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PEACE!

The war of 1914 virtually came to an end on November 11th, 1918, when the armistice was signed by the Allies.

The Treaty of Peace, which followed in due course, was signed by representatives of the Allies and of Germany on June 28, 1919. We join with those who, in this month of July, at the King's request, voice their thanksgivings to Almighty God for victory vouchsafed and for making this awful war to cease.

It is a misnomer to speak of the elaborate document, signed in the Salon de Glaces at Versailles, as a *treaty*. It was simply, and nothing more than the expression of the views of the conquerors, as to what was best to be done, under the circumstances, to put an end, for a time at least, to the awful carnage, devastation and horrors of the most terrible war that has ever cursed humanity—so to manacle a murderous ruffian, drunk with insatiable ambition, lust of power and devilish ferocity that, for a time at least, the world might have a measure of peace—to force the wrongdoers to make some monetary amends for the awful havoc they wrought, and finally to bring to the bar of justice some of those who used war as an excuse for actual crimes, blacker, baser and more ferocious and fiendish than ever were charged in any court of justice since the world was.

This is all as it should be, but it is only a makeshift. It will do nothing for humanity in the future, and sadly little for the world in the present.

The hatred of France for Germany in 1871 (and good cause for it) is exceeded a hundredfold by Germany's hatred for France and her friends in 1919. To this is added a deep and abiding spirit of revenge, and hope for vengeance, by Germany in the years to come.

Some writers have thought that if more lenient terms had been given Germany there would have been good hope of cordial relations in the future. These writers, in our opinion, know nothing of national human nature, certainly nothing of *German* human nature. If Germany were given back all her previous territory, and released from the payment of any indemnity, the only result would be to add contempt to her hatred.

It was hoped by some that the result of the war would be to bring in a reign of true democracy and do away with militarism. The joke of this is, that the Treaty of Peace can only be carried out by force of arms! Germany signs under protest, and with the avowed intention of making this so-called Treaty another "scrap of paper" when her chance comes.

The spirit of Bolshevism, now rampant in Russia and other parts of Europe, and incipient here and elsewhere, is a poison latent in human nature all the world over. There is no cure for it, and when conditions foster its development the plague breaks out and does its deadly work. When that time fully comes (it has not come yet) there may be an alliance between Bolshevism and German militarism (in essence the same) which will make the people of that day wish they had lived in the more peaceful days of 1914-1919. There are those who look for such worse times because they say they find it in the "sure word of prophecy."

They may be right or may be wrong, but it is not in our province to argue the point. Every lawyer, however, has to do with history and precedents, and to those of them who read history honestly and carefully, and take time to judge of the future from the past, we assert, without fear of contradiction, that history (which gives the story of the past, from the day when Cain murdered Abel, until a heartless German sailor drowned the women and children on the "Lusitania" and a brutal German soldier murdered Edith Cavell) proves conclusively that there can be no peace for this sin-cursed Earth until someone comes with superhuman power as the Prince of Peace.

We are told that such a One is coming, and that "He shall reign in righteousness" and "shall rule the nations with a rod of iron." We trust that this may be so, for a torn and weary world longs for millenial rest and peace.

WILD BEAST HUNTING IN CANADA.

The strange ignorance or apathy or fear of taking action (whichever it may be) which has possessed the authorities in relation to the spread of Bolshevism in Canada, has been the surprise of thinking people for a long time past. In ancient days when judgments were falling upon Egypt for her treatment of an oppressed people, the thinking men of that day came to Pharaoh, and said, "Know you not that Egypt is destroyed." He had been living in a fool's paradise. There are those who have warned those responsible for the administration of justice that agents of the "wild beast" which destroyed Russia, and still menace the world's civilization, is with devilish energy and cunning, seeking the destruction of this once peaceful and contented country, which we fondly hoped was safe in its isolation and its distance from the centre of the whirlwind. It almost looks as though worse things are coming, if there is delay in checking the plague that is upon us.

We are all glad that some action has at last been taken in Winnipeg, in the right direction, and we trust it may not stop there. It is no time to be mealy-mouthed or apologetic when firebrands are being thrown into the inflammable material that abounds in these days of unrest. Those who throw them must be put where they can do no further harm.

It may be that some innocent persons may temporarily suffer with the guilty; but that cannot be helped, and must be endured for the general benefit. It is not desirable under present circumstances to quote as appropriate the merciful saying of our criminal law that it is better that ten suspected criminals should go free, rather than that one innocent man should suffer. This suffering in connection with the matter in hand would soon be remedied and could be compensated. Socialists and union men are in bad company just at present, and it is up to them to realize this and "stand from under." We do not believe, however, that the honest men of the classes referred to, or the working men who do not belong to either class, are in sympathy with Bolshevism, as we now use that word, and they do in fact

repudiate its monstrous doctrines. In truth capital and labour should join forces to hunt and destroy the "wild beast." The aim of the Bolshevist is the same as was the aim of Germany; the control of the world for their own aggrandizement, and must be put down with the same firm hand. Its potency lies in the fact that human nature is the same in every country and in every century. The natural heart of man is, we are told, "only evil continually" and "deceitful above everything and desperately wicked"; and when the restraints of civilization and religion are removed, and the stern administration of justice wanes, it shews itself as the merciless, masterful monster it really is.

It is unnecessary to go into details. The daily papers tell us enough without making enquiries from government detectives, or secret service men. Probably if the public knew all they do, the present surprise at the hitherto inaction of the Government would increase.

Emphasizing what we have said on this subject, there comes to us from the Department of Public Inspection at Ottawa the report of the British Government on "Bolshevism in Russia." It is a piteous and revolting tale. The atrocities there spoken of, and the equally horrible villainies of the German wild beasts would, if there were no other side to the picture, make a man ashamed of his species. The following is the Department's introduction to the report:—

"The collection of reports printed in the accompanying pamphlet tell the story of the great Russian tragedy from the commencement of Bolshevist rule to April of the present year. It furnishes convincing evidence of the murders and massacres that have gone hand in hand with the regime of Lenine and Trotsky. It records these crimes with full particulars of time, place and names of victims. The report also records the state of utter demoralization which prevails throughout Russia, affecting her industries, her railways, her agricultural activities and every other sphere of human enterprise. Canadian readers will find in this dark picture of Soviet Russia a means of appraising for themselves the claims and professions of Bolshevism."

THE LAW OF MORTGAGES OF REAL ESTATE BY JOHN DELATRE FALCONBRIDGE, M.A., L.L.B.

Mr. Falconbridge needs no introduction to the profession as a writer on legal topics, as his work on the Canadian Law of Banks and Banking, published in 1913, has become the recognized Canadian text book on that subject, and on the Law of Bills of Exchange.

The present treatise, however, marks a considerable advance upon his earlier work. Though based on "Bell and Dunn," published in 1899, it has been not only modernized but greatly enlarged, and completely rearranged. Not being in the form of notes upon the statutes, as in his earlier effort, the writer has had greater scope for shewing his mastery of the subject by laying out in advance the plan to be followed throughout the work, and not the least valuable feature of the book is the complete and well arranged "Table of Contents."

The student seeking an analysis of the Law of Mortgages, cannot do better than spend some time on this table; and the practitioner who wants a general account of some point under consideration will turn it up more readily if he will familiarize himself with the logical and careful method first thought out and then invariably adhered to by the writer.

The table of cases is also extensive, and an actual count of a number of pages shews that nearly one-half the decisions referred to are either Canadian or Privy Council judgments in Canadian cases. While Ontario cases are in the majority, there is a sufficiently copious selection from decisions of other Provinces.

Turning to the subject matter, we find that the practical and modern predominate, although there are occasional references to the history of the law and some older forms of mortgage in England, and also an interesting chapter devoted to Law and Equity in Upper Canada, in which that somewhat obscure topic in its relation to the Law of Mortgages is treated The work is

intended to be, as it is, practical, but one is tempted to regret the absence of a fuller historical treatment of the topic, especially when we recall that Mr. Falconbridge is well equipped for work of that kind. This does not mean, however, that some of the older features of the law are neglected, because where they have a modern bearing they appear to be sufficiently treated. Instances of this are seen in the chapters dealing with the abstruse and now happily rare problems of Consolidation and Tacking, while the principles of the Law of Merger, which involve the consideration of older doctrines, receive a chapter to themselves.

One of the interesting features of the book is Part II., where, under the heading "Priorities," the general principles of equity governing the subject are first taken up, and then priorities created by the Registry Office and Land Titles Act are discussed, and finally the priorities given or formerly given by virtue of the doctrine of Consolidation and Tacking already referred to, are set forth.

Mr. Falconbridge also treats of Subrogation as affecting priorities particularly under the Registry Act, and cites and relies upon the cases of *Brown* v. *McLean*, 18 O.R. 533, and *Abell* v. *Morrison*, 19 O.R. 669. These cases were, at the time they were decided, subjected to a good deal of criticism, and the then Editor of the *Canadian Law Times*, Mr. Edward Douglas Armour, K.C., advanced cogent arguments against their correctness, insofar as they relied upon the doctrine of subrogation. (See 11 C.L.T. 23.)

