the following circumstances: The defendants Cox and Hatt were trustees of the house in question. Hatt was a solicitor, and Cox was his managing clerk. Throughout the transaction Hatt (through Cox) acted as the plaintiff's solicitor. Cox had certain valuations of the property, previously obtained by Hatt, showing that the property was of much less value than the price the plaintiff was to give; these valuations Cox failed to disclose to the plaintiff. The plaintiff knew that the defendants were trustees, and in the course of the transaction he offered, and Cox accepted, a bribe. The defendants set up this fact, but claimed specific performance of the contract. Younger J., who tried the action, held that Hatt was bound to disclose to the plaintiff all material facts relating to the matter, and that he was not relieved of that obligation by the fact that he owed a conflicting duty to his *cestuis que trust*. But he held that the defendants, by claiming specific performance of the contract, had waived their right to repudiate it on the ground of the bribe, and, therefore, the plaintiff was not deprived of his equitable right to rescission on the ground of non-disclosure by his solicitor of material facts, and with this conclusion the Court of Appeal (Lord Cozens-Hardy, M.R., and Warrington, and Scrutton, L.JJ.) agreed.

DEFENCE OF REALM—ORDER IN COUNCIL AUTHORIZING INTERNMENT OF BRITISH SUBJECT—VALIDITY OF ORDER IN COUNCIL —HABEAS CORPUS—DEFENCE OF THE REALM CONSOLIDATION ACT (5 GEO. 5, C. 8) S. 1 (1)—DEFENCE OF THE REALM REGULATIONS 1914, REG. 14 B.

Rex v. *Halliday* (1914) A.C. 260. By the Consolidated Defence of the Realm Act (5 Geo. 5 c. 8), (see Dom. Stat. 1915, p. 37);

which Act is operative in Canada, as in all other British Dominions, the King in council is empowered to make regulations for securing the public safety. In assumed pursuance of the Act an order in council was passed empowering the Secretary of State to order the internment of any person "of hostile origin or associations" where, on the recommendation of a competent naval or military authority, it appears to him expedient for securing the public safety, or defence of the realm: Reg. 14 B. Under this regulation the Secretary of State ordered the internment of one Arthur Zadig, a naturalized British subject of German birth and parentage. Zadig thereupon applied for a writ of habeas corpus, and on the hearing of the application before a Divisional Court (Lord Reading, C. J., and Lawrence, Rowlatt and Atkin, JJ.), the motion was refused, and on appeal to the Court of Appeal, (Eady, Pickford and Bankes, L.JJ.), the decision was affirmed. From this decision an appeal was had to the House of Lords (Lord Finlay, L. C., and Lords Dunedin, Atkinson, Shaw, and Wrenbury), and the decision has been affirmed, Lord Shaw dissenting. The contention of the appellant was that the regulation was *ultra vires* and not authorized by the statute, and an invasion of the liberty of the subject, but this argument did not prevail, except with Lord Shaw, who delivered what might almost be called a political harangue on what he conceives to be a gross attack upon the freedom of the people, and a revival of the methods of the Star Chamber.

DEFAMATION—LIBEL—PRIVILEGED COMMUNICATION—EXCESS OF PRIVILEGE.

Adam v. *Ward* (1917) A.C. 309. This was an appeal to the House of Lords (Lord Finlay, L. C., and Lords Loreburn, Dunedin, Atkinson, and Shaw), from the judgment of the Court of Appeal (Buckley, Pickford, and Bankes, L.JJ.) The action was for libel in the following circumstances: The plaintiff, who was formerly an officer in a cavalry regiment, and was subsequently elected a member of Parliament, in a speech in the House of Commons charged that the General commanding the brigade, of which the plaintiff's regiment had formed part, had sent confidential reports to Headquarters on officers under his command, containing wilful and deliberate misstatements. The General in question referred the matter to the Army Council, of which the defendant was secretary, and he, by its direction, wrote a letter to the General vindicating him against the charge, and containing defamatory statements about the plaintiff, and also sent a copy

of the letter to the press for publication, and it was widely published in the British Press, both in the United Kingdom, and overseas Dominions. The defendant pleaded privilege, and the House of Lords, affirming the decision of the Court of Appeal, held that the occasion was privileged, and that there was no evidence of malice, and that, having regard to the circumstances in which the charge was made by the plaintiff, the publication of the defendant's letter was not unreasonably wide, and that, in the special circumstances, the alleged defamatory statements complained of were strictly relevant to the vindication of the General, and that the whole letter was protected, though, on the question of relevancy, Lord Loreburn expressed some doubt. It may be noted that the Judge at the trial left it to the jury to say "Was the letter of a public nature?" Was the subject of the letter a matter about which it was proper for the public to know? and that the jury answered these questions in the negative; but their lordships held that these questions were for the Judge to determine, as it is for him to say whether or not the document complained of was privileged.

ONTARIO—MUNICIPAL TAXATION—ASSESSMENT OF RAILWAY BRIDGE—"RAILWAY LANDS"—ASSESSMENT ACT (R.S.O. 1914 c. 105) s. 47 (3).

Cornwall v. Ottawa and New York Ry. (1917) A.C. 399. This was an appeal from the decision of the Supreme Court of Canada, 52 S.C.R. 466, affirming a decision of the Appellate Division S.C.O., 34 O.L.R. 55. The question involved was as to the right of a municipality to tax certain railway companies as owners and lessees of an international railway bridge, in respect of the part of the bridge situate within the limits of the municipality. The bridge in question was one across the St. Lawrence and the soil and bed of the river, and of Cornwall Island, upon which the piers and abutments rested, were vested in the Crown in right of the Province. The Assessment Act (R.S.O. 1914 c. 195) s. 47 (3), exempts from assessment structures and other property upon "railway lands" and used exclusively for railway purposes or incidental thereto, except stations and certain other buildings. The Judicial Committee of the Privy Council, affirming the judgments of the Courts below, held that by the terms of s. 47 (3) the bridge was exempt from taxation, and that the words "railway lands" included any land occupied and used by a railway, and had no reference to the title under which the land was held.

