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CONVEYANCING SYMBOLS.

The subject of conveyancing has occupied the attention of the Legislature and the legal profession in England for the past century. The Real Property Commission appointed in 1829, at the instance of Lord Campbell, and of which he was the head, has shewn, in its monumental three volumes, not only the need for reform, but the nature of the reforms which were proposed, and its labours were singularly fruitful, for many of the enactments they proposed were in the next few years adopted, and, while the nature of estates and interests in real property was thereby considerably modified, the practice of conveyancing was, by the abolition of fines and recoveries and by other important reforms, practically revolutionized. Some of these reforms have been adopted in Ontario—one is tempted to think without much reflection—and when, later English changes have been adopted, they have also been followed by partially similar enactments here. Compare the English Conveyancing Act, 1881, with our conveyancing legislation of 1886. Even in recent years the subject has received much consideration in England, and in 1908 a Commission was appointed to hear evidence on the working of the Land Transfer Acts, which sat sixty-one times during two and one-half years, called eighty-four witnesses, and embodied the evidence in two large blue books and their own report in a third book of fifty-six folio pages. This shows how seriously the subject, not only of conveyancing, but of real property law in general, is taken in England.

In Upper Canada and Ontario there has been but little independent enquiry into the laws. We adopted the Yorkshire Registry laws of Queen Anne, and have amended and enlarged them at hazard since; and we also introduced the Torrens system, making it optional in a limited district and compulsory in some of our newer territories. It has not, however, been adopted as

universally in Ontario as its merits deserve, and much difficulty and hesitation are apparent in changing from the older to this more modern system of land transfer. It seems evident that we are to have with us for some time the registry office, the search of title and the grant, with its historical and feudal associations, and it is worth while enquiring into the condition of our present forms for transferring realty in order to apprehend, not only what their present meaning is, but also to see whether there is no opportunity for improvement.

Few people who see an ordinary conveyance realize how little of its meaning appears upon its face.

Probably most lawyers would find it difficult to explain off-hand exactly what an ordinary grant means, and it is safe to say that no layman who signs or accepts one knows accurately what he is getting. It is an extraordinary thing, when we think of it, that there should be so much mystery about a land transaction, and so much that is hidden even from the wise and prudent.

The Short Forms Acts have made our conveyancing look simple enough, but the fact is, as all conveyancers know, that a grant, lease or mortgage is an exceedingly complicated affair, and that much of what is spread before us is merely a set of symbols conferring rights and imposing liabilities which must be looked for elsewhere. A document under one of these statutes is a cryptogram, containing meanings hidden from those who lack the key.

It is inevitable that transactions constantly taking place, such as dealings with lands, should habitually take substantially the same form, and equally inevitable that there should grow up a body of jurisprudence interpreting and regulating these constantly recurring transactions.

In no part of our law are these tendencies more evident than in conveyancing In England, as in other civilized communities, land and crimes were the subjects chiefly demanding the attention of jurists during the formative period of the law. The principles affecting them were moulded at an early period in the country's development, and not only does this ensure a larger body of precedents and legislation, but much that is archaic has, in

English law, clung to real property transactions down to the present time.

The result is that, when rights in land are created or transferred, the document embodying the arrangement is surrounded by many incidents, and affected by many statutes and precedents which are not set out in it, but which, nevertheless, vitally affect the rights of the parties. No one can explain a deed intelligently unless he knows something of feudal conveyancing, and no one can construe it accurately unless he refers to the Law and Transfer of Property Act, and probably also to one of the Short Forms Statutes. A grant, mortgage or lease, therefore, is not a simple, but a very complicated transaction, and, if all that a short form deed implies were written into it, it would be a very long and mysterious document.

With those parts of the law, either judicial or legislative, which merely regulate or interpret a deed, this article does not deal, and this discussion is limited to those parts of it which are read into the deed by the employment of symbols, and chiefly to the covenants for titles.

It was these covenants for title which contributed largely to the length of deeds, and they illustrate the changes which have taken place in our conveyancing. Originally where a deed was made, certain warranties, express or implied, accompanied the actual transfer of the seisin. The germ of them lay in the protection which the lord afforded his tenant, and which was incident to the oaths of fealty and homage accompanying a feudal real estate transaction. It might mean physical defence of the tenant's possession; it did mean defence of his title in the Courts, and an unsuccessful defence resulted in judgment directing the warrantor to substitute other lands equally valuable for those of which the tenant had been deprived. It was by a perversion of these principles that conveyancing by means of common recoveries became possible. This "learning of warranties," which Sir Edward Coke describes as "one of the most curious and cunning learnings of the law and of great use and consequence" (Co. Inst. 366*a*), had, "by repeated Acts of the Legislature, been reduced to a very narrow compass": note 315, Co. Inst. 365*a*.

This note was written towards the end of the eighteenth century, although warranties might still be demanded or implied when Sir William Blackstone lectured: 2 Bl. Com. 300; and one wonders whether the "curious and cunning" nature of the learning had not made it so difficult to construe and apply the relevant doctrines that they became unpopular, as well as of limited application.

The fact remains that these warranties became obsolete, and, no doubt, one reason was the substitution of the Lease and Release and other forms of conveyancing under the Statute of Uses, for the feoffment, with its appropriate deed or charter, which the law in later times required as evidence that this ancient ceremony had been performed. In the conveyancing under the Statute of Uses, people relied upon the wording of the covenants, which they expressly agreed to in their deed, instead of merely inserting a warranty and leaving the law to define its operation.

In Blackstone's period certain covenants, including those for quiet enjoyment and right to convey, were described as "usual": 2 Bl. 303; and he refers to the fact that formerly conveyances were more concise than in his day: *ib.* 295. In confirmation of this, it is interesting to compare the old deed of feoffment in the reign of Edward VI. and its simple warranty clause with the release of 1747, with its lengthy covenants, both of which are found in the appendix of Book II. of the Commentaries. It is said that the "extravagant verbosity" shown in the latter example dated from the end of the sixteenth century, and is due to the faulty system of remuneration, which paid a lawyer, not for his learning, but for the length of his document: Williams' Real Property, 21st ed. 618. The statute 9 V.C. 6 (Can.) recognizes this as one of the causes of long documents by providing that conveyancers shall be paid for skill and not for length. This author, at the following page, points out the attempts made in England to reduce this verbiage in 1833, 1845 and 1859 and 1860. The legislation of 1845 took the form of Acts Respecting Short Forms of Conveyances and Short Forms of Leases, 8 and 9 Vict. caps. 119 and 124. These statutes were cuttingly criticized by Mr. H. W. Brodie, the author of probably the most

finished piece of real property draughtsmanship, the Act for the Abolition of Fines and Recoveries—our Estates Tail Act—who says that the Short Forms Acts "have been found to be impracticable and have already (1850) become a dead letter"; see Shelford's Real Property Statutes, 5th ed. 547; and the former was repealed in England by the Conveyancing Act (1881), 44 and 45 Vict. cap. 41, Sched. II., which substituted shorter forms of covenants for title, and directed that they be implied where appropriate words, such as "beneficial owner," were employed in the body of the deed. We partially authorized this practice by our Conveyancing and Mortgage Acts, now R.S.O. c. 109, s. 22 and R.S.O. c. 112, s. 8, though these changes have not yet become popular here. In England, therefore, the Short Forms Act of 1845 resulted only in the saving of "more than one skin of parchment": Shelford *supra*, but, though, as adopted in Upper Canada, they were also criticized by Mr. Leith (R. P. Stat. 99 *et seq.* and Leiths Williams, 311 *et seq.*), there was a more powerful incentive to use them here. In 1865 memorials were abolished and deeds were required to be registered in full: 29 Vict. c. 24, s. 30, and thereafter it became an important matter to reduce the expense of registration as much as possible. The Act respecting Short Forms of Conveyances had been enacted in Upper Canada in 1846 as 9 Vict. c. 6, that respecting Leases as 14, 15 Vict. c. 8, and a similar Act respecting Mortgages, not enacted in England, was passed as 27 and 28 Vict. c. 31. The expense of registration, which would tend to reduce rather than increase the conveyancers' fees, finally popularized these statutes, and they came into vogue, and have been employed ever since. It is worthy of remark also that, when in 1851 a grant was given the same effect as to corporeal hereditaments as feoffments had formerly enjoyed, so that the Statute of Uses was no longer necessary as a conveyancing medium, no attempt was made to revive the warranty, but the covenants formerly employed in bargains and sales were transferred bodily to the grant. Section 10 of R.S.O. c. 109, providing that the word "grant" shall carry no implied warranty, reminds us of earlier controversies on this point. That these covenants are not satisfactory or sufficiently

comprehensive is evidenced by present long forms of mortgages which are made, not only in pursuance of the Short Forms of Mortgages Act, but, besides making the mortgagor convey as beneficial owner so as to incorporate the implied covenants of the Mortgage Act, contain, in addition, long special terms suited to the ideas of the lender or imposed upon him by the law stationer. So far as mortgages are concerned, it is safe to say that the statutes passed to reduce the length of mortgages have been unfruitful and they have chiefly resulted in insuring that the mortgagor shall not understand what he is signing. To a lesser extent it is probably correct to say that parties to leases and grants are similarly in the dark.