The other argument mentioned by Mr. Justice Street in *Brown* v. *McLean*, is referred to by Mr. Falconbridge in his foot note on page 129, and the more recent decision of *Noble* v. *Noble*, 25 O.L.R. 329, 27 O.L.R. 342, lends colour to the view that while *Brown* v. *McLean* may be correct in the result, it depends for its validity not upon subrogation but upon the peculiar statutory effect of a discharge of mortgage when registered. Mr. Falconbridge, however, very wisely makes it a rule to cite the cases without too frequently throwing doubt upon their validity.

While the general practitioner will value Mr. Falconbridge's work for its usefulness, one feels that he is entitled to credit in another respect. His book is good literature; and though one does not insist upon excellence of style in a legal work, there is no reason why it should not exist and the standard in our own Province has heretofore been anything but high.

We have not yet developed a Blackstone, Pollock, Anson, Story or Kent, but Mr. Falconbridge, like the late Professor Lefroy, knows and appreciates good English and, like Mr. John S. Ewart, he knows the value of careful study and thought before the actual spade work begins, and the result is that we have in this book a standard set for legal writing, which is all too rare in Canada, but which, let us hope, will become more frequent now that Mr. Falconbridge, like Professor Lefroy and Mr. Ewart, has shewn us that such things can be done here.

SHIRLEY DENISON.

FEES TO WITNESSES AND JURORS.

The increased cost of living touches the administration of justice as it does every other branch of business. At present we refer to two matters which constantly arise in the trial of cases, (1) fees to witnesses, and (2) payment of jurymen. As to the first of these, it was in the good old days considered to be a matter of duty to the public, as well as a matter of friendship for friends or neighbours, for men to give testimony in Court without fee or reward. In the course of time it became the practice to pay a small sum by way of remuneration for their loss of time. The sum is now regulated by a tariff of costs. In Ontario, a witness residing within three miles of the Court House is entitled to one dollar per diem.

As compensation for loss of time this sum is now absurdly inadequate, and if witnesses are to be paid at all, they should be paid something more in accordance with the value of their time. It would not be convenient, or perhaps advisable, to attempt to ascertain what the time of each witness is worth, but

some change in the tariff would seem to be advisable if the practice of paying witnesses at all is to be continued. Cases constantly arise where the present tariff causes trouble.

In a recent case a motorman of a street railway was the only witness, outside the litigants, to an accident as to which a suit arose. He refused to attend Court, although subpoenæd, saying it was a matter in which he had no interest and he would lose a day's pay and only receive one dollar. Cases of a similar character frequently arise.

As to payment to jurymen, history tells us that the jury system began by those who had personal knowledge of the event in question being called together to talk the matter over, and decide the dispute according to their idea of what justice demanded. By degrees outsiders were called in to hear the witnesses and give their opinion, and the present jury system became the law of the land. In those days it was considered an honour to be selected as a juror; time, moreover, was not as valuable as it is now. In these days there is a very practical difficulty confronting some of those who might, under other circumstances, be willing to do patriotic service in a jury room. One difficulty is that, notwithstanding laudable efforts on the part of judges to arrange a convenient time for holding courts, farmers are frequently called away from their farms at seeding time and other times when their presence at home is almost a necessity.

As long as the jury system remains, these and other difficulties arise. It may be that nothing can be done in the way of a remedy, but both these subjects are worthy of consideration.

CONSTITUTIONAL GOVERNMENT.

A writer in *Law Notes* (U.S.A.) refers to a matter which has been a subject of much comment in the United States in connection with the multitude of foreigners who have made that country their home. In the course of his remarks he says: "Our Government was not perfect at its foundation; it has developed

and must continue to develop. But, in its structure and essence it is the best the world has ever seen." We who belong to the British Empire demur to the statement that it is the best constitution the world has ever seen. That, however, should not be laid to the charge of those who formulated it; they did the best they could at the time. The British constitution is the result of development for a period of a thousand years or so, and ought to be, as it is, the best. One difficulty our neighbours to the South of us had to contend with was the tremendous importation of foreigners, owing to their desire to increase the population. It is an evil which we have copied in this country of later years, as we know now to our sorrow. The writer adds these words: "Many methods have been suggested by which we may proceed to make this more of a nation and less of a polyglot boarding house."

The "Americanization" of these too numerous foreigners is the remedy suggested. The description above given of a nation's difficulty shews that the writer is fully alive to the situation, and the desirability of Americanizing, or preferably Anglo-Saxonizing, these polyglot boarders.

WAR CRIMINALS.

The draft Treaty of Peace had a section stating the terms agreed upon by the Allies as to the trial and punishment of war criminals. These terms as then set forth were as follows:—

"The Allies publicly arraign the ex-Emperor William II. for a supreme offence against international morality and the sanctity of treaties.

"The ex-Emperor's surrender is to be asked for from the Dutch Government, and a special tribunal is to be set up, consisting of one judge from each of the five Great Powers. The tribunal is to be guided by the highest principles of international policy, and is to have the duty of fixing whatever punishment it thinks should be imposed.

"Military tribunals are to be set up by the Allies to try persons accused of acts of violation of the laws and customs of war, and the German Government is to hand over all persons so accused.

"Similar tribunals are to be set up by any particular Allied Power against whose nationals criminal acts have been committed.

"The accused are to be entitled to name their own counsel, and the German Government is to undertake to furnish all documents and information the production of which may be necessary."

We trust that in the many changes that have since been made nothing has been arranged to lessen the force of these conditions. Brutal murder should not go unpunished whether committed in war time or when peace reigns. We may here quote from *Law Notes* (U. S.) some satirical observations which are appropriate in this connection:—

"Prisoner at the bar," said the judge, "you are by your own admission guilty of unnumbered crimes. You have murdered, ravished and burned. You have spared neither age nor childhood. Before this court women have sobbed out the tale of the dishonour they have endured at your hands; little children have exhibited the mutilations you have inflicted on them. This once fair countryside has been made desolate by you. But I understand you are now going to lead a better life." The prisoner looked down at his manacled hands and sidewise at the burly guards around him and forced his evil face into the semblance of a smile. "Yes, your honour," he responded. "In that case," said the judge, "you are discharged. We have formed in this country a law and order league, to membership in which you have been admitted, and some of our best citizens will be glad to let you rest in their homes until you recover from the fatigue caused by your resisting arrest."

UNBORN PERSONS AS LITIGANTS.

Cases sometimes arise where persons who may hereafter come into existence would be interested in questions brought before the Court for decision, and it is desirable that they should be bound by the result of the litigation, and as they are not in existence it is obvious they cannot be made parties, so the *Rules* provide for the appointment of some person to represent them: see *Rules* 76, 77. An application was recently made for the appointment of such a representative to be added as a defendant: see *Lang* v. *Toronto General Trusts Cor.*, 16 O.W.N. 193, but according to the reporter the Judge ordered the unborn persons to be made parties; we are afraid the reporter must have misrepresented the learned Judge, and probably the order actually made was as asked, viz., for the addition of the Official Guardian as a defendant appointed to represent the unborn issue; for, although Parliament is said to be able to do anything except turn a man into a woman, we doubt very much if it could empower the Court to make a nonentity a defendant; at all events the *Rules*, which have the force of a statute, do not at present appear to authorize that proceeding.

THE PRESUMPTION OF PATERNITY.

The maxim of the common law is that marriage is the proof of paternity, and this is really only a translation of the passage in the Digest (24.5), *Pater vero is est quem nuptiae demonstrant*. The civil law, however, differed from the common law in permitting the presumption of paternity which was afforded by the existence of the marriage to be more easily rebutted. When the question of legitimacy comes up for decision at the present day in jurisdictions where English law is administered—as in peerage cases, affiliation cases, etc.—the most difficult points to determine are usually the limits within which the presumption of paternity afforded by marriage is allowed to be rebutted, and the strength of the evidence necessary to successfully rebut the presumption.

The two cases in the English courts in which the subject has been most recently under discussion seem to be *Gordon v. Gordon* (90 L.T. Rep. 597; (1903) P. 141) and the *Poulett Peerage* (1903) A.C. 395), the former having been decided on the 12th March, the latter on the 24th July, of the year 1903. In each case the legitimacy of a child born in wedlock was disputed, and, although the two cases were entirely dissimilar in their circumstances, it is worth noting that the judicial enunciation of the principles on which the legitimacy of a child born in wedlock may be controverted was not uniform, though practically contemporaneous.

In the *Poulett Peerage* the statement by a husband that he had not had connection with his wife before marriage was held admissible to shew that a full-grown child born six months after marriage was not his child. Lord Halsbury on that occasion said: "There was at one time authority for saying that if the husband and wife were within the four seas you must presume that there was intercourse, and that you could not possibly contradict it. I think that idea is completely exploded. The question is to be treated as a question of fact, and, like every other question of fact when you are answering a presumption, it may be answered by any evidence that is appropriate to the issue." In *Gordon* v. *Gordon* Sir Francis Jeune, in giving the custody of a child to the father, respondent in the suit, declined to act on or pay any attention to the statement of the mother that the child's father was the co-respondent in the suit. The President quoted from Nicolas on Adulterine Bastardy, as representing "accurately the law on the subject," a passage of which part runs as follows (the italics being in the original): "Sexual intercourse between man and wife must be presumed, and *nothing, except evidence* that the husband *did not have such intercourse* at the period of conception, can illegitimise a child born in wedlock." Nicolas says further on (though not quoted in *Gordon* v. *Gordon*): Unless it was *impossible* for the husband to be the father of the infant . . . the law protects the interest of the child by securing to it the right of legitimacy." In

view of Sir Francis Jeune's observation that Nicolas represents "accurately the law on the subject," it is important to point out that this observation and Nicolas' statements are opposed to the current of authority and considerably exaggerate the difficulty of rebutting the presumption of the paternity of a child that arises from the fact of the marriage of its mother.