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Fitzpatrick, C.J.
Davies, Idington,
Duff and Anglin, JJ.]

SMITH v. DARLING. [36 D.L.R. 15.

Limitation of actions—Redemption of mortgage—Disabilities.

The disability sections of the Limitations Act (R.S.O. 1914, ch. 75), do not apply to an action to redeem a mortgage.

Faulds v. Harper, 11 Can. S.C.R. 639; 9 A.R. (Ont.) 537, referred to; 32 D.L.R. 307, 36 O.L.R. 587, reversing 9 O.W.N. 385, affirmed.

A. B. Cunningham, for appellant; *J. L. Whiting*, K.C., and *J. A. Jackson*, for respondents.

ANNOTATION ON ABOVE CASE FROM D.L.R.

1. PRIOR TO 1833.

A mortgagor's right to redeem will not be barred by lapse of time so long as he remains in possession, but it may be barred if he is out of possession. Conversely, if a mortgagee has obtained possession, his right to foreclose will not be barred by lapse of time so long as he remains in possession, but if he is out of possession his right to foreclose or to bring an action for possession may be barred by lapse of time.

In England, prior to 1833, there was no statute limiting the time within which a mortgagor out of possession might sue for redemption or within which a mortgagee out of possession might sue for foreclosure. There was, however, a statute limiting the time within which a mortgagee might bring an action for possession of the mortgaged land, for by 21 Jac. I, ch. 16, sec. 1, it was enacted that no entry should be made into any lands, but within 20 years after the right or title to the same should accrue. This statute was held to apply only to claims which were recognized in a Court of law, and to have no application to a purely equitable claim for instance that of a mortgagor to redeem after his estate in the lands had been forfeited by his default in payment of the mortgage money.

The Court of Chancery, however, applied the statute by analogy. "For where the remedy in equity is correspondent to the remedy at law, and the latter is subject to a limit in point of time by the Statute of Limitations, a Court of equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation. This is the meaning of the common phrase, that a Court of equity acts by analogy to the Statute of Limitations, the meaning being, that where the suit in equity corresponds with an action at

law which is included in the words of the statute, a Court of equity adopts the enactment of the statute as its own rule of procedure. But, if any proceeding in equity be included within the words of the statute, there a Court of equity, like a Court of law, acts in obedience to the statute." *Knox* v. *Gye* (1872), L.R. 5 H.L. 656, Lord Westbury at p. 674.

Thus, by analogy to the statute of James, the rule became established in Chancery, as stated by Lord Hardwicke in Anon (1746), 3 Atk. 313, "that after 20 years' possession of the mortgagee, he should not be disturbed, or otherwise it would make property very precarious, and a mortgagee would be no more than a bailiff to the mortgagor, and subject to an account; which would be a great hardship." See also *Bonney* v. *Ridgard* (1784), 1 Cox's Cases in Ch. 145, at p. 149; *Barron* v. *Martin* (1815), 19 Ves. 327. Conversely the Court of Chancery would not entertain a suit for foreclosure after the lapse of the period of 20 years which would operate as a bar to a common law action for recovery of possession of the land.

Similarly, by analogy to the statute, if the mortgagor was prevented from asserting his claim by reason of any of the impediments mentioned in the statute, namely, imprisonment, infancy, coverture, unsoundness of mind, or being beyond the seas (not having absconded), a period of 10 years after the removal of the impediment was allowed to him. A very slight act on the part of the mortgagee, acknowledging the title of the mortgagor, was sufficient to take the case out of the statute. The case was also taken out of the statute by the mortgagor's remaining in possession of part of the mortgaged lands. 2 Wh. & T., L.C. in Eq., 6th ed., pp. 1219, 1220.

2. The Statutes of 1833 and 1874.

The statute of James, so far as it was applied by analogy or otherwise to claims to real property, was superseded in England by the Real Property Limitation Act of 1833 (3 & 4 Wm. IV., ch. 27) and in Upper Canada by a similar statute of 1834 (4 Wm. IV, ch. 1). The general period of limitation stated in these statutes was 20 years, but in 1874 by 37 & 38 Vict. ch. 57 (operative from the 1st of January, 1879) the period under the English statute was reduced to 12 years, and in the same year by 38 Vict. ch. 16 (operative with some exceptions from the 1st of July, 1876) the period in Ontario was reduced to 10 years.

These statutes contain provisions specifically relating to suits for redemption but before those provisions are discussed it will be advantageous to refer to some of the provisions which affect proceedings by a mortgagee for possession or for foreclosure or sale.

3. Action to Recover Land.

The statute of 1833 contained no provision specially applicable to a suit for foreclosure *eo nomine* by a mortgagee out of possession, but they provided in general terms that no person should "make an entry" or "bring an action to recover any land" after the statutory period. This general provision, originally enacted by sec. 2 of the statute of 1833, was superseded by sec. 1 of the statute of 1874 which reduced the limitation period from 20 to 12 years, and the corresponding provision in Ontario is the Limitations Act (R.S.O. 1914, ch. 75), sec. 5, as follows:—

5. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom he claims, or if such right did not accrue to any person through whom he claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same.

Sec. 6 defines in detail the point of time at which in various circumstances the right to make an entry or distress or to bring an action shall be deemed to have first accrued within the meaning of sec. 5. Sec. 7 makes special provision as to the effect upon a future estate of the fact that the person entitled to the particular estate upon which the future estate is expectant is out of possession. Secs. 6 and 7 do not require further comment here.

After some conflict of opinion, it was held that a suit for foreclosure or sale was a proceeding to recover land within the meaning of the statute. *Wrixon* v. *Vize* (1842), 3 Dr. & War. 104; *Harlock* v. *Ashberry* (1882), 19 Ch.D. 539; *Fletcher* v. *Rodden* (1882), 1 O.R. 155; *Heath* v. *Pugh* (1882), 7 App. Cas. 235, 16 R.C. 389; *Trust and Loan Co.* v. *Stevenson* (1892), 20 A.R. (Ont.) 66, at 79-80.