In speaking of the common forms of covenants, upon which our Short Forms Acts are based, Mr. T. Cyprian Williams says that the "best of them, though prolix, were marvellously accurate," but difficulties have frequently occurred in their interpretation. The efforts of Lord Eldon, in *Browning* v. *Wright*, 2 B. & P. 13, and of Lord Ellenborough, in *Howell* v. *Richards*, 11 East. 633, to construe the covenants appearing in the deeds before them, are good early examples of this, and the best commentary upon the multitude of words frequently employed is that, if so many words are used, the least that might be expected is that all contingencies are foreseen and clearly provided for, but these and many other decisions shew that the contrary is the case. The covenant for quiet possession has created much difficulty: see *Jeffries* v. *Evans*, 19 C.B.N.S. 267; *David* v. *Sabin* (1893), 1 Ch. 523; *Gold Medal* v. *Lumbers*, 29 O.R. 75, 26 A.R. 78, 30 S.C.R. 55; and it is pointed out by Mr. Leith (R. P. Stat. 104) that the measure of damages under it may differ from the damages recoverable under the covenant for right to convey. The form of power of sale in mortgages is never accepted by careful conveyancers as sufficient. If some of the covenants have not been much under consideration, the reason probably is that they are of very little practical importance. The covenants to produce title deeds and for further assurance are scarcely ever before the Courts, and probably not one sale in a hundred fell through or was questioned because the grantor was a trustee

giving limited covenants only. Sometimes, too, the statutory equivalent for the words in the deed are a positive danger, as in the case of the words, "property . . . of the grantor . . . upon the same lands," in R.S.O. c. 109, s. 15, which by s. 2 (*g*) includes real and personal property. Does this mean that all chattels of the grantor on the land when the deed is delivered pass to the grantee? Probably not; but the deed is made to say so. Then, too, interference with the symbols is dangerous. The benefit of the covenant may be lost or abridged: *Lee* v. *Lorsch*, 37 U.C.R. 262; *Re Gilchrist*, 11 O.R. 537; *Clark* v. *Harvey*, 16 O.R. 159; *Barry* v. *Anderson*, 18 A.R. 247; *Roche* v. *Allan*, 23 O.L.R. 300 at p. 306.

It is submitted, without elaborately reviewing the cases, that they prove the danger rather than the usefulness of the present forms. Indeed, such a proposition hardly requires proof from the cases. It must be dangerous to employ forms which hardly any one reads carefully and which are themselves monuments of cumbersome and involved verbosity.

Would it not be better to examine them carefully, strike out all or most of the words "said" and "aforesaid," which belong to an earlier age of conveyancing, consider how far their provisions are useful at a time when the Registry Acts have provided, as they do, for the custody of one duplicate of the deeds, and endeavour to provide a form which, in modern language, will spread upon the face of the document all that the parties are asked to sign or accept, or, if that makes the deed too long, adopt the principle of the English Conveyancing Act, 1881, shorten and modernize the covenants, and provide for their implication by the use of appropriate words in the deed. We have facilities for doing that now in R.S.O. caps. 109 and 112, but the old and cumbersome covenants are still implied. A reconsideration of these covenants would involve also a scrutiny of R.S.O. c. 109, s. 15, which uses over fifty nouns and, in all, one hundred and fifty-one words to describe what shall be included in the word "land." It was the old conveyancing form of words copied into the Short Forms Act in 1846, and carried into our Conveyancing Act in 1886, and still persists in implying,

in conveyances of what may be vacant land, the grant of all the appurtenances of houses, etc., which may be upon it, an anomaly which was discovered in England and corrected in 1881: 44 and 45 Vict. c. 41, s. 6.

This may be a matter of taste only, but it is also worthy of consideration that, from Coke to the present time, the word "land" *primâ facie* includes everything under or upon it from the centre of the earth up to the heavens: cp. Coke Inst. 4*a*, with *Liverpool* v. *Chorley* (1913), A.C. p. 211.

It requires courage to submit a substitute for the ancient forms so familiar, but so little understood, but it is worth while considering whether they could not be radically altered. The following draft covenants are not suggested as forms which could be safely used without further scrutiny, but the writer submits that, crude as they probably are, they would serve every practical purpose which the older forms of grants incorporate. There is no pretence that they have the same legal effect—he would be a bold man who attempted to say exactly what the legal effect of the present covenants is, and it could not be done in a document; it would require a large book—but they are suggested as furnishing most of the protection which the ordinary purchaser seeks when he pays for and gets his deed. The covenants in leases and mortgages are capable of equally radical modification, and might be rendered equally simple, though they would be more numerous.

1. The word Grantor shall include the heirs, executors, administrators and assigns of the Grantor and those claiming through or in trust for him, and the word Grantee shall include the heirs, executors, administrators and assigns of the Grantee.

2. That, notwithstanding any act done or knowingly suffered by the Grantor, he now has the right to convey the lands and premises with their appurtenances to the Grantee in the manner and according to the intent appearing in these presents.

3. That the Grantee may peaceably enter on and possess the lands and their appurtenances and receive the rents and profits for his own use free from any claim of the Grantor.

4. That the lands are free from all incumbrances created or

suffered to be created by the Grantor, and that the Grantor will indemnify and save harmless the Grantee from any such incumbrance.

5. That the Grantor will at his own place of abode only on every reasonable request of the Grantee, but at the Grantee's expense, execute any necessary and lawful conveyance or other assurance for more perfectly conveying and assuring the lands conveyed or intended so to be and their appurtenances to the Grantee provided that no such further assurance shall contain or imply a covenant or warranty except against the acts and deeds of the person making the same.

6. That (unless prevented by fire or other inevitable accident) the Grantor will, on payment of his expenses, produce whenever necessary to prove or defend the Grantee's title in or out of Court any deed or other instrument in his possession affecting the title to the lands and will furnish notarially attested copies or abstracts of the same and permit them to be compared with the originals.

7. The Grantor releases to the Grantee any right, title, interest, claim or demand which the Grantor has had or might but for these presents have had in the lands.

8. The wife of the Grantor, in consideration of the benefits conferred upon her husband by the purchaser under this conveyance, doth grant and release unto the Grantee all her dower and any right or interest which she now has in the lands.

It will be observed that covenants 2, 3 and 4 are limited to acts or defaults of the Grantor and those claiming under or in trust for him. They do not even include any person from whom the grantor took upon an intestacy or by devise.

It was sometimes customary for the grantor, claiming under a devise or on an intestacy, to covenant for the title of his ancestor or devisor and against his encumbrances: see *Browning* v. *Wright*, 2 B. & P. 13, but it is submitted that the covenants under the Short Forms Act do not go behind the grantor's title so as to render him responsible for defects in the title of his predecessors or in the title which he acquired from them. Our covenants are not so broad as the English statutory form, which reads that,

"notwithstanding anything by the person who so conveys *or any one through whom he derives title otherwise than by purchase for value*," the grantor has power to convey, etc. This point may yet arise in *Ontario Asphalt* v. *Montreuil*, 29 O.L.R. 534, see p. 552, where the Chief Justice of Ontario says that a conveyance in fee simple by a life tenant under a will would render him liable to an action on the covenants for title and quiet enjoyment if the remainderman should evict the grantee. In a conveyance under the Short Forms Act there would be no covenant for title, and the covenants for right to convey and for quiet possession appear to be limited to acts or defaults of the grantor. The remaindermen, in that case, would claim by a title contemporaneous with the life tenant's and not created by him, and apparently, therefore he would not be liable to the purchaser if the latter were ejected, as it would not be due to anything done or suffered by the grantor. The cases of *Harry* v. *Anderson*, 13 U.C.C.P. 476, and *Re Fennedy*, 26 Gr. 33, illustrate this principle, though, in view of the doubts expressed in the latter case and of the interpretation of the words, "knowingly or wilfully suffered or permitted," in *Eastwood* v. *Ashton* (1913), 2 Ch. 39, it is questionable whether the precise point—the liability under the grantor's covenant for taxes accrued prior to his title—would be decided in the same way at the present time.

April, 1914. SHIRLEY DENISON.

WHEN LYNCH LAW BECOMES A NECESSITY.

The public are again being told that the British Government is at last beginning to wake up to the condition of things resulting from its apathy and utter stupidity in connection with the militant suffragette outbreak in England; but, so far as one can see at present, Judge Lynch is the only resource to cope with the situation. The incapacity of the present government in this and perhaps other matters has made England a laughing stock to other nations, and has brought humiliation to its citizens. This apathy

and ineffectiveness has permitted the destruction of valuable property, and, what is worse, has fostered a most dangerous and growing spirit of anarchy. If the British press is to be believed, it will in all likelihood also bring on riots and bloodshed, still further to disgrace the nation.