The quotation from the *Poulett Peerage* made above, though not under the circumstances a binding pronouncement or decision, does in fact represent broadly the result of cases in the House of Lords such as the *Banbury Peerage* case (1811, 1 Sim. & St. 153) and *Morris* v. *Davies* (1837, 5 Cl. & F. 163), though the law as to admissibility of evidence in legitimacy cases is in some respects on a footing of its own. The *Banbury Peerage* case is fully reported in Sir H. Nicolas' book, pp. 291-551, the report above cited giving only the opinion of the Judges in answer to questions put to them in the House of Lords. These opinions were, however, the basis of the House of Lords' decision in the case and were subsequently examined and approved in *Morris* v. *Davies* (*sup.*). The result of these two cases is that the presumption of legitimacy arising from the birth of a child during wedlock may be rebutted by circumstances which, to the satisfaction of the judicial tribunal, lead to a contrary presumption. That is, it need not be shewn that it was "impossible for the husband to be the father" as laid down by Nicolas. The rule as laid down in *Morris* v. *Davies* was again approved of in the *Aylesford Peerage* (1885, 11 A.C. 1).

The reliance placed by Sir Francis Jeune in *Gordon* v. *Gordon* upon Nicolas on Adulterine Bastardy was probably due to its being overlooked that Sir Harris Nicolas wrote his book in a measure to demonstrate that the *Banbury Peerage* case was wrongly decided, and before the case of *Morris* v. *Davies* had gone to the House of Lords, where the decision of Lord Lyndhurst in Chancery was affirmed.

The whole subject of the strength and admissibility of evidence to rebut the presumption of the legitimacy of a child born in wedlock has recently been discussed in an Australian

case: (*In the Estate of L.*, 1919, V. L. R. 17). The judgment delivered by Mr. Justice Cussen in the Supreme Court of Victoria is a valuable contribution to the literature of the subject. All the relevant English cases and authorities seem to have been cited. The applicant in *In the Estate of L.* claimed to be entitled to a share in certain funds as the child of a lady who was admitted to be her mother. The applicant was born in wedlock, but during a period of complete separation between her mother and the latter's husband. The legitimacy of the applicant was disputed, and it was necessary for her, in order to establish her claim to the share in the funds in question, to shew that her father was the husband of her mother. This the applicant failed to do, and it was eventually decided that she was not legitimate, and had not established her claim to the share in the funds. The evidence on which it was held that the initial presumption of the applicant's legitimacy had been effectually rebutted consisted largely of circumstances connected with the mother's life and the conduct and statements of the husband and the wife and her paramour. The husband was never, apparently, away from Victoria, so that there was no actual impossibility of his having had access to his wife at the time of the applicant's conception. The point of view taken by the court is shown by two extracts from the judgment: "The admission of evidence relating to the conduct of husband or wife or alleged adulterer is a special exception to the ordinary rules of evidence. . . . It is a case in which legal relevancy is made to conform to logical relevancy by reference to almost universal experience based upon the affection of a parent for his or her offspring, and the contrary feeling induced in a husband in the case of spurious issue of a wife." "Now, in this case I am satisfied that the general presumption of legitimacy and sexual intercourse at the critical time between husband and wife has been repelled."

In the *Poulett Peerage* (*sup.*) the husband refused to recognize as his a child born after marriage which must have been begotten before marriage. The evidence was sufficient to rebut

the presumption of legitimacy. In general, however, the case of antenuptial conception stands upon a ground of its own. In *Rex* v. *Luffe* (1807, 8 East, 193) Lord Ellenborough said: "The marriage of the parties is the criterion adopted by the law, in cases of antenuptial generation, for ascertaining the actual parentage of the child. For this purpose it will not examine when the gestation began, looking only to the recognition of it by the husband in the subsequent act of marriage." This quotation has been taken as part of the headnote to the report of *Turnock* v. *Turnock* (1867, 16 L. T. Rep. 611). In that case it was held by Sir J. P. Wilde that a child born within six months of the marriage was the legitimate daughter of her parents, and administration of the goods of her deceased father was granted to her.

This general rule as to ante-nuptial generation was at one time thought to have been broken in *Foxcroft's* (*Foxcote's*) case, an old case of 10 Edw. 1 (1 Rolle Abr. 359), which, according to Sir Harris Nicolas, is "the earliest case of legitimacy which is reported." According to this case (as usually translated from the Norman-French) a woman was married to the man by whom she was pregnant twelve weeks before the birth of her child; the child was declared a bastard and incapable of inheriting the land of his deceased father. This case is the subject of a reporter's note in *Rex* v. *Luffe* (*sup*), and in Nicolas' Adulterine Bastardy it was pointed out that the case had been "*entirely misunderstood,* and that the question which arose . . . depended solely upon the validity of the marriage itself": (p. 562; italics in the original). The difficulty was cleared up, as far as it can be cleared up, in 1893 by an account of the original roll given in the preface to vol. 9 of the Revised Reports.

All the cases above referred to have been cases where the presumption of legitimacy was rebutted by evidence that the husband did not have access to the wife at such a time as to make it possible for him to have been the father of the person whose legitimacy was in question. Where there are other reasons for doubting the fact of paternity—as impotence, etc.—than

mere want of access, different considerations come into play. But, as regards the mere question of access or no access, the broad rule is that the presumption of paternity may be rebutted by any evidence that is satisfactory to the tribunal deciding the case, and it is not necessary that the impossibility of access should be absolutely demonstrated.—*Law Times.*

PREFERENCE SHARES AND SURPLUS ASSETS.

It has sometimes been argued that a preference share has affinities to a debenture—that it is, in fact, a thing halfway between an ordinary share and a debenture. At any rate, the exact nature of preference shares and the rights they confer on their holders are by no means yet finally fixed. In particular, judicial authority as to the right of preference shareholders to participate in the distribution of surplus assets on the winding-up of the company may be said to be still fluid. It is, of course, always a question of construing the contract between the company and the preference shareholders, and the contract includes as part of its terms the memorandum and articles of association in addition to any resolutions under the authority of which preference shares may have been issued. Occasionally the contract is precise, as in *Re South African Supply and Cold Storage Company* (91 L.T. Rep. 447; (1904) 2 Ch. 268), where the memorandum expressly provided that preference shares should have certain rights and priorities, but were not to "confer any further right to participate in profits or surplus assets." More often nothing precise is said about the right of a preference shareholder to any part of the surplus assets, and it appears to be a matter of mere accident that this question has not arisen more frequently.

At one time the same doubt existed on the subject of the rights of preference shareholders to any share in the profits or dividends beyond the actual preferential rights accorded to them in so many words. But it seems now to be settled that the right of preference given once and for all to the shareholder is all he is entitled to in respect of his preference shares. In *Will* v.

United Lankat Plantations Company (107 L.T. Rep. 360; (1912) 2 Ch. 571) Lord Justice Farwell said: "The whole of the attributes of a preference share are limited and defined on its birth. It has a preference, and such a preference as is given to it by the resolution." This observation was approved of when the case went on appeal to the House of Lords, where it was affirmed (109 L.T. Rep. 754; (1914) A.C. 11). Lord Atkinson said: "If one had to construe the second of these resolutions, one would naturally come to the conclusion that the dividend prescribed was the only dividend the shareholder was to receive. It is said that the earlier part of the resolution by making him a shareholder gives him a right to some additional dividend on distribution. It does not appear to me to be at all capable of that construction." It might perhaps have been thought that this principle of restricting the rights of preference shares with respect to dividends would apply to the case of surplus assets; however, Lord Justice Farwell in the case quoted declined to admit this, and observed that "the considerations affecting capital and dividend are entirely different." The question of dividends related to the concerns of a company as a going concern, whilst any question of surplus assets only arises on a winding-up.

The difficulty in determining whether, apart from positive provisions of the whole contract between the company and the shareholder, a preference share does carry with it the right to a share of surplus assets on a winding-up has been brought once more into prominence by a decision of Mr. Justice Astbury—*Re Fraser and Chalmers Limited*—(see *post*, p. 45). The assets were those remaining after payment of the liabilities of the company, the capital paid up on the preference and ordinary shares, and arrears of dividends on the preference shares. Under the resolutions creating the preference shares nothing was said directly affecting the right of preference shareholders to these assets, the only right given being one "to have the surplus assets applied, first, in paying off the capital paid up on the preference shares held by them respectively; and, secondly, in paying off

the arrears (if any) of the preferential dividend aforesaid to the commencement of the winding-up before any return or payment of capital is made to the holders of the other shares." Sec. 186 (1) of the Companies (Consolidation) Act 1908 is: "The property of the company shall be applied in satisfaction of its liabilities *pari passu*, and subject thereto shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company." But this affords no light on the question under consideration. Mr. Justice Astbury did not agree with the contention that the express rights given to the preference shareholders were the whole of their rights as such, since they had voting and other rights as members of the company; they should not therefore be deprived of a right to share in an ultimate surplus. The result was that the surplus assets were ordered to be distributed rateably between the ordinary and the preference shareholders. The case of *Re Espuela Land and Cattle Company* (101 L.T. Rep. 13; (1909) 2 Ch. 187) was held to be a direct authority for this decision and was followed accordingly.