The statute of 1833 also contained a provision (sec. 40) limiting the time within which an action might be brought to recover any sum of money secured by any mortgage or lien or otherwise charged upon or payable out of land or rent. By sec. 8 of the statute of 1874 the limitation period was reduced from 20 to 12 years. The corresponding provision in Ontario is R.S.O. 1914, ch. 75, sec. 24.

As the provision just mentioned was confined to an action to recover money, an additional and explanatory statute—7 Wm. IV., & 1 Vict., ch. 28—was passed in England "for the purpose of preserving in the mortgagee the right to make an entry and bring an ejectment to recover the lands." *Chinnery* v. *Evans* (1864), 11 H.L.C. 115, at 133. This explanatory statute was superseded by sec. 9 of the statute of 1874 (which reduced the limitation period from 20 to 12 years). The corresponding provision in Ontario is R.S.O. 1914, ch. 75, sec. 23, as follows:—

23. Any person entitled to or claiming under a mortgage of land, may make an entry or bring an action to recover such land, at any time within ten years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than ten years have elapsed since the time at which the right to make such entry or bring such action first accrued.

A payment under this section must be a payment by a person liable to pay as mortgagor or his agent, or at least by a person bound or entitled to make a payment of principal or interest for the mortgagor, as was the receiver in the case of *Chinnery* v. *Evans* (1864), 11 H.L.C. 115, A payment of rent made by a tenant of the mortgaged property to the mortgagee pursuant to a notice by the mortgagee requiring the rent to be paid to him is not such a payment. *Harlock* v. *Ashberry* (1882), 19 Ch.D. 539. But a payment made by any person "concerned to answer the debt," or by a person who under the

mortgage contract is entitled to make a tender, and from whom the mortgagee is bound to accept a tender, of money for the redemption of the mortgage, is a sufficient payment. A payment by the principal debtor was held sufficient to create a new starting point as against a surety. *Lewin* v. *Wilson* (1886), 11 App. Cas. 639, at 644, 646. So a payment is sufficient if made by a person who has become bound to the debtor to pay (*e.g.*, a transferee of the equity who is bound as between himself and the transferor to pay), notwithstanding that such transferee has himself transferred the equity to a third person. *Trust and Loan Co.* v. *Stevenson* (1892), 20 A.R. (Ont.) 66.

4. Foreclosure Gives New Starting Point.

In *Heath* v. *Pugh* (1881), 6 Q.B.D. 345, 16 R.C. 376, it was held by the Court of Appeal (Lord Selborne, A.C., Baggallay and Brett, L.JJ.) reversing the judgment of the Common Pleas Division (Lord Coleridge, C. J., and Lindley, J.), that the effect of an order of foreclosure absolute obtained by a legal mortgagee is to vest the ownership of and beneficial title to the mortgaged land for the first time in the mortgagee, so that an action, brought within 20 years next after the order of foreclosure, by the mortgagee to recover possession of the land was not barred by the Statutes of Limitations (3 & 4 Wm. IV. ch. 27 and 1 Vict. ch. 28), although more than 20 years had elapsed since the legal estate in the land had been conveyed to the mortgagee and since the last payment of principal or interest secured by the mortgage. This decision was affirmed by the House of Lords (Earl Cairns, Lord O'Hagan, Lord Blackburn and Lord Watson) *sub nomine Pugh* v. *Heath* (1882), 7 App. Cas. 235, 16 R.C. 389, and in effect is a decision that since the passing of the Judicature Acts an action for foreclosure is an action to recover land (but not an action to recover possession of land: *Wood* v. *Wheaten* (1882), 22 Ch.D. 281.)

From a theoretical point of view the correctness of the decision in *Pugh* v. *Heath* is open to question, because a suit for foreclosure was, prior to the Judicature Acts, not a proceeding *in rem* for the purpose of recovering the land but was merely a suit *in personam* brought by the mortgagee (the legal owner) for the purpose of depriving the mortgagor of the equitable right to redeem. The effect of the Judicature Acts, it is submitted, was merely to confer upon one Court the jurisdiction formerly possessed by different Courts and not to change the character of the rights which might be claimed by suit or action. The Judges of the Common Pleas Division were therefore logical in holding that the suit for foreclosure did not confer upon the mortgagee any title to the land which he did not possess before; that the action for possession was the first proceeding brought by the mortgagee to recover the land, and that as it was not brought within the statutory period, the mortgagee was barred. Practically, however, the result of such a decision was almost grotesque, as it would have deprived the mortgagee of the whole benefit of the foreclosure proceedings which had been brought to a successful conclusion in the year immediately preceding that in which the action for possession was commenced. A similar case will not often arise because the mortgagee now has the right to claim foreclosure and possession in the same action. Formerly he would have had to sue in equity for foreclosure and to bring an action at law for possession although he might have pursued his different remedies concurrently.

5. Disabilities Clause in Case of Action to Recover Land.

In the statute of 1833 the general 20-year period of limitation of entry or action was subject to an extension (in favour of a person who was under disability or some one claiming under him) for a further period of 12 years after such person ceased to be under disability or died, whichever of those two events first happened (sec. 16), provided that the entry must be made or the action brought within 40 years of the time when the right first accrued (sec. 17), and that additional time should not be allowed for the disabilities of successive claimants (sec. 18). These provisions were superseded by secs. 3, 5 and 9 of the statute of 1874 (which reduced the additional period allowed for disability from 10 to 6 years, and reduced the ultimate limitation of 40 years to 30 years), and the corresponding provisions in Ontario are R.S.O. 1914, ch. 75, secs. 40, 41 and 42, as follows:—

> 40. If at the time at which the right of any person to make an entry or distress, or to bring an action to recover any land or rent, first accrues, as herein mentioned, such person is under any of the disabilities hereinafter mentioned (that is to say) infancy, idiocy, lunacy or unsoundness of mind, then such person, or the person claiming through him, notwithstanding that the period of ten years or five years (as the case may be) hereinbefore limited has expired, may make an entry or a distress, or bring an action, to recover such land or rent at any time within five years next after the time at which the person to whom such right first accrued ceased to be under any such disability, or died, whichever of those two events first happened.