It has been clear to the public for a long time that if women persistently choose to unsex themselves, and act as male ruffians, they should be treated as such. They have been warned time and again that exasperated crowds of men will not forever put up with their criminal foolishness, wanton destruction of property and disloyalty, even if those who are appointed to protect the public and to administer the law neglect their duty. It is this sort of thing that, from time to time, seems to make Lynch law a necessity and the only protective measure.

If the police were to let an exasperated populace take charge of the situation, and the former attend to their proper duties of protecting the persons and property of peaceable people, instead of giving assistance to these lawbreakers, there would soon be an end of the militant suffragettes. The hunger strike dodge would also cease if the farce of forcible feeding were discontinued and the schemers allowed to starve themselves if they wanted to. Of course, they would not starve, but, if they did, it would serve them right.

England must now cease to boast of its vaunted law and order and take rank with Mexico. The present condition of things is simply intolerable, and a disgrace even to the Asquith-Lloyd George-Churchill-McKenna Government.

The last outrage was an attempt to blow up the Coronation Chair and "Stone of Destiny" in Westminster Abbey. If the British public will stand that, it will stand anything.

CONTRACTS IN RESTRAINT OF TRADE.

In the recent case of *Eastes* v. *Russ* (110 L.T. Rep. 296; (1914) 1 Ch. 468) the Court of Appeal held that a covenant binding the covenantor for life not to engage in a certain kind of scientific work within a radius of ten miles from a certain spot in London was an unreasonable restriction and void under the doctrine of law which refuses to sanction the validity of contracts in restraint of trade.

A covenant whereby the vendor of some professional or other business undertakes to refrain from carrying on his profession or trade or business within a proscribed area is a highly useful and often an absolutely necessary provision, from the point of view of the purchaser of that business. In many cases it is practically the only way of preserving the subject-matter of the sale. All this supposed protection may fall to the ground if the covenant entered into be so stringent that the law may, at the instance of the vendor, vitiate it under the doctrine mentioned above. It follows that it is a matter of first-rate importance to know how far such a covenant can be safely made to extend; and it is proposed in this article to extract from the authorities the principles by reference to which this question may be answered in any particular case.

In the first place, it will be observed that restraints of this kind are usually either restraints in point of space, or restraints in point of time. A man may prohibit himself from carrying on a particular profession or trade within a proscribed area. This is restraint in point of space. Or he may prohibit himself from carrying it on for a specified period. This is restraint in point of time. Often the restraint is one both in point of space and in point of time.

In the second place, the reader is warned from giving much weight to the distinction, between general and partial restraints, which he will find drawn in a great number of cases, especially in the older cases. It was once thought that a general restraint not to carry on a trade in the realm was *ipso facto* void, as being a general restraint. "Any deed," said Chief Justice Best in

Horner v. *Ashford* (1825, 3 Bing. 322, at p. 326), "by which a person binds himself not to employ his talent, his industry, or his capital in any useful undertaking in the kingdom would be void." The reader must guard himself against accepting dicta of this description. The subject is, indeed, greatly confused by the former rigid adherence to this distinction between general and partial restraints. In point of fact, a restraint, general in point of space, would readily be held bad at the present day; but this is not because it is general, but because, being general, it would probably be held to be unreasonable. We may anticipate matters this far by stating that the reasonability of the restriction in the circumstances of the particular case is the true legal test of the validity of the covenant or contract.

To turn now to what Lord Justice Bowen has called the common law narrative in the development of this doctrine—in Elizabethan times all engagements in restraint of trade were held to be void on the grounds of public policy. Thus in *Colgate* v. *Bachelor* (Cro. Eliz. 872) an obligation not to carry on the trade of a haberdasher was held bad, although the proscribed area was only the county of Kent. This rule was relaxed by the courts yielding to the requirements of trade. The doctrine itself was found to be more in restraint of trade than the covenants which it purported to vitiate. Masters had in every apprentice a potential rival in trade, and persons becoming aged and infirm lost their trade because they could not put in a vicarious successor. Qualified covenants in restraint of trade had, in practice, come into vogue, and were found to be exceedingly useful in London and other large towns, where traders were wont to let their shops and wares to their apprentices when out of their apprenticeships, on the apprentices binding themselves not to use the trade in the street: (see *Broad* v. *Jollyfe*, 1620, Cro. Jac. 596). These consequences led to gradual recognition of the possible validity of a covenant in restraint of trade if made for a reasonably sufficient consideration. But this relaxation only extended to so-called partial restraints.

Here we come to the differentiation between general and partial restraints. Lord Macclesfield in the case of *Mitchel* v. *Reynolds*

(1711, 1 P. Wms. 181) entered into an elaborate classification of restraints on trade, and laid it down as a hard-and-fast rule, upon the authorities as they then existed, that a restraint in point of space, if general, was absolutely void, but if partial, it might or might not be void according to circumstances. This proposition was adopted in many subsequent cases. Even if a restraint were strictly limited in point of time, yet if it were general in point of space the courts would hold it void: (see *Ward* v. *Byrne*, 1839, 5 M. & W. 548).

Down to 1831 it was always held that the party seeking to enforce a contract in partial restraint of trade had to discharge the onus of showing the adequacy of the consideration for the restriction: (see *Young* v. *Timmins*, 1831, 1 Tyrw. 226). But shortly afterwards the Court of Exchequer Chamber held for the first time that in cases of partial restraint the question of the adequacy of consideration was one for the parties, and not one for the court, although the burden was on the covenantee to show that there was some good consideration: (see *Hitchcock* v. *Coker*, 1837, 6 Ad. & E. 438).

During the two decades between the years 1830 and 1850 many cases of partial restraints occurred in which the courts upheld the covenant, and during this period it came to be realized that all partial restraints of trade which satisfied the conditions of the law as to reasonableness and good consideration were not an injury but a benefit to the public: (see per Lord Justice Bowen in *Maxim-Nordenfelt Guns and Ammunition Company* v. *Nordenfelt*, 68 L. T. Rep. 833; (1893) 1 Ch. 630, at pp. 655, 656).

The judgments of the Law Lords, when the last-mentioned case came before the House of Lords, finally did away with the lingering effect of Lord Macclesfield's classification. Their Lordships held, in effect, that although the generality of a restraint in point of space was no doubt an element to lead the Court to the conclusion that the restriction was an unreasonable one, yet because a restraint was general in point of space it was not for that reason necessarily bad. The real question, their Lordships held, in all cases of restraint was whether in the circumstances of the case the restriction unreasonably exceeded what was ne-

cessary for the protection of the covenantee. "When once it is admitted," said Lord Herschell (*Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Company*, 71 L. T. Rep. 489; (1894) A. C. 535, at p. 548), "that whether the covenant be general or particular the question of its validity is alike determined by the consideration whether it exceeds what is necessary for the protection of the covenantee, the distinction between general restraints ceases to be a distinction in point of law." "The tendency in later cases," added his Lordship, "has certainly been to allow a restriction in point of space which formerly would have been thought unreasonable, manifestly because of the improved means of communication. A radius of one hundred and fifty or even two hundred miles has not been held too much in some cases. For the same reason I think a restriction applying to the entire kingdom may in other cases be requisite and justifiable."

Every case must, of course, be decided upon its own particular circumstances, and because a covenant not to carry on a trade within a radius of twenty miles of a certain spot may have been held good in one case, it does not follow that a covenant to carry on the same trade within a similar area would be held good in another case. Yet the following instances of covenants, which the Court has upheld as valid and unoffending against the doctrine, will serve as a general guide on the subject.

We shall take the medical profession first. In *Atkins* v. *Kinnear* (1850, 4 Ex. 776) a surgeon, entering into a three years' partnership with another surgeon, covenanted not at any time to practise as a surgeon within a distance of two and a half miles of a particular house in London, the distance to be measured by the usual streets or ways of approach to the house. In *Davis* v. *Mason* (1793, 5 T. R. 118) the covenant debarred practice for a period of seven years within a distance of ten miles of a particular country town in Norfolk. In *Sainter* v. *Ferguson* (1849, 7 C.B. 716) the restraint was unlimited in point of time, but the proscribed area was seven miles from Macclesfield. In *Gravely* v. *Barnard* (1874, 18 Eq. 518) the proscribed area was a particular parish in Sussex, and a distance of ten miles from that parish with the exception of the town of Lewes. This restraint was to last

so long as the covenantee, or any person to whom he should sell his business of a surgeon, should continue to practise. In *Palmer* v. *Mallet* (36 Ch. Div. 411) the restraint was unlimited in point of time, but limited in point of space to a ten miles radius of a country town.

To pass to kindred professions. In *Haywood* v. *Young* (1818, 2 Chitty, 407) the profession restrained was that of an apothecary, within a distance of twenty miles of Aylesbury. No limit was specified in point of time. In *Hitchcock* v. *Coker* (1837), 6 Ad. & E. 438) the restriction was against the carrying on of the business of a chemist and druggist in Taunton, or within three miles of that town, without a time limit on the restriction. In *Mallan* v. *May* (1843, 11 M. & W. 653) the covenant was to the effect that the covenantor, who was to become an assistant for a term of years to a firm of surgeon dentists, and who was to be instructed in that profession, would not practise after the expiration of that term in London.