Re Espuela Land and Cattle Company was decided by the present Master of the Rolls (then Mr. Justice Swinfen Eady), and is notable for containing a definite statement of the broad principle that: "There is not any rule of law that shareholders having a fixed preferential dividend take that only," or are debarred from sharing in a distribution of surplus assets on a winding-up. One of the questions in this case was how the assets remaining after paying preference capital, interest thereon, and ordinary capital were to be distributed. The articles gave the preferential shareholders a right to a cumulative preferential dividend of 10 per cent., and a preferential right on winding-up "to be paid out of the property and assets of the company the full amount of capital paid up" on the shares. Nothing was said about surplus assets. Mr. Justice Swinfen Eady held, after enunciating the general principle above referred to, that as a matter of construction there was nothing in the memorandum or articles taking away the *primâ facie* right of

the preference shareholders to participate with the ordinary shareholders in the surplus assets. These surplus assets were therefore distributed rateably between the preferred and the ordinary shareholders according to the nominal amount of the shares. In this particular instance each preference share was one hundred times the nominal amount of each ordinary share, and received a proportion of the distributed assets accordingly. It is to be noticed that the argument on behalf of the ordinary shareholders that the preference shareholders had no rights in the company's assets beyond repayment of their capital with interest—which would place a preference share rather on the footing of a debenture—was expressly rejected.

This question, however, was only one of several that arose for decision in *Re Espuela Land and Cattle Company*, and possibly might have been considered more fully. At any rate, it was considered much more fully in a subsequent case before Mr. Justice Sargant—*Re National Telephone Company* (109 L. T. Rep. 389; (1914) 1 Ch. 755)—with the result that an opposite conclusion was arrived at, and the principle laid down by Mr. Justice Swinfen Eady and referred to above was not acted on. In *Re National Telephone Company* there were several classes of preferred shareholders, and the rights conferred on some of the preference shares were not restricted to the payment of a fixed dividend. In no case, however, was any right to a share in the surplus assets on a winding-up expressly given to any preference shareholder. Mr. Justice Sargant referred to the observations of Lord Justice Farwell in *Will* v. *United Lankat Plantations Company* (quoted above), and thought that the Lord Justice had "applied to the rights of preference shares with regard to dividend a canon of construction which is necessarily applicable in the same way to the rights of preference shares in the winding up, if those rights are expressly provided for." The learned Judge went on to say that, seeing that Mr. Justice Swinfen Eady had treated rights in winding-up and rights to dividend as analogous, and that the Court of Appeal had made use of the canon of construction referred to, authority was in

favour of the view that the express attachment of rights to preferential shares on their creation "is *primâ facie* a definition of the whole of their rights in that respect, and negatives any further or other right to which, but for the specified right, they would have been entitled." Apart from this authority, Mr. Justice Sargant also thought that "as a matter of ordinary construction, not only from the business point of view, but from the legal point of view, the express mention of the rights which the preference shareholders were to be entitled to in a winding-up would have operated as an exclusion of any further or other rights." Thus the decision in *Re National Telephone Company* was that the whole of the surplus assets were divisible among the ordinary shareholders (or deferred stockholders).

In both *Re Espuela Land and Cattle Company* and *Re National Telephone Company* the question whether preference shares are entitled to any of the surplus assets is treated as a matter of construction. This, of course, is so in a general way. But the divergence in result between the two cases is brought about by different canons of construction being applied. It remains to be seen which is the canon that will be finally held to be the right one. The most recent case—*Re Fraser and Chalmers Limited*—follows *Re Espuela Land and Cattle Company* in construing the rights expressly given to preference shares as part only of their rights. It may ultimately turn out that the other canon—by which "the whole of the attributes of a preference share are limited and defined on its birth"—is the proper canon of construction to be adopted. Until this conflict of authority is settled, it will be difficult for preference shareholders to get satisfactory legal advice as to their position.

When the decision in *Re National Telephone Company* was given by Mr. Justice Sargant, the case of *Will* v. *United Lankat Plantations* had not reached the House of Lords. That the Court of Appeal's decision in that case was affirmed (though, of course, only on the question of dividends payable when the company was a going concern) is all in favour of the canon of construction adopted and the view taken in *Re National Telephone Company.—Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

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BANKRUPTCY—SECURED CREDITOR—JUDGMENT CREDITOR—EQUITABLE EXECUTION—RECEIVER.

Re Pearce (1919) 1 K.B. 354. Although this is a bankruptcy case it is deserving of attention inasmuch as Horridge, J., has therein decided that a judgment creditor who by way of equitable execution has obtained the appointment of a receiver, does not thereby become "a secured creditor," where the application of the moneys to be received depends on a further order to be obtained, and which is not in fact obtained, before an act of bankruptcy supervenes. In this case the order appointing the receiver provided that the moneys to be received should be applied in carrying on the business of the debtor and to "retain the balance of said profits to be applied in discharge of the debts and costs due to the plaintiffs as and when may be hereafter ordered," and by a subsequent order it was directed "that the receiver be at liberty to accumulate the balance of the said profits to form a fund out of which the judgment creditors may be paid their debts and costs." Some of the moneys received had been paid into Court. It was held that as neither of these orders actually ordered the payment or application of the moneys to the plaintiffs they had no lien or charge on them, and were, therefore, not "secured creditors" as against the trustee in bankruptcy who became, on his appointment, entitled to the surplus in Court and in the hands of the receiver.

TORT—ANIMALS FERÆ NATURÆ—RATS—BUSINESS ATTRACTING RATS TO PREMISES—INJURY DONE BY RATS ON ADJOINING PREMISES—CAUSE OF ACTION.

Stearn v. *Prentice* (1919) 1 K.B. 394, was an action of a novel kind. The plaintiff alleged that the defendants carried on a bone manure factory which had the effect of attracting a large quantity of rats, and that the rats from there invaded the plaintiff's premises and ate his corn causing substantial loss to the plaintiff; *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, and kindred cases were relied on in support of the plaintiff's case but on appeal from a County Court a Divisional Court (Bray and Avory, JJ.) held that they did not apply, and there being no evidence that the bones kept by the defendants were excessive or unusual in quantity, they could not be held responsible for the rat nuisance. The fact that the plaintiffs were at liberty to destroy any rats on their premises was held to differentiate the case from cases where the collection of a crowd of people to the annoyance of one's neighbours was held to be an actionable nuisance.

PRACTICE—SURPRISE—ACTION TRIED BY JURY—NEW ISSUE RAISED BY DEFENDANT AT TRIAL—NO APPLICATION FOR ADJOURNMENT—TRIAL LASTING SOME DAYS AFTER NEW ISSUE KNOWN—NEW TRIAL.

Isaacs v. *Hobhouse* (1919) 1 K.B. 398. This was an application by the plaintiff for a new trial on the ground of surprise. The action was for libel and was tried with a jury. On the second day of the trial or beginning of the third day, the plaintiff hearing that the defendant was going to state that the first of the two interviews at which facts material to some of the questions in issue arose, was some months earlier than the plaintiff thought was admitted to be the date, and on this new issue the plaintiff was not prepared with evidence to corroborate his evidence as to the date. No adjournment, however, was asked and the trial proceeded some days longer and resulted in a verdict for the defendant. The plaintiff rested his claim to a new trial on the ground that he was surprised by the new issue, and that it would have been useless to have asked for an adjournment as his principal witness on the point was absent in America and he did not then know what evidence he would be able to give. The Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.) refused the motion, holding that as the plaintiff did not apply for an adjournment, he must be taken to have taken his chance of obtaining a verdict on the evidence then at his disposal.

PRACTICE—INJUNCTION TO RESTRAIN PROCEEDINGS—CONCURRENT ACTION AS TO SAME MATTER—PROCEEDINGS BY PLAINTIFF IN ENGLAND AND BY DEFENDANT IN SCOTLAND—OPPRESSIVE OR VEXATIOUS PROCEEDINGS—BURDEN OF PROOF.

Cohen v. *Rothfield* (1919) 1 K.B. 410. On September 9, 1918, this action was commenced by the plaintiff against the defendant as his agent claiming an account and for damages for breach of duty in wrongly inducing the plaintiff's customers to become the defendant's customers. On September 14, the defendant commenced an action in Scotland against the plaintiff claiming an account of the transactions between himself and the plaintiff. The plaintiff applied to restrain the defendant from prosecuting the Scotch action as being in the circumstances vexatious and oppressive. Shearman, J., granted the application, but the Court of Appeal (Scrutton, L.J. and Eve, J.) held that as it appeared that the defendant had announced his intention of bringing the Scotch action before the plaintiff commenced the present action, and had more diligently prosecuted his action than the plaintiff

had prosecuted the present action; and it had not been shewn that the defendant would not gain some advantage by his action in Scotland which he could not get in the present action, the plaintiff had not discharged the burden which was on him of shewing that the Scotch action was vexatious and oppressive. The order of Shearman, J., was thereupon reversed.