The corresponding section of the English Act of 1874 (sec. 3) specifies "coverture" as one of the disabilities provided for. The Ontario statute was changed in this respect by 38 Vict., ch. 16, *Hicks* v. *Williams* (1888), 15 O.R. 228.

A disability arising after the right has accrued will not prevent the time from running. *Murray* v. *Watkins* (1890), 62 L.T. 796.

> 41. No entry, distress or action, shall be made or brought by any person, who, at the time at which his right to make any entry or distress, or to bring an action to recover any land or rent first accrued was under any of the disabilities hereinbefore mentioned or by any person claiming through him, but within twenty years next after the time at which such right first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such twenty years, or although the term of five years from the time at which he ceased to be under any such disability, or died, may not have expired.

If a person is under one disability when his right first accrues and then falls under another disability before the removal of the first, his right may be enforced after the removal of the second, provided it be within the ultimate limitation of 20 years. *Burrows* v. *Ellison* (1871), L.R., 6 Ex. 128.

> 42. Where any person is under any of the disabilities hereinbefore mentioned, at the time at which his right to make an entry or distress,

or to bring an action to recover any land or rent first accrues, and departs this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent beyond the period of ten years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, first accrued or the period of five years next after the time at which such person died, shall be allowed by reason of any disability of any other person.

6. MORTGAGOR OUT OF POSSESSION.

See 28 of the statute of 1833 contained a provision specially applicable to the case of a mortgagor being out of possession. This provision was superseded in England by sec. 7 of the statute of 1874 (reducing the limitation period from 20 to 12 years), and the corresponding provision in Ontario is R.S.O. 1914, ch. 75, sec. 20, as follows:—

20. Where a mortgagee has obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action to redeem the mortgage, but within ten years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, has been given to the mortgagor or to some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee, or the person claiming through him, and in such case no such action shall be brought, but within ten years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.

7. DISABILITIES CLAUSE NOT APPLICABLE TO SUIT FOR REDEMPTION.

It was held by Jessel, M.R., in *Kinsman* v. *Rouse* (1881), 17 Ch.D. 104, that the time within which a mortgagor might sue for redemption was not to be extended by reason of his being under any disability. The disabilities provision (R.S.O. 1914, ch. 75, sec. 40, *supra*) saves the right of any person "to bring an action to recover any land" if such person is under disability, but, as Jessel, M.R., pointed out, an action to redeem is not, properly speaking, "an action to recover land," and the section evidently refers to cases of ordinary ownership, where the rightful owner has been dispossessed. Sec. 20 contains no qualification of the rights of the mortgagee as against the mortgagor and there is no reason for extending the disabilities provision to the case of a mortgagor.

The same result was reached in *Forster* v. *Patterson* (1881), 17 Ch.D. 132, by Bacon, V.C., who laid emphasis on the order in which the sections are arranged. In the English statute the section relating to actions by a mortgagor *follows* the disabilities section, and Bacon, V.C., considered it clear that one is not at liberty to read into the special section relating to mortgagors, a qualification derived from an earlier and more general section. In the English statute (37 & 38 Vict., ch. 57, similar in arrangement to 3 & 4 Wm. IV., ch. 27) the matter is made more plain because the disabilities section

begins: "If at the time at which the right of any person to make an entry or distress, or to bring an action or suit to recover any land or rent, shall have first accrued as aforesaid"—thus referring back to the earlier sections. The Upper Canadian statute, 4 W. IV., ch. 1, is similar in arrangement and wording to the English statute.

In C.S.U.C. 1859, ch. 88, sec. 45, the similar expression "as hereinbefore mentioned" is used, and in R.S.O. (1877), ch. 108, sec. 43 "as aforesaid," but inasmuch as the section relating to actions by mortgagors precedes the disabilities section, the application of the latter section to the former is not excluded by the expressions quoted. In R.S.O. (1887), ch. 111, sec. 43, and R.S.O. (1897), ch. 33, sec. 43, the reference is made quite specific by the expression "as in sections 4, 5 and 6 mentioned," so that the application of the disabilities section to the redemption section is excluded, unless a suit for redemption should be held to be an "action to recover land," contrary to the opinion of Jessel, M.R., in *Kinsman* v. *Rouse, supra.* In 10 Edw. VII., ch. 34, sec. 40, and R.S.O. (1914), ch. 75, sec. 40, the more general expression "as herein mentioned" is substituted for the specific reference to the earlier sections, but it was held in the principal case of *Smith* v. *Darling* that no change in meaning was intended.

In *Faulds* v. *Harper*, a Divisional Court (1883, 2 O.R. 405) held that the disabilities section (R.S.O. 1877, ch. 108. sec. 43) applied to a suit for redemption, the case of *Hall* v. *Caldwell*, (1861), 7 U.C.L.J., O.S. 42, 8 U.C.L.J., O.S. 93, in the Court of Error and Appeal being followed in preference to *Kinsman* v. *Rouse, supra*, and *Forster* v. *Patterson, supra.* This decision was, however, reversed by the Court of Appeal (1884, 9 A.R. (Ont.) 537). See especially the remarks of Patterson, J.A., at pp. 554 ff. with regard to the case of *Hall* v. *Caldwell*, and with regard to the effect of the changes of wording made in the successive revisions of the statutes. On appeal to the Supreme Court of Canada the judgment of the Court of Appeal was in turn reversed (1886, 11 Can. S.C.R. 639), the decision being based chiefly on the ground that the action was virtually to impeach a purchase by a trustee for sale and that therefore the Statute of Limitations had no application. Strong, J., at p. 655, says:—

> "I think it well, however, to add that if I had to choose between the decisions in *Caldwell* v. *Hall*, and those in *Kinsman* v. *Rouse* and *Forster* v. *Patterson*, I should certainly have agreed with the learned Judges of the Divisional Court; for the reason that since the two cases in 17 Chancery Division were decided, the House of Lords has held in *Pugh* v. *Heath*, 7 App. Cas. 235, that a foreclosure suit is an action for the recovery of land. This being so it follows *à fortiori* that a redemption suit is also an action or suit for the recovery of land. And it is impossible, without doing violence to the words of the statute, to hold that the saving of disabilities does not apply to any action or suit, as well in equity as at law, for the recovery of land."