There are several cases where the restraint has been entered into in respect of a solicitor's business. Thus in *Bunn* v. *Guy* (1803, 4 East, 190) the covenant was not to practise as an attorney, solicitor, or conveyancer, or as agent for any attorney, in London. In *Whittaker* v. *Howe* (1841, 3 Beav. 383) the prohibited area for the practice of an attorney extended to the whole of England and Scotland, although the restraint was limited in point of time to twenty years. In *Dendy* v. *Henderson* (1855, 11 Ex. 194) a clerk agreed with a solicitor, who was engaging him for the purposes of managing a certain estate in Devonshire, not to reside in a certain parish or within twenty-one miles of it, after the termination of the service, or carry on a similar business for twenty-one years within the proscribed area.

The following are cases affecting miscellaneous trades. In *Rolfe* v. *Rolfe* (1846, 15 Sim. 88) the carrying on of the trade of a tailor was prohibited within twenty miles of Cornhill. In *Rannie* v. *Irvine* (1844, 7 M. & Gr. 969) the trade of a baker was prohibited for fourteen years within one mile of the shop. In *Elves* v. *Crofts* (1850, 10 C. B. 241) the trade of a butcher was proscribed for a distance of five miles without any limit on the restriction

in point of time. In *Harms* v. *Parsons* (1862, 32 Beav. 328) the forbidden trade was that of a horsehair manufacturer, the proscribed area being within a radius of 200 miles of Birmingham. In *Turner* v. *Evans* (1852, 2 D. M. & G. 740) the carrying on of the trade of a wine merchant was debarred throughout three counties in Wales.

In all these cases the restraints were held valid. It will be observed that in some cases the proscribed areas were very extensive. Instances of even more extensive areas occur in the case of *Leather Cloth Company* v. *Lorsant* (1869, 9 Eq. 345), where the activities of the covenantors were excluded from Europe, and in the case of *Lamson Pneumatic Tube Company* v. *Phillips* (91 L. T. Rep. 363), where the proscribed area was the Eastern Hemisphere.

The foregoing observations and the review of the cases mentioned above show that the extent of the proscribed area does not of itself serve as a deciding factor whether a contract in restraint of trade is reasonable or not. It is merely one circumstance amongst many. Where the covenant is entered into in respect of some occupation which in its nature is exercisable over a wide area, as, for instance, the business of a commercial traveller, it is only reasonable to allow a much more extended area of prohibition than in other cases. Another important factor is the nature of the transaction. If a covenant be entered into for the protection of the purchaser on the sale of a business with wide connections, and without the covenant the subject-matter of the sale could not be properly secured to the purchaser, it is only reasonable that the covenant be of such a nature as to protect the business from the effect of the covenantor continuing the trade in the neighbourhood. It may be added that after a close examination of the very numerous authorities on this subject, the writer formed the opinion, and advised accordingly, that a covenant was valid which restricted the activities of the covenantor in a particular calling of an essentially cosmopolitan nature, although the covenant embraced, in the proscribed area, all the important ports of four continents.

In the recent case in the Court of Appeal mentioned at the

commencement of this article, the Master of the Rolls and Lord Justice Phillimore held that a restraint imposed upon an assistant microscopist in a pathological laboratory, preventing him during his life from engaging in similar work within a distance of ten miles from the plaintiff's laboratories in London, was in the circumstances of the case wider than was reasonably necessary for the plaintiff's protection, and was therefore void. The fact that it was a lifelong prohibition appears to have had weight with their Lordships. Lord Justice Swinfen Eady took a different view and considered the restraint reasonable.

One point suggested by their Lordships' judgments may be mentioned in conclusion. That is the severability of such contracts and covenants. The majority of the court apparently regretted that they could not find the restraint severable. This suggests the advisability, when the draftsman is instructed to impose as wide a restraint as possible, of drawing the restraint in such a way as to allow of its being severed, so as to avoid the risk of the Court holding the whole to be void. This might be done in various ways. One way would be to define alternative areas and alternative periods, varying, as regards the areas in extent, and, as regards the periods, in duration.—*Law Times.*

LOSS OF SOCIAL ENJOYMENT ARISING OUT OF BREACH OF CONTRACT AS SPECIAL DAMAGES IN CONTEMPLATION OF PARTIES.

The Supreme Court of Michigan held that where a lady purchased a ticket for an ocean voyage in a personally conducted tour and shipped her trunk to the pier in New York, fully apprising the carrier of her purpose, it became liable for failure to deliver the trunk in time, for the mental trouble over loss of social enjoyment she suffered on the trip.

The Court was equally divided on this question, and the judgment of the lower Court was affirmed: *McConnell* v. *Express Co.*, 146 N.W. 428.

The four members of the Court against affirmance thought that

plaintiff was entitled to recover only for the physical suffering occasioned by the breach and damages to the feelings and mental suffering occasioned by the loss of social enjoyment were not within the contemplation of the parties.

The plaintiff had testified she was not seasick on the voyage, which caused the affirming opinion to say that: "It also may be asserted that for people who are good sailors, one of the chief advantages of the journey is the ability to be comfortably clothed and reclining in an easy chair, or walking about the deck, be able to fill the lungs with ozone and to feel the tang of the salt sea in the nostrils and throat, and to watch the ever-changing procession of the waves and the clouds and the colour effects upon the sea and sky. It would add, also, to the enjoyment of a cultivated, normal person to be able to exchange greetings and social amenities with other normal cultivated people, who are sure to be present upon a Cunarder."

The opinion goes on at some length in this vein, the deprivation of all these things being that, as the lady's trunk was left behind, she must

> "Let concealment, like a worm in the bud
> Feed on her damask cheek."

The affirming opinion refers to many telegraph cases showing mental trouble from a telegram not being delivered, a case where a carriage had been engaged to convey a bridegroom to a wedding ceremony, the expulsion of a ticket purchaser from the line where she was, at a bathing resort, none of which seem to cover a case of this kind.

Indeed, if this sort of case is to come within the rule of mental anguish from the breach of a contract, we do not see but the rule of contemplation of damages is without any limit at all.

The plaintiff here is pictured as "an intelligent woman, past middle life, just recovering from an illness, who had planned long in advance an ocean voyage. Knowing from previous experience the advantages she might reasonably expect from it, planning in great detail for a wardrobe and other articles which would supply her necessities and provide for her comfort and

pleasure." Must a carrier in a contract such as was entered into in this case go into all of these things in merely engaging to deliver a trunk for a passenger in time for her trip?

Must it consider whether it was dealing with one who could not enjoy "the tang of the salt sea in her nostrils" unless she were correctly dressed or may it suppose that one out for a pleasant voyage is going to have it whether she have the clothes for the occasion or not?

To refer to cases where sorrow intervenes from the breach of a contract, a Court puts itself on ground where the common experience of mankind sustains it. But when it gets down to chagrin and disappointment over the loss of social pleasure, which one person would bear with philosophical patience and another would exaggerate into a mountain of woe, gets us into a region of doubt and difficulty, where temperaments are the rule of damages. With temperaments hardly may it be supposed the carrier has any acquaintance.

The trouble with this kind of ruling is, that, notwithstanding everyone is on an equality in demanding service such as was contracted to be given in this case, the Court divides its customers into classes opposed to that very equality.

It seems especially true that when people go to travelling, highly sensitive organisms must mix with *hoi polloi*, and take the jolts and pushing and scrambling in a good natured way. They are supposed to be away from their exclusive environments, if our law recognizes anything of that sort, and to take their chance, and if their sensitive souls need to be guarded, they should stay at home. We do not believe in aristocratic notions finding a basis for damages in our law. The lady in this case should be supposed to have to put up with her deprivation in an American way, and a lesson in the doing of this might have brought her more pleasure on her trip than had she been able to have responded to the utmost to "the social amenities of other normal cultivated people." At all events, why should it be said that the carrier knew she set so very much store by all of these amenities?

We think that whenever we get into questions of this nature

we get into exceptional atmosphere, and that all that a public carrier should be bound for would be what a normal American would suffer under the same circumstances, and not a highly sensitive person trusting herself alone on a long personally conducted tour.—*Central Law Journal.*

THE JURISDICTION OF THE PRIVY COUNCIL.

The aptness of the Judicial Committee of the Privy Council for determining the complicated and grave constitutional and Imperial questions which are continually arising in one or other part of the British Empire is signally marked in the developments of the last few years. That august body has been called upon to pronounce on the validity of a proposed Canadian marriage law, on the legality of the retention of a seat in the House of Commons by a member of a firm acting for a Government department, on the true boundary between the States of the Australian Commonwealth, and on the powers of a Canadian Provincial Legislature over the waters which bound the coast of the colony. All these questions have been brought before it by a somewhat extraordinary procedure, under which vexed problems of a quasi-legal character can be referred to His Majesty's Council; and it is in virtue of this residuary jurisdiction that the Crown is about to submit to it the question of the ownership of certain lands in Southern Rhodesia which are claimed by the Chartered South Africa Company. Section 4 of the Act of William IV., 1834, which established the Judicial Committee, provided that His Majesty might refer to the Committee, in addition to any appeals coming from Courts of Justice in the Empire, "any such other matters whatsoever as His Majesty may think fit, and the Committee shall thereupon hear or consider the same, and shall advise His Majesty thereon."—*Law Journal.*

JUDICIAL CHANGES IN ENGLAND.