CRIMINAL LAW—EVIDENCE OF ACCOMPLICE—CORROBORATION—SILENCE OF ACCUSED WHEN CHARGED.

The King v. *Feigenbaum* (1919) 1 K.B. 431. This was an appeal from a conviction and the question for the Court was whether or not the evidence of an accomplice had been sufficiently corroborated. The appellant was charged with having incited certain boys to steal fodder. Evidence was given for the prosecution by the boys and also by a police officer, who stated that he called at the appellant's house after the boys had been arrested and had told him that the boys, giving their names, had informed the police that the appellant had sent them to steal the fodder, and that they had stolen fodder for the appellant on other occasions, giving the dates, and that the appellant had paid them specified sums for the stolen fodder and that to this statement the appellant had made no reply. A Divisional Court (Darling, Avory, and Shearman, JJ.) came to the conclusion that the jury had been rightly directed that they were entitled to consider whether the appellant's failure to reply to the officer was not in the circumstances some corroboration of the boys' evidence, and, therefore, the conviction could not be disturbed, but the Court reduced the sentence from four to three years penal servitude.

VENDOR AND PURCHASER—SALE BY MORTGAGEE UNDER POWER—"REALISE ANY SECURITY"—OMISSION BY MORTGAGEE TO OBTAIN LEAVE OF COURT—DAMAGES PAYABLE BY VENDOR—COURTS (EMERGENCY POWERS) ACT, 1914 (4-5 GEO. V. c. 78), s. 1—(5 GEO. V. c. 22, Ont.).

Braybrooks v. *Whaley* (1919) 1 K.B. 435. This was an action by a purchaser for specific performance of a contract for the sale of land. The sale had been made by the defendant as mortgagee under a power of sale. He had omitted to obtain the authority of the Court to realise his security as required by the Courts (Emergency Powers) Act (4-5 Geo. V. c. 78), (see 5 Geo. V. c. 22, Ont.) and in consequence the sale could not be carried out, the plaintiff claimed a return of his deposit and £50 damages for breach of the contract, and judgment was given therefor in

SALE OF GOODS—UNASCERTAINED GOODS—APPROPRIATION BY SELLER—IMPLIED ASSENT OF BUYER—PASSING OF PROPERTY IN GOODS—THEFT OF GOODS AFTER APPROPRIATION TO CONTRACT.

Pignataro v. *Gilroy* (1919) 1 K.B. 459. In this case certain goods, the subject of a contract of sale, were stolen after they had been appropriated to the contract, and the question was whether the appropriation had been assented to by the buyer. The contract was made on February 12 for the sale of 140 bags of rice delivery to be taken in 14 days. The sale was by sample and the particular bags that were to satisfy the contract were not then ascertained; but the buyer was told that 15 bags would be delivered at the seller's place of business, 50 Long Acre, and 125 bags at Chambers' Wharf. On February 27 the buyer sent a cheque for the price and the next day the seller sent a delivery order for the bags at Chambers' Wharf, and stated that the 15 bags were ready at 50 Long Acre. The plaintiff neglected to send for the 15 bags until March 25, when it was discovered that the bags had been stolen without any negligence of the defendants, the sellers. The buyers brought the present action to recover the price paid for the 15 bags. The Judge of the County Court who tried the action gave judgment in favour of the plaintiffs because he was of the opinion that there was no evidence of appropriation by either party with the assent of the other and consequently that the property in the goods had not passed; but a Divisional Court (Lawrence and Rowlatt, JJ.) reversed this decision holding that in the absence of any dissent on the part of the buyers when notified of the appropriation by the sellers of the 15 bags they must be presumed to have assented thereto. The action was therefore dismissed.

CONTRACT — ILLEGALITY — EMERGENCY LEGISLATION — REGULATION RESTRICTING BUILDING—DEFENCE OF THE REALM (CONSOLIDATION) REGULATIONS, 1914—REGULATION 8E—BREACH OF REGULATION.

Brightman v. *Tate* (1919) 1 K.B. 463. This was an action to recover the balance due under a building contract. The defence was that the work had been done in breach of Regulation 8E made by the Minister of Munitions which forbade the carrying on of any building operations without a licence except where the total cost of the completed work in contemplation did not exceed £500. On June 29, 1916, the plaintiff contracted to do the work in question for a sum equal to the prime cost and ten per cent.

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profit, the contemplated total cost being £1,500. On September 29, 1916, a licence for the work was granted subject to the condition that the total cost should not exceed £1,350. By December, 1916, work of that value had been done, but the contract was not completed. No further licence was applied for, but the work was carried on to completion in April, 1917. The total cost amounted to £2,671. The action was brought to recover the balance, £1,171. McCardie, J., held that the plaintiffs could not recover, as the order of the Minister of Munitions was tantamount to a statutory prohibition to do the work in question. He also held that the fact that it was the defendants' duty to get the required licence, and that they were relying on their own omission to obtain it, as a ground of defence, was no answer to the defence of illegality, but he intimates that if the plaintiffs had carried on the work in the *bonâ fide* belief that the licence which had in fact been obtained covered the work in question, it might have made a difference; but he found as a fact that the plaintiff well knew the limited nature of the licence, and they nevertheless carried on the work in the hope that no question would be raised. The action was therefore dismissed.

PRACTICE—COUNSEL'S AUTHORITY TO COMPROMISE—LIMITATION OF AUTHORITY UNKNOWN TO THE OTHER SIDE—MISTAKE—CONSENT ORDER—RESCINDING CONSENT JUDGMENT BEFORE DRAWN UP.

Shepherd v. *Robinson* (1919) 1 K.B. 474. This was an appeal from an order of Darling, J., restoring the action to the list for trial notwithstanding a consent to judgment by the defendants' counsel. Before the judgment had been drawn up the defendant had applied to Darling, J., to restore the action to the trial list, it being shewn that after the case was on the list for trial, the defendant had expressly instructed her solicitor not to consent to any compromise of the action: this was unknown to her counsel, or the counsel or solicitor for the plaintiff at the time the consent was given. In these circumstances the Court of Appeal (Bankes, Warrington and Duke, L.JJ.) held that the order of Darling, J., was correct, following *Holt* v. *Jesse*, 3 Ch.D. 177.

SALE OF GOODS—ORAL CONTRACT—PART PAYMENT—SALE OF GOODS ACT, 1893 (56-57 VICT. c. 71), s. 4 (1)—(R.S.O. c. 102, s. 12).

Parker v. *Crisp* (1919) 1 K.B. 481. In this case the question was whether or not there had been a sufficient part payment on

an oral contract for sale of goods to satisfy the Sale of Goods Act (56-57 Vict. c. 71), s. 4 (1), (see R.S.O. c. 102, s. 12). The facts were that the plaintiff verbally agreed to buy from the defendant for £387 10s. a quantity of saccharine, and on the same day sent the defendant a cheque in accordance with the agreed mode of payment. On the following day—the duty on saccharine having been in the meantime increased—the defendants wrote to the plaintiffs: "As you are aware the duty on saccharine since yesterday has been increased practically double, and unless you are able to pay the excess duty we regret we shall be unable to send you the goods. We will return your cheque with pleasure on hearing that you will not require the goods." The plaintiffs refused to pay the increased duty, there being no stipulation in the contract to that effect, and after some correspondence the plaintiffs returned the cheque a few days later. A Divisional Court (Coleridge and Avory, JJ.) held on appeal from a County Court that there had been a valid part payment within the statute; although a payment immediately returned would not have been sufficient. In this case the Court held that on the facts there had been an acceptance of the cheque as part payment coupled with a threat to return it, if the defendant's further demand in regard to the increased duty was not acceded to, and so read, it was consistent only with a recognition on the part of the defendants of the contract that had been made.

SALE OF GOODS—IMPLIED CONDITION—"MERCHANTABLE QUALITY" —"IF BUYER HAS EXAMINED THE GOODS"—SALE OF GOODS ACT, 1893 (56-57 VICT. C. 71), S. 14.

Thornett v. *Beers* (1919) 1 K.B. 486. Although this case turns on the construction of the Sale of Goods Act, 1893 (56-57 Vict. c. 71), s. 14, it is nevertheless deserving of attention as that Act is generally understood to be a codification of the common law on the subject. The Act provides that "where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed." The defendants, who were desirous of purchasing from the plaintiffs a quantity of vegetable glue, who dealt in that article, and before doing so went by arrangement with the plaintiffs to the warehouse where the glue, which was in barrels, was stored for the purpose of inspecting. Every facility was

offered to the defendants for inspection, but being pressed for time they did not have any of the barrels opened and merely looked at the outside thereof. They purchased the glue, and after it was delivered they alleged it was not merchantable. Bray, J., who tried the action, held that there had been an examination of the goods within the meaning of the Act, and therefore the defence that the goods were not of merchantable quality was not open to the defendants.

WILL—VESTING—GIFT TO CLASS ATTAINING TWENTY-ONE—PERIOD OF VESTING—ADVANCEMENT OUT OF "VESTED OR PRESUMPTIVE SHARES"—CLASS WHEN CLOSED ON ELDEST ATTAINING TWENTY-ONE.