Whether an action for redemption is, or is not, an action to recover land, the dictum of Strong, J., that the disabilities clauses of the statute apply to a suit for redemption has been overruled, and the decision of the Court of Appeal in *Faulds* v. *Harper* has been followed in the principal case of *Smith* v. *Darling.*

8. NATURE OF POSSESSION REQUIRED.

Time will not run against the mortgagor so long as the possession of the mortgagee may be referred to another title and is not adverse. Thus in *Hyde* v. *Dallaway* (1843), 2 Hare 528, a person to whom property was mortgaged by the tenant for life and remainderman, after having been in possession for 6 years without any acknowledgment of the mortgagor's title, purchased the interest of the tenant for life, and then continued in possession for 20 years. It was held that such possession was not adverse during the existence of the life estate so purchased, and that the statute 3 & 4 Wm. IV., ch. 27, sec. 28, was not, therefore, a bar to a suit for redemption by the remainderman or reversioner. See also *Raffety* v. *King* (1836), 1 Keen 601.

In *Faulds* v. *Harper* (1886), 11 Can. S.C.R. 639, an action for foreclosure had been brought and a decree had been made for a sale. The lands were sold pursuant to the decree and were purchased by one Harper, who acted for and in collusion with the mortgagee. Harper then conveyed to the mortgagee, who took possession and thenceforth dealt with the lands as absolute owner. In an action to redeem it was held that as the mortgagee had been in possession not as mortgagee, but as purchaser, the Statute of Limitations did not apply. The action was virtually one to impeach a purchase by a trustee for sale, to which no Statute of Limitations was applicable. See the cases cited by Strong, J., at pp. 647 ff.

Similarly if a mortgagee sells under a power of sale according to the terms of which he is an express trustee of the surplus, the Statutes of Limitation do not apply to an action by the mortgagor to make the mortgagee account for the surplus. *Banner* v. *Beveridge* (1881), 17 Ch.D. 254; *Re Bell, Lake* v. *Bell* (1886), 34 Ch.D. 462; *Biggs* v. *Freehold Loan and Savings Co.* (1899), 26 A.R. (Ont.) 232 (a case under the Short Forms of Mortgages Act), reversed on another point, 1901, 31 Can. S.C.R. 136.

A security for money lent was expressed in the form of a conveyance to the lender on trust to sell. He entered into possession and remained in possession for more than 20 years. His devisees in trust agreed to sell the mortgaged estate for a sum exceeding the amount owing for principal, interest and costs, and conveyed it to the purchaser by a deed in which the trust for sale was recited. It was held that the security was simply a mortgage, that the Statutes of Limitations applied, that the devisees in trust sold as owners in fee and that the mortgagors had no right to the surplus of the purchase money. *Re Alison, Johnson* v. *Mounsey* (1879), 11 Ch.D. 284.

If, however, the mortgagee conveys the lands to a purchaser who goes into possession, the mortgagee may set up the possession of the purchaser in addition to his own possession, if any, as mortgagee, so as to bar the mortgagor's claim. *Bright* v. *McMurray* (1882), 1 O.R. 172.

The possession required by the statute must be the possession of one person, or of several persons claiming one from or under another by conveyance, will or descent. *Doe d. Carter* v. *Barnard* (1849), 13 Q.B. 945, at 952; *Dedford* v. *Boulton* (1878), 25 Gr. 561.

Where the solicitor of a mortgagor paid off the mortgage for his own benefit, but did not take an assignment of the mortgage, it was held that his possession was the possession of his client and that time did not run against the client. *Ward* v. *Carttar* (1865), L.R. 1 Eq. 29.

If actual possession is once obtained by a mortgagee in assertion of his legal right of entry, it need not be maintained continuously for the statutory period. *Kay* v. *Wilson* (1877), 2 A.R. (Ont.) 133. But possession obtained by the mortgagee after the lapse of the statutory period does not cause his title to revive. *Court* v. *Walsh* (1882), 1 O.R. 167.

The words "possession or receipt of the profits" in R.S.O. (1914) ch. 75, sec. 20, *supra*, seem to include the case of a mortgagee receiving rent from a tenant in possession; receipt of such rent by a mortgagee for the statutory period will, it seems, bar the mortgagor's right to redeem. *Ward* v. *Carttar* (1865), L.R. 1 Eq. 29; *Markwick* v. *Hardingham* (1880), 15 Ch.D. 339; 19 Halsbury, Laws of England, p. 149, note (*l*).

9. Possession of Part of Mortgaged Lands.

The rule which prevailed prior to 3 & 4 Wm. IV., ch. 27, that no lapse of time barred the right of the mortgagor to redeem the whole of the mortgaged lands, if he held possession of part (*Rakestraw* v. *Brewer* (1728), Sel. Cas. Ch. 55, 2 P. Wms., 511) was abolished by sec. 28 of the statute. Hence it has been held that where a mortgagee had been in possession of part of the lands for more than 20 years, the right of the mortgagor to redeem that part was barred, although he held possession of the remainder of the lands. *Kinsman* v. *Rouse* (1881), 17 Ch.D. 104.

On the other hand, if a person has only a partial interest in the equity of redemption, *e.g.*, as tenant, he has a right to pay the whole mortgage debt and receive a conveyance of the mortgaged lands, subject to the rights of redemption of other persons interested in the equity. *Martin* v. *Miles* (1884), 5 O.R. 404, at 416. This principle, that the equity of redemption is an entirety which cannot be redeemed piecemeal or proportionately, has been held to apply even where the person redeeming is entitled only to a share in the equity of redemption and the other persons interested have been barred by the Statute of Limitations. *Faulds* v. *Harper* (1883), 2 O.R. 405, at 411, 11 Can. S.C.R., at pp. 645, 656.