Our English contemporary, the *Law Times*, thus speaks of recent judicial changes in England:—

"The past week has seen several important changes in the Bench of the Supreme Court. Lord Justice Vaughan Williams and Mr. Justice Channell, after many years of strenuous and able service, have retired, the vacancies thus caused having been filled by the promotion of Mr. Justice Pickford and the elevation to the Bench of Mr. Montague Shearman, K.C., and Mr. John Sankey, K.C. Lord Justice Vaughan Williams was a judge of great distinction and sound learning, but of recent years his tendency to prolixity had been to a great extent responsible for the growing list in the Court of Appeal. Both he and Mr. Justice Channell will be greatly missed, and it is to be hoped that they will long be spared to enjoy the rest they have so well deserved. Mr. Justice Pickford is a worthy successor in every way to the Lord Justice whose place he has been selected to fill. In every branch of the common law he has shown himself a first-rate judge, and his promotion will distinctly strengthen the Court of Appeal. The selection of Mr. Shearman and Mr. Sankey is excellent, and will be warmly approved by the whole Profession. The King's Bench at the present time is particularly strong in ability, and compares most favourably even with the giants of the past."

THE PUBLIC INFLUENCE OF LAWYERS.

Lord Haldane, in the interesting speech he delivered at the City of London Solicitors' Company's banquet, remarked that "lawyers were the leaders of public opinion in this country," and that "they had it in their hands to make or mar much of the future." Never was the truth of these words demonstrated more strikingly than in the Home Rule crisis. All the three chief protagonists in the Irish question—Mr. Asquith, Sir Edward Carson, and Mr. John Redmond—are members of the Bar. To these three men, trained in a profession—which, whatever the

ignorant may believe, is accustomed to strive for peace rather than to delight in war, the nation is looking anxiously for a peaceful settlement of the Ulster problem, and upon them all will rest a very heavy responsibility if, because of any inadequate regard for that spirit of compromise which so often secures the triumph of justice in the Courts, they fail to agree upon some reasonable plan by which the threatened dangers, on one side or the other, may be avoided.—*Law Journal.*

JUDICIAL CARE OF PRISONERS AT CRIMINAL TRIALS.

An appeal which came before the Court of Criminal Appeal this week illustrated the extreme jealousy with which our courts are accustomed to guard the interests of prisoners put on their trial for criminal offences. After the summing up in a criminal trial at the assizes, the jury retired for the purpose of considering their verdict. Their prolonged absence led the clerk of assize to consider the possibility of a disagreement, and he made his way to the room to which the jury had retired in order to find out whether there was any likelihood of an agreement as to their verdict. Certain questions were put to him and answered by him, and the jury eventually returned into court with a verdict of guilty. On appeal the conviction was quashed on the ground, amongst others, that the whole of the proceedings in a criminal trial must be held in a public court. No principle of our law appears to be better established than this, although until the decision of the House of Lords in *Scott* v. *Scott* (109 L. T. Rep. 1) there was a singular dearth of judicial authority to this effect. In that case Lords Halsbury, Loreburn, and Atkinson unhesitatingly laid down that it was an inveterate rule that justice should be administered in open court, subject to certain limitations in the cases of courts exercising peculiar jurisdiction, who might hear cases *in camera* where to do otherwise would defeat the ends of justice. It is always a welcome occasion when this cardinal principle of the administration of justice is affirmed.

The case also reminds practitioners of the care exercised by

our courts to prevent any "outside" influence being brought to bear upon a jury which has been empanelled to try a provincial case. Whilst expressly disclaiming any imputation upon the conduct of the learned clerk of assize in respect of his action, the Court of Criminal Appeal held that the fact of his having answered the questions put to him by the jury after they had retired in itself vitiated the verdict. From very early times it has been a misdemeanour indictable at common law to attempt to bribe or corrupt or influence a jury by any means whatever other than by evidence or argument in open court, so as to induce them to favour one party to a judicial proceeding. A similar, and equally salutary, rule prevailed, and still prevails, in the case of a witness.—*Law Times.*

JUDICIAL JOKING.

"The Court is very much obliged to any learned gentleman who beguiles the tedium of a legal argument with a little honest hilarity," Chief Justice Erle told a member of the Bar who apologized for a sally that set the Court in a roar of laughter. To judge from the protests which are being made against judicial humour, there are persons who regard even a "little honest hilarity" as something quite alien to the serious work of the Courts. They would not object to a flash of wit from the witness box; they might even tolerate a witticism from the Bar; but they appear to think that the dignity of the Bench requires that a Judge, no matter how mirthful or tedious the proceedings over which he presides, should sit all day "like his grandsire cut in alabaster." Judicial joking may, no doubt, sometimes be carried to excess. An incident in the judicial career of Sir James Fitzjames Stephen—by no means, in the ordinary sense, a "judicial humorist"—indicates its dangers. He was trying a slander case in which both the parties were Billingsgate salesmen, and the counsel for the defendant did not fail to take full advantage of the humour of the situation. Mr. H. F. Dickens, who represented the plaintiff, seeing the Judge, as well as the rest of the Court, impressed by the jocular aspects of the case, made a strong effort to bring out the serious injury that had been inflicted upon his

client. Mr. Justice Stephen, his sense of fairness aroused, was sobered in a moment, and summed up in favour of the plaintiff. After the jury had returned their verdict the learned Judge sent this note to the plaintiff's counsel: "Dear Dickens,—I am very grateful to you for preventing me from doing a great act of injustice." Perhaps some Judges would display a better regard not only for their reputation as wits but also for the dignity of the Bench if their attempts at jocularity were rather less frequent. For laughter, though it certainly need not be banished from the Courts, may sometimes create an atmosphere in which the serious character of the work is prejudiced. A "little honest hilarity" in a Court of justice is one thing; an habitual striving after the mirth-provoking is quite another.—*Law Journal.*

We regret to record, though it occurred at the ripe age of 83, the death of the late Judge Dillon, so well known in his own country, the United States, and to the profession here. He passed away on the 5th ultimo. He was best known to us as the author of the most important contribution to the law affecting Municipal Corporations. Mr. Dillon served on the Bench of the Iowa Supreme Court and the United States Circuit Court, and was at one time President of the American Bar Association. He also occupied the position of Professor of Real Estate and Equity Jurisprudence at Columbia University, and was subsequently Storrs Professor at Yale. Mr. Dillon was not only one of the ablest lawyers of his day, but a man of the highest character, both in public and private life.

We learn from our English exchanges that a movement is on foot to form in England a Bar Association, based on the lines that obtain in Canada and the United States. In a country so small and compact as Great Britain and Ireland, the principal difficulties which confront us here are eliminated. We are glad to see our brethren across the water waking up in this matter, and have no doubt that the result will be the birth of a strong and useful Association.

REVIEW OF CURRENT ENGLISH CASES.

TRUSTEE—MORTGAGE SECURITY—INTEREST DULY PAID—MORTGAGE PROPERLY RETAINED—DISTRIBUTION OF TRUST ESTATE IN SPECIE—ALLOTMENT OF MORTGAGE TO SETTLED SHARE—MORTGAGE IN FACT WORTHLESS—LIABILITY OF TRUSTEE—JUDICIAL TRUSTEES ACT, 1896 (59-60 VICT. c. 35), s. 3—(R.S.O. c. 121, s. 37.)

In re Brookes, Brookes v. *Taylor* (1914) 1 Ch. 558. In this case a trustee sought the protection of the Judicial Trustees Act, 1896 (59-60 Vict. c. 35), s. 3 (see R.S.O. c. 121, s. 37), but without success. Part of the trust estate consisted of a mortgage on which the interest was regularly paid and the trustee had no reason to suppose that the security was not good and not properly retainable as a trust investment; he distributed the trust estate and without inspecting the mortgaged premises, which were ten miles off, or making any inquiry as to their actual value as a security, he appropriated the mortgage at its par value to a settled share. At the time of the appropriation the mortgaged premises were in fact unoccupied and in a dilapidated condition and practically worthless as a security, though the mortgagor had continued to pay the interest regularly; two years later when an attempt was made to call in the money it was found to be irrecoverable. In these circumstances Astbury, J., held that the trustee was liable for breach of trust, and was not protected by the Act.

WILL—CONSTRUCTION—ADVANCES BY PARENT TO CHILD—RELEASE OF DEBT BY WILL—RESIDUE BEQUEATHED TO WIDOW FOR LIFE AND THEN TO CHILDREN—DIRECTION TO BRING ADVANCES INTO ACCOUNT ON DIVISION.