Re Deloitte, Griffiths v. *Allbeury* (1919) 1 Ch. 209. By a rule of construction laid down in the case of *Andrews* v. *Partington* (1791) 3 Bro. C.C. 401, in the case of a bequest to a class the members of which would be entitled to payment on attaining wenty-one; on the first member attaining twenty-one, the class is closed, unless there be something in the will to indicate a contrary intention on the part of the testator. The rule is confined to wills and does not extend to settlements. The question in this case was whether or not the rule was applicable, which depended on whether or not a contrary intention was manifested in the will. By the will in question £4,000 was bequeathed to trustees in trust to pay the income to Eliza Allbeury during her life, and after her decease in trust to hold the same for all the children equally, or any child, if only one, of the present or future marriage of Edward Allbeury, who should attain twenty-one. A further sum of £3,000 was bequeathed, without any intervening life estate, to all the children of Edward Allbeury whether living at the testatrix's death or born afterwards who should attain twenty-one. The testatrix empowered the trustees to raise any part not exceeding the whole one-third of "the presumptive or vested share" of any such child of the said Edward Allbeury and apply the same for his or her maintenance or advancement. Both Eliza and Edward were living. Edward was married and had only one child and he had attained twenty-one in April, 1918. It was contended by counsel representing unborn issue of Edward, that the rule in *Andrews* v. *Partington* was not applicable because of the direction for maintenance out of the "vested or presumptive" shares—but the Court of Appeal (Eady, M.R., Duke, L.J., and Eve, J.), overruling Sargent, J., held that the words "vested or presumptive" applied only to the £4,000 fund, and the word "presumptive" to the £3,000 fund and therefore the rule applied and on Edward's son attaining twenty-one the class was closed, and he became entitled to the immediate payment of the £3,000.

WILL—CONSTRUCTION—LEGACY ON CONDITION OF THE LEGATEE REMAINING IN A CERTAIN "EMPLOYMENT" FOR A SPECIFIED PERIOD—SERVICE IN H.M. FORCES WHETHER BREACH OF CONDITION.

In re Cole, Cole v. *Cole* (1919) 1 Chy. 218. This also was a case of construction of a will whereby a testator had bequeathed a legacy to his three sons who should, prior to attaining the age of twenty, enter the employ of a named company and remain in such employ until the age of thirty-three. One of the sons born in 1895 in 1913 entered the employ of the named company, but in September, 1914, he voluntarily enlisted in H.M. Forces, with the consent of the directors of the company, from which he had not obtained his discharge. The trustees applied to the Court to determine whether the legatee had remained in the employment of the company within the meaning of the will while serving in the army. Sargant, J., decided that he had, and that the fact that his actual services and pay had been suspended during his absence was not material.

COMPANY-SHARES—JOINT HOLDING—RIGHT OF JOINT HOLDERS TO SPLIT THEIR HOLDINGS—ALTERATION OF REGISTER.

Burns v. *Siemens* (1919) 1 Chy. 225. This was an action to compel a joint-stock company to rectify its register in respect of certain shares jointly held by the plaintiffs in the company. These shares were at present registered in the joint names of the plaintiffs Burns and Hamboro and under the articles of the company Burns, whose name appeared first on the register, was alone entitled to vote on and represent the shares at meetings of the company, and consequently in the case of Burns' illness, the shares could not be represented. The plaintiffs desired to have the register altered, and have one-half the shares registered in the names of Hamboro and Burns. The company, for some reason not very apparent, resisted the action, but Astbury, J., who tried it, held that the plaintiffs were entitled to have the rectification of the register which they desired.

LIBEL—EXCESSIVE DAMAGES—MISDIRECTION—NEW TRIAL—ORD. XXXIX. R. 6—(ONT. JUD. ACT, S. 28).

Barber v. *Deutsche Bank* (1919) A.C. 304. This was an action for libel in respect of eight bills of exchange accepted by the plaintiffs. The libel was proved as to one bill, but not as to the other seven. Special damage as to the seven was shewn by reason of the statement complained of to the amount of £460.

In charging the jury the judge directed them to disregard the evidence as to the seven bills, but inadvertently said they might take into consideration the items of special damage. The jury returned a general verdict for £3,000 in favour of the plaintiffs. The Court of Appeal (as the House of Lords found) having wrongly ordered judgment to be entered for the defendants the plaintiff appealed to the House of Lords (Lord Finlay, L.C., and Lords Haldane, Atkinson, Shaw and Phillimore) and claimed that judgment should be entered in their favour for the amount of verdict less the sum of £460 which they consented to abandon. The defendants asked for a new trial on the ground of excessive damages. Their Lordships (Lords Atkinson and Phillimore dissenting) held that the case came within Ord. XXXIX. r. 6 (Ont. Jud. Act., s. 28), and that there had not been any substantial wrong occasioned by the misdirection, as the plaintiff agreed to the reduction from the verdict of the special damage proved in respect of the seven bills; and therefore there should not be a new trial, but judgment should be entered for the plaintiffs for the amount of the verdict less the £460. Their Lordships who dissented thought that there should be a new trial and that merely to reduce the damages as proposed was in effect invading the province of the jury.

CONTRACT—BUILDING CONTRACT—EXTRAS—WRITTEN ORDER OF ENGINEER—CONDITION PRECEDENT—DISPUTES ARISING OUT OF CONTRACT—ARBITRATION—POWERS OF ARBITRATOR.

Brodie v. *Cardiff* (1919) A.C. 337. This was an appeal from the decision of the Court of Appeal *In re Nott and Cardiff* (1918) 2 K.B. 146 (noted *ante* vol. 54, p. 432). By a building contract it was provided that disputes arising out of the contract were to be referred to arbitration. Disputes having arisen an arbitration took place, for the purpose of ascertaining the amount payable under the contract, which provided that extras were not to be paid for except when done on the written order of the engineer in charge. During the progress of the work the engineer required works to be done which he claimed were required by the contract but which the contractors contended were extras. The engineer refused to give any written orders for these items. The contractor carried out the work as ordered, and claimed to be paid as to the disputed items as for extras. The arbitrator found that the items were in fact extras, and that the contractors were entitled to payment therefor notwithstanding that the engineer refused to give a written order therefor. The Court of Appeal overruled Bray, J., who had held that the arbitrator had power to do as he had done, but the House of Lords (Lord Finlay, L.C., and Lords Atkinson, Shaw, Sumner and Wrenbury) have unanimously reversed the Court of Appeal and restored the order of Bray, J.

MAINTENANCE—CIVIL ACTION—SUCCESS OF MAINTAINED ACTION—ABSENCE OF SPECIAL DAMAGE.

Neville v. *London Express* (1919) A.C. 368. This was an appeal and cross-appeal by the plaintiff and defendants respectively from the judgment of the Court of Appeal (1917) 2 K.B. 564 (noted *ante* vol. 53, p. 425). The trial of the action before Lord Reading, C.J. (1917), 1 K.B. 402 is noted *ante* vol. 53, p. 425. The action was for libel and maintenance, but it is only in regard to the maintenance branch of the action that the appeals were concerned. The libel consisted of certain criticisms published by the defendants of a scheme for the sale of a tract of land by the plaintiff with the view of establishing a summer resort. The maintenance consisted in the defendants helping pecuniarily certain purchasers of lots to bring actions against the plaintiff to recover their purchase money. These actions had been successful, but the learned Chief Justice had held at the trial that the plaintiff was entitled to recover the costs he had been put to in defending the actions. The Court of Appeal held that an action for maintenance would lie notwithstanding the maintained action proved to be successful, but they ordered a new trial on the ground that the verdict was contrary to evidence and perverse. Both the plaintiff and defendants appealed from this decision to the House of Lords (Lords Finlay, L.C., and Lords Haldane, Atkinson, Shaw and Phillimore). The majority of their Lordships agreed with the Court of Appeal that the success of a maintained action is no bar to an action for maintenance, but Lords Shaw and Phillimore were of a contrary opinion. Lord Shaw is of opinion that the essential element of unlawful maintenance is the stirring up of strife, but aid in prosecuting a lawful claim cannot be unlawful maintenance. The subject of the law of maintenance is very learnedly and elaborately discussed, and very weighty reasons are adduced by their Lordships who dissent. But the majority of their Lordships held that the plaintiff, in order to succeed in an action of maintenance, must prove special damage and that the costs he had been put to in defending the maintained actions were due to his improperly defending those actions and could not be claimed as damages for which defendant was liable. The House of Lords therefore dismissed the action as regards the claim for maintenance and affirmed the order granting a new trial so far as it related to the claim for libel.

SHIP — CHARTERPARTY — TIME CHARTER — FRUSTRATION OF ADVENTURE—REQUISITION BY GOVERNMENT.