10. When Time Begins to Run.

R.S.O. (1914), ch. 75, sec. 20, *supra*, provides that where a mortgagee has obtained possession, the mortgagor shall not bring any action for redemption "but within 10 years next after the time at which the mortgagee obtained such possession." The opinion has been expressed that the general rule that time begins to run from the taking of possession is subject to an exception if the mortgagee takes possession before the mortgage is due. Fisher on Mortgages, 6th ed., sec. 1404, citing *Brown* v. *Cole* (1845), 14 Sim. 427, 18 R.C. 116, says: "Time will not run in the case of a common mortgage until the day of redemption has arrived; for the mortgagor cannot redeem before that day." See also *Wilson* v. *Walton* and *Kirkdale Permanent Building Society* (1903), 19 Times L.R. 408. The proposition just quoted must, however, be accepted with caution. The decision in *Brown* v. *Cole*, was to the effect that a mortgagor is not entitled to redeem before the expiration of the time limited for payment of the mortgage debt. The deduction that the statute will commence to run only from the same date appears to be based upon the assumption that the

statutory bar can commence to run only from the time when the right first arose, whereas the statute provides for the commencement from the time when the mortgagee obtained possession. *Re Metropolis and Counties Permanent Investment Building Society, Gatfield's* case, [1911] 1 Ch. 698, at 706-7.

11. ACKNOWLEDGMENT OF TITLE.

It has already been pointed out that before the passing of 3 & 4 Wm. IV., ch. 27, a slight act or admission, even oral, on the part of the mortgagee, constituted a sufficient acknowledgment of the mortgagor's title so as to preserve his right to redeem. That statute, however, required that the acknowledgment should be in writing signed by the mortgagee or the person claiming through him. See now R.S.O. (1914), ch. 75, sec. 20, *supra*.

The statute requires that the acknowledgment should be made *to* the mortgagor or to some person claiming his estate, or to the agent of such mortgagor or person. *Re Metropolis, etc., Society, Gatfield's Case*, [1911] 1 Ch. 698 at 705.

If a mortgagor is a party to an assignment of the mortgage, this may be a sufficient acknowledgment of his title by the mortgagee. *Batchelor* v. *Middleton*, (1848), 6 Hare 75. But a mere recital of the mortgage and an assignment of it, subject to the equity of redemption, by a deed to which the mortgagor or a person claiming his estate is not a party is not sufficient. The assignee is a person claiming, not the mortgagor's estate, but the mortgagee's estate. *Lucas* v. *Dennison* (1843), 13 Sim. 584. See also *Markwick* v. *Hardingham* (1880), 15 Ch.D. 339.

If a mortgagee has entered into possession, accounts of his receipt of rents are not sufficient acknowledgment, unless they are signed by him and kept for or communicated to the mortgagor or his agent. In *Baker* v. *Welton* (1845), 14 Sim. 426, this question was raised but not decided; see Sugden, Statutes Relating to Real Property, 2nd ed., 117; *Re Alison, Johnson* v. *Mounsey* (1879), 11 Ch.D. 284. 19 Halsbury, Laws of England, 151. A letter written by the mortgagee to the mortgagor intimating that the former is willing to give an account is a sufficient acknowledgment. *Richardson* v. *Younge* (1870), L.R. 10, Eq. 275, L.R. 6 Ch. 478. But a mere admission by the mortgagee that he holds under a mortgage title is not sufficient. *Thompson* v. *Bowyer* (1863), 9 Jur. N.S. 863.

In order that the person to whom an acknowledgment is made should be the agent of the mortgagor, it is sufficient if he has acted or has been treated as such by the person making the acknowledgment. *Trulock* v. *Robey* (1841), 12 Sim. 402. Halsbury, *op. cit.*, 151. *Cf. Re Metropolis, etc., Society, Gatfield's Case*, [1911] 1 Ch. 696, at 705.

On the other hand, an acknowledgment by the agent of the mortgagee is not sufficient. *Richardson* v. *Younge* (1871), L.R. 6 Ch. at 480. But the mortgagee's acknowledgment will bind his lessee. *Ball* v. *Lord Rivesdale* (1816), Beatty 550.

It has been said that an acknowledgment given by the mortgagee after the expiration of the statutory period is sufficient. *Stansfield* v. *Hobson*, 1852, 3 De G. M. & G. 620, affirming 16 Beav. 236. The correctness of this construction of the statute has, however, been questioned. *Markwick* v.

Hardingham (1880), 15 Ch.D. 339; *Sanders* v. *Sanders* (1881), 19 Ch.D. 373, at 379; *Shaw* v. *Coulter* (1905), 11 O.L.R. 630. The words "in the meantime" in the statute (R.S.O. 1914, ch. 75, sec. 20) would seem to exclude an acknowledgment given after the period has expired. Under sec. 14 (relating to the right to make an entry or distress, or bring an action to recover land or rent), it has been held that an acknowledgment given after the expiration of the statutory period is too late. *McDonald* v. *McIntosh* (1857), 8 U.C.R. 388; *Doe d. Perry* v. *Henderson* (1846), 3 U.C.R. 486.

12. Acknowledgment to or by One of Several Persons.

The statute 3 & 4 Wm. IV., ch. 27, sec. 28, contained provisions as to acknowledgments by one of several mortgagees or to one of several mortgagors. The corresponding provisions in Ontario are R.S.O. (1914), ch. 75, secs. 21 and 22, as follows:—

> 21. Where there are more mortgagors than one, or more persons than one claiming through the mortgagor or mortgagors, such acknowledgment if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons.
>
> 22. Where there are more mortgagees than one, or more persons than one claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the person or persons so signing, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him, or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons as have given such acknowledgment are entitled to a divided part of the land or rent comprised in the mortgage or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which bears the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent bears to the value of the whole of the land or rent comprised in the mortgage.