In re Young, Young v. *Young* (1914) 1 Ch. 581. In this case a will was up for construction. The testator had made advances by way of loan to each of his sons on the understanding that they were to carry interest, but that the testator would not enforce payment, and that if not repaid the advances were to be brought into account on the division of the testator's estate. The testator never required repayment, but some of the advances were repaid spontaneously. By his will the testator gave his residuary estate to his wife for life and on her death he directed it to be divided among such of his children as should then be alive

and the issue of any deceased child to take his or her parent's shares. The will further provided that if a son should at the death of the testator's wife be an undischarged bankrupt his share should be held in trust for his wife and directed that in making the division of the estate any advances made to a son which had not been repaid should be brought into account with interest at 2 per cent. from the date of the advance to the date of the testator's wife's death. The question was whether the effect of these provisions was to release the sons from liability for their respective debts and Sargant, J., held that they were not released, and that they were liable to pay interest thereon to which the widow would be entitled during her lifetime.

ADMINISTRATION—EXECUTORS—ASSETS OF TESTATOR—BUSINESS OF TESTATOR CARRIED ON BY EXECUTORS—NO PROVISION IN WILL FOR CARRYING ON BUSINESS—EXECUTOR'S RIGHT TO INDEMNITY—CREDITORS OF TESTATOR AND CREDITORS OF EXECUTORS—PRIORITY.

In re Oxley, Hornby v. *Oxley* (1914) 1 Ch. 604. This was an administration action in which a question arose as to the respective rights of creditors of the testator and creditors of the executors whose claims had been incurred by the carrying on by the executors of the business of the deceased. There was no provision in the will directing the executors to carry on the business of the testator, but they had done so in order to provide for the support of the testator's widow who was also an executrix. At the time of the testator's death in 1908 he was indebted to the plaintiffs, who knew that the executors had from that time carried on the business and took no steps to prevent them from so doing. In 1912, the executors filed a petition in bankruptcy and were adjudicated bankrupt. The plaintiff then brought the present action and obtained the usual judgment for the administration of the deceased testator's estate. The present proceeding was an application on behalf of certain persons who had become creditors of the executors in carrying on the business. They claimed that the plaintiffs having had knowledge of the business being carried on must be deemed to have acquiesced therein and they claimed to be entitled to priority over the creditors of the testator to the extent which the executors were entitled to be indemnified by the estate for the liabilities incurred in carrying on the business. Joyce, J., dismissed the application, and the Court of Appeal (Cozens-Hardy, M.R., and Buckley and Phillimore, L.JJ.) affirmed his decision, being of the opinion that the knowledge of

WILL—LEGACY—"DOMESTIC SERVANT"—MALE NURSE—TEMPORARY SUSPENSION OF SERVICE.

In re Lawson, Wardley v. *Bringloe* (1914) 1 Ch. 682. In this case the meaning of "domestic servant" was under consideration. By a will a testator who died in April, 1912, bequeathed to each of his "domestic servants" who should have been in his service two years prior to his decease, the amount of one year's wages. One of the claimants was a male nurse who was engaged in 1907 by the receiver in lunacy of the testator's estate, as an assistant attendant on the testator at a weekly wage of one guinea. He did not sleep in the house but took some of his meals there. From November, 1910, until the testator's death he was engaged for night duty at £2, 2s., a week, but was absent on a holiday from June 26 to October 23, 1911, during which time he received no wages but it was understood that he should, and he did return to the testator's service. The question was whether he came under the category of "domestic servants" and Eve, J., held that he did. The term "domestic" he held to be equivalent to "household" and that although, to fulfil the requirements of the will, it was necessary for the service to be continuous for the period named, that did not involve service from day to day and the suspension of service with the consent of the master did not disentitle the claimant to the legacy.

COMPANY—TRUST DEED TO SECURE DEBENTURES—RENUMERATION OF TRUSTEES—APPOINTMENT OF RECEIVER.

In re Locke, Wigan v. *The Company* (1914) 1 Ch. 687. By a trust deed to secure debentures of a limited company there was a primary trust to pay the costs and expenses in the execution of the trust including the trustees' remuneration which by the deed was fixed at £105 per annum. In 1911 an action was commenced to carry the trusts into execution and a receiver was appointed on July 14, 1911. The remuneration of the trustee had been paid to Jan. 1, 1911. The trustee claimed to be paid his remuneration down to the close of the proceedings in the action out of the proceeds of the sale in priority to the debenture holders, but Eve, J., held that he was only entitled to remuneration down to the appointment of the receiver; but inasmuch as he had not rendered any appreciable service since that date, he was not entitled to any further remuneration.

able nuisance and affirmed the judgment of Joyce, J. Phillimore, L.J., considered the matter one for police regulation and therefore that the defendants were not liable.

WILL—CONSTRUCTION—CHARITABLE TRUST—"RESIDENCE FOR LADIES OF LIMITED MEANS"—TRUSTEES TO EXPEND RESIDUE "AS THEY KNOW TO BE MOST AGREEABLE WITH MY DESIRES"—PAROL EVIDENCE—SECRET TRUST—COMMUNICATION TO ONE OF TWO TRUSTEES.

In re Gardom, Le Page v. *Attorney General* (1914) 1 Ch. 662. In this case a will was up for construction, first as to a trust for charity and second as to a bequest of residue. The testatrix who died in March, 1911, by her will, made in 1900, devised and bequeathed her property to Dr. Page and his daughter in trust to sell and convert such portions as may be necessary for the maintenance of a temporary house of residence "for ladies of limited means," and if at any time such house should be considered unnecessary, the money thus set apart was to be distributed by the trustees yearly among such ladies as the trustees might think worthy of such assistance. The will appointed Dr. Page and his daughter executors and directed that they should "expend all or any of the residue of my estate in such manner as they know to be most agreeable with my desires." By codicil in 1903, the testatrix confirmed her will. Dr. Page proved that in 1886 the testatrix told him that she intended to provide for his three children, and that on various occasions she had said she would make a will and leave all to them, and that in 1900 she handed him a duplicate of the will and said, "I have told you many times I was going to make my will and that I would leave all to your dear girls." The last statement was made before or contemporaneously with the execution of the will and Dr. Le Page accepted the trusts, but no statements as to the testatrix's intentions were made by her to his co-executrix prior to the will. Eve, J., held that the trust for the maintenance of the house was a good charitable trust; and he was also of the opinion that the evidence was sufficient to warrant him in declaring that the residue was held in trust for the three daughters of Dr. Le Page. The next of kin appealed on the second point and the Court of Appeal (Cozens-Hardy, M.R., Eady and Phillimore, L.JJ.) reversed his decision on the ground that the evidence failed to establish any trust in favour of the daughters and therefore the next of kin were entitled to the residue.

the plaintiffs that the business was being carried on did not in any way render them assenting parties. The decisions of Kekewich, J., *In re Brooks* (1894) 2 Ch. 600, and of the Irish Master of the Rolls *In re Hodges* (1899) 1 I.R. 480, were held to be bad law. If the plaintiffs had made any claim to the assets which had accrued from the subsequent carrying on of the business, that might have amounted to concurrence in the carrying on of the business, but there was no evidence that they had done so.

LUNATIC—REAL ESTATE—ESTATE TAIL—POWER TO BAR ENTAIL —LUNACY ACT, 1891 (54-55 VICT., c. 65) s. 27—RE SETTLEMENT OF PROCEEDS.

In re E. D. S. (1914) 1 Ch. 618. In this case the Court of Appeal (Cozens-Hardy, M.R., and Buckley and Phillimore, L.JJ.) held that there is jurisdiction under the Lunacy Act, 1891 (54-55 Vict., c. 65) s. 27, to authorize the committee of a lunatic to sell the lunatic's estate tail, and for that purpose to bar the entail, and that, under ordinary circumstances, the proceeds of the sale should be resettled by the Judge under his general jurisdiction, so that the remainderman may not be prejudiced.

NUISANCE—OBSTRUCTION OF HIGHWAY—THEATRE—COLLECTION OF CROWD BEFORE OPENING OF DOORS—INTERFERENCE WITH ACCESS TO ADJACENT PREMISES—INJUNCTION—POLICE REGULATION.

Lyons v. *Gulliver* (1914) 1 Ch. 631. The defendants in this case carried on a theatre on premises near those of the plaintiffs. In order to attend the theatre crowds assembled morning and afternoon in the street during important periods of the day in such large numbers that access to and egress from the plaintiffs' premises were seriously interfered with. The plaintiffs claimed that the defendants were guilty of causing an actionable nuisance and they claimed an injunction. Joyce, J., tried the action and at his suggestion the defendants undertook to open their doors an hour before the commencement of the performance. He therefore refused an injunction and awarded nominal damages. From this decision the defendants appealed, contending that they were lawfully carrying on their business in the ordinary way, and that as the police had undertaken to regulate the crowd the defendants were not responsible. The Court of Appeal (Cozens-Hardy, M.R., and Eady and Phillimore, L.JJ.) held, (Phillimore, L.J., dissenting), that the defendants had committed an action-

WILL—CONSTRUCTION—CAPITAL OF SHARES UNDISPOSED OF—SUPPLYING OMISSION BY IMPLICATION—"SURVIVORS OR SURVIVOR."