Bank Line v. *Capel* (1919) A.C. 435. In this case the question was whether or not a time charterparty had been put an end to by reason of the frustration of the contract by reason of circumstances supervening over which the parties had no control. The charterparty in question made in February, 1915, the defendants agreed to let a steamer to the plaintiffs, the charterers, for twelve months from the time the vessel should be delivered and placed at the disposal of the charterers at a coal port in the United Kingdom as ordered by the charterers to trade between safe ports within specified limits. The charterparty excepted loss or damage arising from restraint of princes. It also provided that if the steamer was not delivered on April 30, 1915, the charterers should have the option of cancelling the charter, and should it be proved that the steamer, through unforseen circumstances, could not be delivered by April 30, 1915, the charterers within 48 hours after receiving notice thereof should declare whether they cancel or will take delivery of the steamer, also that the charterers should have the option of cancelling the charterparty if the vessel should be commandeered by the Government. The vessel was not ready for delivery by April 30, 1915, but the charterers did not cancel the contract. On May 11 the vessel was requisitioned by the Government, and some effort was made by the charterers and owners, without success, to get the vessel released. These efforts ceased in June, 1915. In July, 1915, the owners received an offer to purchase the vessel subject to their being able to procure her release which they succeeded in doing in the following September by substituting another vessel. The charterers then commenced the present action for breach of the charterparty. Rowlatt, J., who tried the action, held that the requisitioning of the vessel by the Government operated as a frustration of the adventure, and put an end to the contract. The Court of Appeal reversed his judgment, and the House of Lords (Lord Finlay, L.C., and Lords Haldane, Shaw, Sumner and Wrenbury) have now reversed the decision of the Court of Appeal and restored the judg[illegible] of Rowlatt, J., dismissing the action, Lord Haldane dissen[illegible]

Reports and Notes of Cases.

Province of Ontario

SUPREME COURT.

Appellate Division.] [45 D.L.R.

A. J. REACH CO. v. CROSLAND.

Easement—Right of way—Tax-sale—Effect.

A right of way appurtenent is extinguished upon a sale and conveyance of the servient tenement for arrears of taxes. Confirmation of the sale and validation thereof by statute has the effect of curing any defect in the method of assessment.

Taxes—Right of way—"Land."

A right of way appurtenant is not assessable as a separate interest in land, nor covered by an assessment of the dominant tenement; it is included in the "land" itself upon an assessment of the servient tenement.

Cooke for appellants. *Morley* for respondent.

ANNOTATION ON ABOVE CASE FROM 45 D.L.R.

The Easement of Way.

Ordinarily a right of way is a mere personal license: *Naegele* v. *Oke* (1916), 31 D.L.R. 501, 37 O.L.R. 61. In order that there may be a true easement it is necessary that there should be a dominant and a servient tenement, and that the easement should be connected with, and for the enjoyment of, the dominant tenement: *Rangeley* v. *Midland R. Co.* (1868), 3 Ch. App. 310. Where an easement is claimed by prescription, the owner of the dominant tenement in substance admits that the property of the servient tenement is in another, and that the right claimed is being asserted over the property of another; and therefore where the claimant to the easement has been asserting title to the property over which he claims the easement, and exercises rights of ownership thereon as his own property, he cannot claim an easement in respect of the exercise of such rights: *Att'y-Gen'l of S. Nigeria* v. *Holt*, [1915] A.C. 599 at 617, 618; *Lyell* v. *Hothfield*, [1914] 3 K.B. 911.

An incorporeal right cannot be appurtenant to an incorporeal right. It is said that there are exceptions to this rule, and that there is nothing incongruous in the owner of a several fishery, which is an incorporeal hereditament, having a right of way over the land adjoining for the purpose of exercising his right: *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401. See Armour on Real Property, p. 20.

A right of way "appurtenant" must be appurtenant to some particular parcel of land, and should refer in the grant to the dominant tenement: *Miller* v. *Tipling* (1918), 43 D.L.R. 469, 43 O.L.R. 88.

A way in the rear of a house held to be included amongst "easements or privileges appertaining" to the land and to pass as such: *Ennis* v. *Bell* (1918), 40 D.L.R. 3, 52 N.S.R. 31.

The general words "ways, rights, privileges and appurtenances," in deeds of land, do not include the inchoate enjoyment of a prescriptive right of way until the statutory period has run: *McLean* v. *McRae* (1917), 33 D.L.R. 128, 50 N.S.R. 536.

A right of way will not pass by implication as appurtenant to land under the general words of "ways, easements and appurtenances" where the strip over which the way is claimed had not been in use as a way *de facto* to the land conveyed: *Peters* v. *Sinclair* (P.C.) (1914), 18 D.L.R. 754, affirming (1913), 13 D.L.R. 468, 48 Can. S.C.R. 57.

A way of necessity does not arise merely to afford greater convenience of access; nor will it, in the circumstances, pass as an "appurtenant" on the principle of non-derogation from the grant: *Fullerton* v. *Randall* (1918), 44 D.L.R. 356.

An agreement by an owner of land granting a privilege, to an adjoining owner, for a term of years, to draw water from a spring on his land, is a personal license by the grantor, not an easement, and does not run with the land: *Naegele* v. *Oke* (1916), 31 D.L.R. 501, 37 O.L.R. 61.

A conveyance of land for mining purposes does not confer upon the grantee the right to carry on the excavations in derogation of a right to a passageway for cattle reserved in the deed: *Canada Cement Co.* v. *Fitzgerald* (1916), 29 D.L.R. 703, 53 Can. S.C.R. 263.

A right to go on abutting land to draw water from a well there situate may be the subject of an easement created by a partition agreement and evidenced by indicating the well and path to same running from the house on the adjoining lands on the plan accompanying the partition deeds; and such easement will be binding on parties subsequently acquiring the parcel on which the well is situate with notice of such plan and partition agreement: *Publicover* v. *Power* (1914), 20 D.L.R. 310.

Where adjoining owners construct their buildings according to a party-wall plan, and one is given a passageway to his building by means of a communicating door through the party wall, a valid easement is thereby created, independently of any grant or deed, to the stairways and passageways necessary for the proper use of his building, and it is co-extensive with and as durable as the easement of the party-wall: *Smith* v. *Curry* (1917), 36 D.L.R. 400; 42 D.L.R. 225.

An easement by prescription in a way, not appurtenant nor essential to the beneficial enjoyment of a dominant tenement, can be acquired only by an uninterrupted use for the full period of twenty years: *Salter* v. *Everson* (1913), 11 D.L.R. 832.

The doctrine of lost grant as applied to easements was not superseded by the Limitations Act (R.S.O. 1914, c. 75, and previous Acts), but before it can be applied there must be affirmative proof that a burden was imposed on the

servient tenement of the right claimed; the evidence of user sufficient to raise the presumption of a lost modern grant depends upon the circumstances of each particular case and where established non-user not amounting to abandonment does not destroy it: *Watson* v. *Jackson* (1914), 19 D.L.R. 733, 31 O.L.R. 481, referring to *Tilbury* v. *Silva* (1890), 45 Ch.D. 98, and *Re Cockburn*, (1896), 27 O.R. 450.

An easement by way of lost grant may be acquired by long user of a highway for carrying a stream across it for milling purposes, though the right could not be sustained as a prescription at common law, or under the Limitations Act (R.S.O. 1914, c. 75, s. 34), for want of continuity of user: *Abell* v. *Village of Woodbridge* (1917), 37 D.L.R. 352, 39 O.L.R. 382. This decision was reversed by the Appellate Division, Middleton, J., dissenting: see 15 O.W.N. 363.

It has been decided that the Statute of Limitations does not apply to easements: *Mybel* v. *Doyle*, 45 U.C.Q.B. 65 (followed in *Ihde* v. *Starr* (1909), 19 O.L.R. 471, 21 O.L.R. 407); *McKay* v. *Bruce* (1891), 20 O.R. 709; *Bell* v. *Golding* (1896), 23 A.R. (Ont.) 53 at p. 489. Consequently, there is no bar under the statute for not bringing an action to prevent disturbance of the right. But an easement may be extinguished or abandoned. And it is a question of fact in each case whether there has been an intention to abandon, and an abandonment of, the right.

Mere non-user is not of itself an abandonment, but is evidence with reference to an abandonment: *Jones* v. *Township of Tuckersmith* (1915), 23 D.L.R. 569, 33 O.L.R. 634 (reversed by Supreme Court of Canada: See memo 12 O.W.N. 368, 13 O.W.N. 383); *Publicover* v. *Power*, 20 D.L.R. 310, referring to *Ward* v. *Ward*, 7 Ex. 838; *James* v. *Stevenson*, [1893] A.C. 162 at p. 168. And so where there was continuous non-user and non-claim of a right of way accompanied by adverse obstruction by the erection of buildings upon the land over which the right was alleged to exist for eleven years, it was held that the owner of the dominant tenement had abandoned his right: *Bell* v. *Golding*, *supra*. Whether the acts done are done by the owner of the servient tenement acquiesced in by the owner of the dominant tenement, or by the owner of the dominant tenement himself, makes no difference. The abandonment may be presumed in either case if the facts are sufficient: *Bell* v. *Golding*, *supra*. And the owner of the dominant tenement may so use it as to prevent him from successfully maintaining an action to assert his right, in which case the servient tenement is discharged from the burden of the easement: *Anderson* v. *Connelly*, 22 T.L.R. 743.

An easement may also, of course, be released by conveyance. And if the dominant tenement is mortgaged, the mortgagor may release the right as far as he and those claiming under him are concerned, but the right will still subsist in the mortgagee. On payment of the mortgage and reconveyance of the land the right of the mortgagee disappears, and the easement is completely extinguished: *Poulton* v. *Moore*, [1915] 1 K.B. 400. See Armour on Real Property, p. 530.