The provision of sec. 22 that the acknowledgment of one of several mortgagees "shall be effectual only against the party signing the acknowledgment" is directed to the case of several mortgagees where an account taken against one will bind his interest, but not the interest of any other person. The statute has no application to the case of a mortgage to several persons jointly as trustees. In the latter case there must be an acknowledgment by all. *Richardson* v. *Younge* (1871), L.R. 6 Ch. 478.

13. Against Whom Time Runs.

It has been held that the time will run against a person entitled to the equity of redemption in remainder, although the mortgagee enters into posses-

sion and the statutory period elapses in the lifetime of the tenant for life. *Harrison* v. *Hollins* (1812), 1 S. & St. 471.

A prior mortgagee in possession acquires a title against both the mortgagor and subsequent mortgagees who are out of possession. *Samuel Johnson & Sons* v. *Brock*, [1907] 2 Ch. 533, *cf. Wakefield and Barnsley Union Bank* v. *Yates*, [1916] 1 Ch. 452.

JOHN DELATRE FALCONBRIDGE.

Book Reviews.

Rescission of Contracts: A treatise of principles governing the rescission, discharge, avoidance and dissolution of contracts. By CHARLES BRUCE MORRISON, K.C., New Zealand. Stevens & Haynes, Bell Yard, Temple Bar. 1916.

As the author says in his preface this book is an endeavour to escape the embarrassment which every practising lawyer has experienced in trying to spell out of the decided cases a definite and satisfactory set of principles to guide one in advising on breaches of contract. This laudable effort the author has carried out with much success. Some articles on this subject appeared a few years ago in *The Law Quarterly Review*.

The matters discussed may be classified under the following heads:—Rescission by act of both parties—Discharge by breach—Rescission by new agreement—Resolutive condition—Repudiation—Discharge of entire contracts and of partly executed contracts—Avoidance for misrepresentation—Mistake—Dissolution by operation of law—Restitution—Damages. The author, as a matter of convenience which will be appreciated by those who seek information from this excellent treatise, gives in an appendix the judgment in some leading cases in *ipsissima verba*.

It may be that in the present turmoil caused by the reckless lawlessness of the outlaws of Europe who claim that "might is right" there may not be much demand for this volume; but, when right prevails again and contracts again become sacred, it will, we doubt not, find a ready sale.

The Grotius Society: Problems of the War. Vol. 2. Sweet & Maxwell, Ltd., 3 Chancery Lane, London. 1917.

This volume contains the papers read before the Society (now two years old), last year. It seems scarcely worth while in these days to discuss what nations ought to do or how international law, almost a dead letter, should be enforced. One of the papers

attempts to give a definition of treason in war time. A certain Ex-Minister of Justice of this Dominion might appropriately meditate on the author's comments.

New York State Bar Association: Proceedings at the 40th annual meeting, January, 1917.

The profession is much indebted to this excellent Association for the attention given to matters professional by the leading men of that State. Those who have time to peruse its pages will find much of interest even in this country.

Political Appointments: Parliaments and the Judicial Bench in the Dominion of Canada. 1896 to 1917. By N. OMER COTE, I.S.O. (of the Department of the Interior) Ottawa, 1917.

The above volume is a continuation, up to the 30th June, 1917, of the first volume published in 1896, which covered the period from the 1st July, to the 31st December, 1895; the two volumes forming a complete record for the first half century of the Canadian Confederation: 1867 to 1917.

We have nothing but praise for this excellent publication. It is most carefully compiled and scientifically arranged. No library is complete without it. The author is a son of the late C. J. Cote, who in 1866 published a similar work covering the Union period of the Province of Canada from 1841 to 1866.

War Notes.

LAWYERS AT THE FRONT.

KILLED IN ACTION.

A. E. A. Evans (Marlatt, Warner & Evans, Winnipeg), Captain, killed in action, June 16.

R. W. Davis (Davis & Ebbels, Saskatoon, Saskatchewan), Major, died of wounds, July 10.

DATES TO BE NOTED.

We record for future reference the following important dates and incidents of special interest to Canadians in connection with the present war:—

APRIL 2.

The President of the United States, Woodrow Wilson, read his message to Congress advising that: "Congress declare the

recent course of the Imperial German Government to be in fact nothing less than war against the Government and people of the United States; that it formally accept the status of the belligerent which has thus been thrust upon it, and that it take immediate steps not only to put the country in a more thorough state of defence, but also to assert all its power and employ all its resources to bring the Government of the German Empire to terms and end the war."

The President's message was a crushing and stinging indictment of German atrocities. As the climax of these acts he referred to the submarine attacks on neutral vessels. The conclusion of his message will go down in history as a pronouncement rivaling those of his great predecessor in the Presidential chair—Abraham Lincoln, the greatest American. It was as follows:

"We shall fight for the things which we have always carried nearest our hearts—for democracy—for the right of those who submit to authority to have a voice in their own government; for the rights and liberties of small nations; for a universal dominion of right by such a concert of free peoples as shall bring peace and safety to all nations and make the world itself at last free. To such a task we can dedicate our lives and our fortunes, everything that we are and everything that we have, with the pride of those who know that the day has come when America is privileged to spend her blood and her might for the principles that gave her birth and happiness and peace which she has treasured. God helping her, she can do no other."

AUGUST 29.

On this day an Act respecting Military Service, being chapter 19 of 7-8 George V., was assented to, superseding for the time being the Canada Militia Act of 1904.

OCTOBER 12.

A Royal proclamation was this day promulgated calling out for active service men comprised in class 1 as described in the Military Service Act, 1917, *i.e.*: All male subjects of his Majesty resident in Canada since August 4, 1914, who have attained the age of 20 years, born not earlier than 1883, and who were on July 16, 1917, unmarried or widowers without children. The men included in this class are, with certain exceptions, deemed to be enlisted and subject to military law and placed on active service for the defence of Canada either within or without its limits.

OCTOBER 13.