In re Mears, Parker v. *Mears* (1914) 1 Ch. 694. By the will in question in this case the testator bequeathed personal estate on trust to pay the income thereof to his three daughters for life and after the decease of any of them leaving issue to pay a third part of the capital of the trust fund to her children, and in the event of any of his daughters dying without issue, the survivor or survivors were to take her share of the income for life, and in case all of his daughters should die without leaving issue the capital of the trust fund was to be divided among his next of kin. What happened was that one daughter died leaving issue to whom one-third of the capital was paid, then the other two died without issue and it will be seen this contingency was not provided for. It was contended on behalf of the children of the daughter who left issue that the Court ought to hold that by implication the two-thirds of the capital were bequeathed to those children, but Eve, J., held that there was an intestacy as to the two-thirds.

DISCOVERY—PATENT—INFRINGEMENT—NAMES OF MANUFACTURERS OF INFRINGING ARTICLES.

Osram Lamp Works v. *Gabriel Lamp Co.* (1914) 1 Ch. 699. In this case which was an action for the infringement of the plaintiff's patent, the plaintiffs sought to obtain from the defendants, by way of discovery, information as to the persons to whom they had sold alleged infringements of the patent in question and of the persons by whom such alleged infringements were manufactured. The application was for a further and better answer to these interrogatories and was dismissed by Eve., J, who said, "It is legitimate to save labour and expense by means of interrogatories directed to obtain admissions of fact which the party interrogating must prove in order to establish his case; it is not legitimate where the admissions sought relate to facts which it is not incumbent on the interrogating party to prove, but which, if proved, may assist him in proving those facts on the proof which his right to relief depends."

PRACTICE—FOREIGN FIRM—SUING FOREIGN FIRM IN FIRM'S NAME—SERVICE OUT OF THE JURISDICTION—ORD. xlviii A. R. 1—(ONT. RULES 25, 100, 101.)

Von Hellfield v. *Rechnitzer* (1914) 1 Ch. 748. In this case the plaintiff sued, among others, a French firm carrying on business

in France, consisting of three partners all domiciled in Paris and having no place of business in England. These defendants were sued in the firm name and leave having been obtained to serve them out of the jurisdiction they were duly served at the principal place of business of the firm. They applied to set aside the proceedings, on the ground that they could not be sued in the firm name. Astbury, J., granted the application and the Court of Appeal (Buckley and Phillimore, L.JJ.) affirmed his order: A typographical error appears in the headnote of this case, a very unusual thing, we may observe, in the Law Reports.

COMPANY—WINDING UP—SURPLUS ASSETS—PREFERENCE SHARES —CAPITAL RETURNED—RIGHTS OF PREFERENCE SHAREHOLDERS IN SURPLUS.

In re National Telephone Co. (1914) 1 Ch. 755. This was a winding-up proceeding. After payment of the ordinary and preference shares in full a surplus of assets remained, in which the preference shareholders claimed a right to participate, but Sargant, J., rejected the claim, holding that the preferential rights accorded to preference shareholders on the creation of the preference shares, either with respect to dividends or return of capital, is *prima facie* a definition of the whole of their rights as to such shares, and negatives any further or other rights to which, but for the specified rights, they would be entitled. It may be noted that the articles of association in this case expressly provided that the preference shares were not to share in surplus assets.

COMPANY—WINDING UP—EXAMINATION OF DIRECTORS—POWER TO ORDER EXAMINATION IN OPEN COURT—COMPANIES CONSOLIDATION ACT, 1908 (8 EDW. 7, c. 69) s. 174—(R.S.C., c. 144, s. 121).

In re Property Insurance Co. (1914) 1 Ch. 775. This was a winding-up proceeding in which the liquidator having found serious irregularities in the conduct of the company's business, had obtained *ex parte* a summons for the examination of certain directors of the company in open court The English Rules as to winding-up proceedings provide that such examinations may be taken before a registrar of the Court. The directors concerned applied to rescind the summons on the ground that it should not have been made *ex parte* and at all events should not have directed the examination to take place in open Court, the applicants being willing to submit to private examination before the registrar.

Astbury, J., held that as there was no charge of fraud against the applicants there was no reason why the examination should have been ordered to take place in open Court and to that extent he varied the order.

LANDLORD AND TENANT—COVENANT NOT TO ASSIGN OR SUB-LET WITHOUT CONSENT—CONSENT NOT TO BE WITHHELD IN CASE OF A RESPECTABLE AND RESPONSIBLE PERSON—WITHHOLDING CONSENT—REASONABLE TIME—ASSIGNMENT WITHOUT CONSENT.

Lewis v. *Pegge* (1914) 782. This was an action by the plaintiff company as landlords to recover possession of certain demised premises on the ground that they had been sub-let by the lessee without the plaintiff's consent. The lease contained the usual covenant by the lessee not to assign or sub-let without the consent of the lessors, but provided that the consent should not be withheld in case the proposed assignee or sub-lessee was a respectable and responsible person. On April 3, 1913, the lessee notified the plaintiffs of his desire to sub-let the premises to one Higham, a respectable and responsible person, and asked the company's consent. Owing to the forgetfulness of the plaintiff's secretary the request was not brought to the attention of the directors of the plaintiff company; and on April 14, 1913, the lessee, having received no reply, sub-let to Higham and gave him possession. Neville, J., who tried the action, held that, in the circumstances, there had been no breach of covenant as the consent of the plaintiff was a pure formality and had been withheld, and he thought that in the circumstances of this case, from April 3 to April 14, was a reasonable time to wait for a reply. The action therefore was dismissed with costs.

CONTRACT—SALE OF LAND—MEMORANDUM IN WRITING—SIGNATURE BY AGENT "LAWFULLY AUTHORIZED"—SOLICITOR—PART PERFORMANCE—STATUTE OF FRAUDS (29 Car. 2, c. 3) s. 4—(R.S.O., c. 102, s. 2.)

Daniels v. *Trefusis* (1914) 1 Ch. 788. This was an action for the specific performance of a contract for the sale of land in which the defendant set up the defence of the Statute of Frauds (29 Car. 2, s. 3) s. 4, (R.S.O. c. 102, s. 2). The memorandum in writing on which the plaintiff relied came into existence in somewhat peculiar circumstances. The contract was in the first place verbally made by the defendant with one, Girdlestone, who was

really the plaintiff's agent. After the contract with the defendant had been made Girdlestone claimed to be the owner of the property under a contract with the plaintiff and he subsequently brought an action against the plaintiff for specific performance of his alleged contract which was dismissed. The plaintiff's solicitor in the course of that action being desirous of knowing what the defendant in the present action could testify about the matter, wrote to his solicitors asking to be furnished with a statement of the evidence the defendant, Trefusis, could give and in reply received back a statement signed by the solicitors, which it was admitted contained a sufficient memorandum of the contract to satisfy the statute; but it was claimed that though his solicitors were Trefusis' agents, they were not agents for the purpose of signing any memorandum under the statute; but Sargant, J., who tried the action, held that it was not necessary in order to comply with the statute that the agent signing the memorandum should be expressly appointed to sign a memorandum under the statute, but that it was enough that he had authority as agent to sign the particular memorandum he did sign, though it might unexpectedly turn out that such memorandum would have the effect of being a memorandum which would bind the client under the statute. It further appeared in the evidence that during the negotiations with a view to carrying out the sale the defendant's solicitors had requested that two weekly tenants of the property should be got rid of, and that in pursuance of this request notice to quit was given to the tenants, who gave up possession in consequence. This the learned Judge held to be an act of part performance unequivocally referable to the contract, which also entitled the plaintiff to the relief claimed.

COMPANY—DEBENTURES—FLOATING CHARGE—RESERVATION OF POWER TO COMPANY TO MORTGAGE OR DEAL WITH ITS PROPERTY—SUBSEQUENT FLOATING CHARGE—PRIORITY.

In re Cope, Marshall v. *Cope* (1914) 1 Ch. 800. In 1894 a company issued £2,000 of debentures secured by a floating charge on its undertaking and property, all of which debentures were declared to be entitled to rank *pari passu* but it was provided that notwithstanding the charge thus created, the company was to have power to mortgage and deal with its property as it might think fit. In 1904 the company created a second series of debentures for £2,000 which were also secured by a floating charge and all of which debentures were declared to rank *pari passu*. The question was as to the priorities of the first and second series of de-

bentures, and Sargant, J. held that the second series did not rank *pari passu* with the first series, but after them.

SOLICITOR—ILLEGAL AGREEMENT—PERMITTING NAME TO BE USED FOR PROFIT OF UNQUALIFIED PERSON—SOLICITORS' ACT 1843 (6-7 VICT. c. 73), s. 32—(R.S.O. c. 159, s. 28).