An easement of way ceases upon the union and servient tenements: *Blackadar* v. *Hart* (1917), 35 D.L.R. 489; *Rosaire* v. *Grand Trunk R. Co.* (1912), 42 Que. S.C. 517. An easement also comes to an end when the purposes

for which it has been acquired or the means by which it is excerised become unlawful: *Wilson* v. *Smith* (1915), 22 D.L.R. 909.

The fact that a highway intervenes between the dominant and the servient estate is not a bar to the existence of a right of way as an easement: *Petipas* v. *Myette* (1913), 11 D.L.R. 483, 47 N.S.R. 270.

No such unity of possession is created by a lease of a dominant estate to the owner of a servient estate as to render s. 36 of the Limitations Act, 10 Edw. VII. c. 34 (Ont.), applicable to an action by the dominant owner to establish his right to use a prescriptive right of way, the use of which he reserved in such lease: *Thomson* v. *Maxwell* (1912), 3 D.L.R. 661.

The owner of the servient tenement of a servitude of passage liberates it by the extinctive prescription resulting from his possession for thirty years with no use of the right by the owners of the dominant tenement: *Hamelin* v. *Pepin* (1912), 42 Que. S.C. 276; *Goldstein* v. *Allard* (1912), 42 Que. S.C. 25.

Bench and Bar

CANADIAN BAR ASSOCIATION.

The annual meeting of the Association is fixed for August 29th, and is to be held at Fort Garry Hotel, Winnipeg. The following circular issued by the President gives detailed information in reference to the object of the Association, and the provisional programme for the meeting. Further information can be obtained from the Secretary-Treasurer, R. J. Maclennan, 156 Yonge St., Toronto:—

"This circular has several objects: (1) To request the members to remit the annual dues for 1919, namely $2. (2) To invite judges and lawyers who have not yet become members to join the Association, and (3) To give notice of the annual meeting to be held at Winnipeg on the 27th, 28th and 29th August next.

"The objects of the Association briefly stated are: (1) To advance the science of jurisprudence; (2) To promote the administration of justice; (3) To promote uniformity of legislation; (4) To uphold the honour of the profession, and (5) To encourage cordial intercourse among the members of the Canadian Bar.

"Membership is open to any member in good standing of the Bar of any Province, and to any judge or retired judge of Courts of Record in Canada. The annual dues, as above stated, are $2.00, and in remitting the members are asked to use the enclosed membership circular. In the case of firms one cheque for all the members will be appreciated.

"The officers are sometimes asked what advantage is derived from the payment of $2.00 for membership in the Association. The answer is, that such a lawyer is looking at the matter from the wrong point of view. The spirit of membership is not what can be got out of the Association by the individual, but how much his interest, co-operation and goodwill can further its objects, even if it is only by the payment of the small annual fee. Generally this explanation is followed by a membership remittance.

Accompanying this circular is a complete list of the officers and council and also of the standing and special committees. It necessarily follows that a great deal of the work of the Association must be done by correspondence, because it is not possible to have many general meetings. The first committeeman named in each Province is asked to act as a local chairman and be charged with the duty of actively assisting the general convener of the committee. It is also suggested that the Vice-President in each Province should be a general supervisor of all the committees in his particular jurisdiction, assisting them and encouraging them in their work.

"The provisional programme for the annual meeting is as follows:—

"Tuesday, 26th August.—Forenoon, conference of Commissioners on Uniform Laws; afternoon, meeting of the Council

"Wednesday, 27th August.—Forenoon, official greetings from the Manitoba Premier and Mayor of Winnipeg, President's address, report of council, appointment of committees, Association luncheon; afternoon legal education and general business; evening, the President's dinner to the Council, reception and garden party at Government House.

"Thursday, 28th August.—Forenoon, fire insurance and model policy, election of officers, luncheon and address; afternoon, legal ethics, company law, reception for the ladies of the party at Government House; evening, public address.

"Friday, 29th August.—Forenoon, administration of justice, unfinished business, report from council, luncheon at St. Charles Country Club; afternoon, continuation of unfinished business, meeting of council; evening, Association banquet at Fort Garry Hotel.

"It is expected that at each session one of the Vice-Presidents will assist the President in conducting the business. Outstanding lawyers are being invited from the United States and from England; announcement of these will be made later.

"The officers have not been able to secure reduced rates for transportation, because the railways are not to be interfered with in the work of returning our soldiers to their homes. Summer tourist rates, however, are available, and the eastern members should purchase return tickets to Winnipeg (or Vancouver, if they intend to take a trip to the Coast). The Secretary has been furnished with the following figures: Montreal to Winnipeg and return, $86.40; Toronto to Winnipeg and return, $67.95; Montreal to Vancouver and return, $130.85, and Toronto to Vancouver and return, $110.15. There are stop-over privileges, and for a small additional sum the travellers can make part of the journey by the Lake route.

"At the last meeting, which was held in Montreal, good progress was made in the development of the Association. The interesting addresses which were delivered and the discussions on Legal Education, Administration of Justice, Foreign Judgments, Succession Duties, Company Law, will appear in the Year Book, which has been delayed, but will soon be in the hands of the members.

"It is hoped that there will be a large attendance in Winnipeg in August. Those who desire information about hotel rates and reservations should communicate with Mr. J. M. DeC. O'Grady, of 305 Trust and Loan Bldg., Winnipeg, who is acting as a local Secretary, and will be pleased to give delegates all possible information."

ALBERTA LEGISLATION.

Mr. John D. Hunt, K.C., of Edmonton, Clerk of the Executive Council of Alberta, has prepared a synopsis of important Acts passed at the second session of the fourth Legislature of the Parliament of that Province. He has kindly forwarded us a copy of his exceilent summary.

No less than 52 statutes are digested, winding up with the usual Omnibus Act peculiar to modern legislation—the "Statute Law Amendment Act." This synopsis must have been a laborious work and will be useful to many; but in these days of electric light and defective vision we could have wished the type used had not been of such a minute character.

We notice the following suggestion by the compiler printed on the cover:—

"Every School District should be a little democracy, and the school house the social centre of the community, where all the

...ple come together in a neighbourly way on terms of equality to discuss among themselves their common interests and to devise methods of helpful co-operation."

The Anglo Saxon maw has a heavy task in Alberta in nationalising its large foreign population. Perhaps this is suggested as one way of helping its digestion.

Flotsam and Jetsam.

Distinction Between Simple and Gross Negligence.

Some courts and lawyers have contended that it is impossible to draw an instruction distinguishing between gross and simple negligence, if, in fact, there is any clear mark of separation that can be put in words, between these two terms. This confusion is a reflection on the ability of the Courts to administer the law. If the law provides for different grades of negligence and imposes a different measure of liability in each grade, the Courts must be prepared to state the distinction between these two grades of negligence with sufficient clearness to enable a jury to pass with some measure of intelligence on the facts before them.

We are, therefore, indebted to the Supreme Court of Massachusetts for undertaking to make this distinction. In the recent case of *Altman* v. *Aronson*, 121 N.E. 505, the question arose as to the measure of liability of a gratuitous bailee, who, in this case, was a vendee who returned to his vendor goods not called for by the contract of sale. The goods were lost by the express company and it was sought to make the defendant vendee liable on the ground that he marked the goods as being of less value than $50, when, in fact, they were worth many times that amount. It was admitted that the vendee in returning the goods was a gratuitous bailee, and as such was liable for only gross negligence, but the question arose over an instruction defining gross negligence. That part of the instruction which the Court held to be erroneous was as follows:—

"Now, if the ordinarily prudent man, in shipping goods, in dealing with his own property, would have shipped them by an express company, and would have shipped them upon an express receipt in which the value was limited to not more than a certain sum, if that would be what an ordinarily prudent man would have done under like circumstances and in a similar situation—if that is what these defendants did, of course, they are not liable. If, on the other hand, they did not deal with it as the ordinarily prudent

man, dealing with his own property under like circumstances, would have done, and if they were careless in not doing so, then the plaintiff would be entitled to a verdict in this case."

The Court held this instruction to be erroneous because "it imposed upon the defendants liability for simple negligence." The Court admits that the facts were sufficient to support a verdict for plaintiff, but insisted that the jury should be required to say whether it was gross negligence or want of good faith for defendant "to re-ship such a large quantity of silk with an excessive undervaluation." The Court then essays the difficult task of stating the proper distinction between these two terms. The Court says:—

"Gross negligence is substantially and appreciably higher in in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character, as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others. The element of culpability which characterizes all negligence is in gross negligence magnified to a high degree, as compared with that present in ordinary negligence. Gross negligence is manifestly less watchfulness and circumspection than the circumstances require of a person of ordinary prudence. But it is something less than the wilful, wanton and reckless conduct which renders a defendant who has injured another liable to the latter even though guilty of contributory negligence, or which renders a defendant in rightful possession of real estate liable to a trespasser whom he has injured. It falls short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from wilful and intentional conduct which is or ought to be known to have a tendency to injure. This definition does not possess the exactness of a mathematical demonstration, but it is what the law now affords."—*Central Law Journal.*