The efforts of the Premier of Canada, Sir Robert Borden, to form a Union Government for the better prosecution of the war arrived on this day at a successful issue; the Government so formed being composed of an equal number of members of the two great political parties, with Sir Robert Borden as Premier. The first meeting of the new Cabinet was held the same day. The distribution of offices, as subsequently arranged, is as follows:

Premier, Secretary of State for External Affairs and President of War Committee and of Reconstruction and Development Committee—Hon. Sir Robert Borden, P.C., K.C.
President of the Council and Vice-President of War Committee—Hon. N. W. Rowell, K.C.
Secretary of State—Hon. Martin Burrell.
Minister of Justice—Hon. C. J. Doherty, K.C.
Solicitor-General—Hon. Hugh Guthrie, K.C.
Finance Minister—Sir Thomas White.
Postmaster-General—Hon. P. E. Blondin.
Leader in the Senate and Chairman Military Hospitals Commission—Sir James Lougheed, K.C.
Minister of Trade and Commerce—Sir George Foster.
Minister of Militia and Defence—Hon. S. C. Mewburn, K.C.
Minister of Militia and Defence, Overseas—Hon. Sir Edward Kemp.
Minister of Public Works—Hon. F. B. Carvell, K.C.
Minister of Railways and Canals—Hon. John D. Reid.
Minister of Customs—Hon. Arthur Sifton, K.C.
Minister of Interior—Hon. Arthur Meighen, K.C.
Minister of Marine and Fisheries and Naval Services—Hon. C. C. Ballantyne.
Minister of Inland Revenue—Hon. Albert Sevigny, K.C.
Minister of Immigration and Colonization—Hon. J. A. Calder.
Minister of Agriculture—Hon. T. A. Crerar.
Minister of Labour—Hon. Thomas W. Crothers, K.C.
Ministers without portfolio—Hon. Frank Cochrane; Hon. A. K. McLean, K.C. (*Vice-President of Reconstruction and Development Committee*) and Hon. Gideon Robertson.

A TIMELY SUGGESTION.

We have been asked to publish the following Proclamation issued by one of the greatest and best men of modern times, Abraham Lincoln, President of the United States of America, at the end of the second year of the bitter struggle between the Northern and the Southern States. It is unnecessary to enlarge upon the appropriateness of such a suggestion at a time when all the civilized nations of the earth are at war—a war which has

already lasted more than three years, and the end not yet in sight. This Proclamation was as follows:—

"Whereas, the Senate of the United States, devoutly recognising the supreme authority and just government of Almighty God in all the affairs of men and of nations, has by a resolution requested the President to designate and set apart a day for national prayer and humiliation; and

Whereas, it is the duty of nations as well as of men to own their dependence upon the overruling power of God, to confess their sins and transgressions in humble sorrow, yet with assured hope that genuine repentance will lead to mercy and pardon, and to recognize the sublime truth, announced in the Holy Scriptures and proven by all history, that those nations only are blessed whose God is the Lord;

And, insomuch as we know that by His divine law nations, like individuals, are subjected to punishments and chastisements in this world, may we not justly fear that the awful calamity of civil war which now desolates the land may be but a punishment inflicted upon us for our presumptuous sins, to the needful end of our national reformation as a whole people? We have been the recipients of the choicest bounties of Heaven; we have been preserved these many years in peace and prosperity; we have grown in numbers, wealth, and power as no other nation has ever grown. But we have forgotten God. We have forgotten the gracious hand which preserved us in peace and multiplied and enriched and strengthened us, and we have vainly imagined, in the deceitfulness of our hearts, that all these blessings were produced by some superior wisdom and virtue of our own. Intoxicated with unbroken success, we have become too self-sufficient to feel the necessity of redeeming and preserving grace, too proud to pray to the God that made us.

It behooves us, then, to humble ourselves before the offended Power, to confess our national sins, and to pray for clemency and forgiveness.

Now, therefore, in compliance with the request, and fully concurring in the views of the Senate, I do by this my proclamation designate and set apart Thursday, the 30th day of April, 1863, as a day of national humiliation, fasting, and prayer. And I do hereby request all the people to abstain on that day from their ordinary secular pursuits, and to unite at their several places of public worship and their respective homes in keeping the day holy to the Lord and devoted to the humble discharge of the religious duties proper to that solemn occasion.

All this being done in sincerity and truth, let us then rest

humbly in the hope authorized by the Divine teachings that the united cry of the nation will be heard on high and answered with blessings no less than the pardon of our national sins and the restoration of our now divided and suffering country to its former happy condition of unity and peace.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington, this 30th day of March, A.D 1863.

ABRAHAM LINCOLN."

Bench and Bar

JUDICIAL APPOINTMENTS.

Daniel McNeil, of the Town of Inverness, in the Province of Nova Scotia, K.C.; to be Judge of the County Court, District Number Six, comprising the Counties of Inverness, Antigonish and Guysborough, in the said Province, vice His Honour Judge McGillivray, deceased (Sept. 17).

James McNairn Hall, of the Town of Haileybury, in the Province of Ontario, Barrister-at-Law; to be a Junior Judge of the District Court of the Provisional Judicial District of Algoma, in the said Province of Ontario (Oct. 4).

Evan Hamilton McLean, of the Town of Bowmanville, in the Province of Ontario, Esquire, Barrister-at-law, to be Junior Judge of the County Court of the County of Renfrew, in the said Province. (Oct. 13.)

E. J. Hearn, of the City of Toronto, K.C., to be Junior Judge of the County Court of the County of Waterloo.

E. N. Lewis, Barrister-at-law, to be junior Judge of the County Court of the County of Huron.

APPOINTMENTS TO OFFICE.

Gilbert White Ganong, of St. Stephen, in the Province of New Brunswick, to be Lieutenant-Governor in and over the Province of New Brunswick aforesaid, vice Hon. Josiah Wood.

Hugh Guthrie, of the City of Guelph, in the Province of Ontario, K.C., to be Solicitor-General of Canada.