Harper v. *Eyjolfsson* (1914) 2 K.B. 411. This was an action for malicious prosecution, in which judgment was given at the trial for the plaintiff for £175 from which the defendant appealed on the ground that the Judge had improperly admitted evidence of an agreement of service between the plaintiff, who was not a qualified solicitor, and his employer, one Nimmo, who was a solicitor. By the agreement in question Nimmo agreed to employ the plaintiff as his clerk on the terms of paying him £3.10 per week and in addition a bonus of 25 per cent. on all gross costs and other profits (exclusive of disbursements) received by Nimmo from business introduced by the plaintiff, and it was also provided that in the event of the determination of the engagement the bonus of 25 per cent. should be continued to be paid, less £3.10.0 per week. This agreement the defendants contended was an illegal agreement and in contravention of the Solicitors' Act 1843, s. 32, and therefore inadmissible. The Divisional Court (Ridley and Bankes, JJ.) held that the first part of the agreement was unobjectionable and valid as it merely provided for the common case of a managing clerk introducing clients and business to his employer as his agent but they held that the second part of the agreement whereby the solicitor became bound to continue to pay the bonus after the relationship of master and clerk had ceased was a contravention of the Solicitors' Act, and was an agreement for carrying on business for an unqualified person: *semble* such an agreement would be invalid in Ontario. See R.S.O., c. 159, s. 28.

ARBITRATION—AWARD—MISCONDUCT OF ARBITRATOR—REJECTION OF EVIDENCE.

Williams v. *Wallis* (1914) 1 K.B. 478, may be briefly noticed for the fact that a Divisional Court (Lush and Atkin, JJ.) express the opinion, though they do not actually decide, that improper rejection of evidence by an arbitrator may be misconduct, which would justify the setting aside of his award.

REPORTS AND NOTES OF CASES.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Chancellor Haldane, Lords Atkinson and Moulton.] [110 L.T. Rep. 484.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA *v.* ATTORNEY-GENERAL FOR DOMINION OF CANADA; ATTORNEY-GENERAL FOR PROVINCE OF ONTARIO AND OTHERS, *Interveners.*

Provincial Legislature — Authority to grant fishing rights — Tidal and non-tidal waters—Railway belt—British North America Act, 1867 (30 & 31 *Vict. c.* 3), *ss.* 91, 92, 109.

Appeal by special leave from an opinion given by the Supreme Court of Canada on the 18th February, 1913, in a reference by the Governor-General in Council, dated the 29th June, 1910, under s. 60 of the Supreme Court Act (R.S.C. 1906, c. 139).

Under the "terms of union" upon which British Columbia was admitted into the Union of Provinces created by the British North America Act, 1867, the Legislature of that province granted to the Dominion Government what is known as the railway belt, consisting of a belt of public lands along the entire length of a certain line of railway which was to be constructed. By s. 81 of the Act the Parliament of Canada has exclusive legislative authority over "sea coast and inland fisheries," and under s. 92 of the Provincial Legislature has exclusive legislative power over "property and civil rights in the provinces."

Held, that it was not competent to the Legislature of British Columbia to authorize the Government of that province to grant the exclusive right to fish in either the tidal or navigable non-tidal waters within the railway belt as the grant of that land to the Dominion Government had passed the water rights incidental to such lands.

Held, also, that it was not competent to the Legislature of British Columbia to authorize the Government of that province to grant the exclusive right of fishing in the open sea within

three miles of the coast of that province or in any arms of the sea and estuaries of the rivers, such right being a public right with regard to which the Dominion Parliament has exclusive legislative authority.

Sir Robert Finlay, K.C., *Lafleur*, K.C., *Geoffrion*, K.C., and *Geoffrey Lawrence*, for appellants. *Newcombe*, K.C., *Bateson*, K.C., *Stuart Moore*, and *Raymond Asquith*, for respondent.

Book Reviews.

A Commentary on the Canadian Law of Simple Contracts, with additional chapters on the Rules governing Canadian Appeals to the Judicial Committee of the Privy Council and the Supreme Court of Canada. By W. WYATT PAINE, Barrister-at-law. Toronto: The Carswell Company, Ltd., 19 Duncan Street. London: Sweet & Maxwell, Ltd., 3, Chancery Lane. 1914.

The author of the above, which claims to be the first Canadian treatise on the law on Contracts, is already favourably known to the profession as the author of a Commentary on the Law of Bailments, etc., and as the editor of the 15th and 16th editions of Chitty on Contracts and of the 3rd edition of Clerk and Lindsell on Torts It is noteworthy that we should have to go to England for someone to write a treatise on Canadian law; but we are glad that it is so, for the work seems to be excellently well done, and the book will be found a most useful addition to our legal literature in the Dominion of Canada. It must not be forgotten, however, in this connection, that the last edition of Leake on Contracts, which is in the front rank in the elucidation of Company Law, came to us in 1912 with a Collection of Canadian Cases annotated by Hon. Mr. Justice Russell, making it in effect, though not in name, a Canadian treatise.

The author states that his principal object in the preparation of this work has been to select and exhaustively treat those matters in connection with simple contracts which are of common occurrence in business. An interesting, and, we may add, a very helpful feature of this book is that it is designed to be a companion volume to Chitty's Treatise on the Law of Contracts, and it is linked to that well known work by marginal references to those pages in the latest edition of Chitty, in which a similar point has been discussed.

The difficulties of law-book making which exist in the United States come before us in this country in the work before us.

We allude to the varieties in statute law in the different provinces of the Dominion as will be seen by the Table of Statutes, which gives the Imperial Statutes and those of the Dominion as well as the various legislative enactments of the provinces and territories of the Dominion. This Statute law is fully referred to, constituting about one-half of the volume, and is carefully annotated with references to the appropriate authorities. The rules governing Canadian appeals to the Judicial Committee of the Privy Council and the Supreme Court of Canada form a useful appendix. The volume appears in the best style of its well known publishers.

A Treatise on the Law of Carriers, as administered by the Courts of United States, Canada and England. By DEWITT C. MOORE, of the Johnstown New York Bar, U.S.A., author of the Law of Fraudulent Conveyances. Second edition, in three volumes. Albany, N.Y.: Matthew Bender & Company. 1914.

This work claims to cover the principles and rules applicable to carriers of goods, passengers, live stock, common carriers, connecting carriers and interstate and international transportation by land and water. An ambitious programme, but well carried out.

There are law books galore on the subject of carriers, some of them dealing with special features of this large subject, such as carriers by land, carriers by water, railways, etc., and soon probably we shall have books on carriers by aeroplanes and submarines.

The first edition of this work appeared in one volume in 1904. It now comes in three volumes, and this fact, and a glance at the table of cases, indicates how the work has grown, and shews as well the great industry and research of the author, for the citations number over 15,000. This multitude of cases would almost lead to a suggestion as to the desirability of weeding out many of them, for the simple reason that a busy practitioner would be grateful for help that would save him the labour of wading through such a mass of cases as are given to support many of various propositions.

The work is of a very comprehensive character and the subjects are systematically arranged from a practical and workaday standpoint, thus giving the information in form easy of access. This is a most important feature in a work treating on a subject so wide, and one ever growing in importance and development. We think it may safely be said that Mr. Moore has

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Flotsam and Jetsam.

Certain observations that have been made recently by some members of the Bench, anent a series of reports published by one of our contemporaries, draws attention to the fact that in this country there are no "authorised" or "regular" reports of cases that have any monopoly or privilege for citation. As Lord Esher pointed out in 1889, the courts will accept "reports by barristers who put their names to their reports." The matter is thus tersely and accurately put in Lord Halsbury's Laws of England: "A barrister has the right of authenticating by his name the report of a case decided in any of the superior courts. As soon as a report is published of any case with the name of a barrister annexed to it, the report is accredited, and may be cited as an authority before any tribunal."

WOMEN AND THE LAW.—Last week a deputation was received by the Lord Chancellor in support of the admission of women as solicitors, legislation being clearly necessary for this purpose, having regard to the decision of the Court of Appeal in *Bebb* v. *The Law Society*. According to Lord Haldane's observations, both he and the Prime Minister and the law officers are in favour of such admission, but, according to the reports published in the Press, Mr. Hills was the sole member of the deputation who belonged to the branch immediately concerned. The Bar has already expressed its views as to the opening of the Inns of Court to women, and we shall feel greatly surprised if, when the Law Society is given an opportunity of considering the matter, there is not a very large majority against any change being introduced by statute. As we have already stated, although the present generation may see lady barristers and lady solicitors, we do not believe any benefit will accrue to the ladies themselves, the Profession, or the public.—*Law Times*.

By the death of Mr. Danckwerts, K.C., the Bar has lost a great personality. As a lawyer he had hardly an equal, while his memory for statutes and decided cases was extraordinary. Although perhaps often somewhat brusque in manner, he was popular with the Profession, and he will be generally missed.

ERRATUM.

By an error of proofreader the following words were omitted at the end of the second paragraph on p. 295: "is based on it being negligence per se."