Canada Law Journal.

VOL. LIV. TORONTO, DECEMBER, 1918. No. 12

CANADIAN BAR ASSOCIATION.

THE ADMINISTRATION OF JUSTICE.

We publish in full, as promised, the report of the Committee of the Association on the Administration of Justice, presented at the last meeting in Montreal by Mr. W. J. McWhinney, K.C., as amended and adopted by the Association. It may be remembered by some of our readers that we have in these columns on various occasions advocated some if not all these commendations contained in the report. We trust they will receive due attention by those in authority. The report reads as follows:—

1. *Court Officials.*—It is respectfully submitted that in these democratic days, some of the positions of officials attending the Courts have become obsolete and are maintained,. not from necessity or usefulness, but from mere custom, and serve no useful purpose. The moneys thus expended can be applied to meet increased expenditure and to secure efficiency in other official positions. It is also submitted that all official positions requiring legal knowledge should be filled from the ranks of the legal profession and not by laymen under the patronage system.

2. *Interprovincial Agency Allowances.*—The information of your committee is, that despite resolutions of Bar Associations and statutes, agency allowances are made in most Provinces. It is therefore recommended that the statutes be amended, where necessary, and a uniform practice be adopted, so that agency allowances may be recognized and permitted of one-third to the forwarding solicitor of all fees and remuneration charged or allowed, excepting disbursements and counsel fees where counsel is retained outside the agent's firm with the consent of the principal.

3. *Judgments and their Enforcement.*—(This clause was dropped as the subject was reported on by the special Committee on Foreign Judgments.)

4 *Judicial Positions.*—Appointments to the Bench through political exigencies or financial necessities of the aspirants should be discouraged, and legal attainments and other judicial qualities should be sought in making such appointments. The present method, it is alleged, is the result of the patronage system, and it is strongly urged that these appointments should be independent of patronage control and that recommendations from the Bar Associations and Law Societies, as to the fitness of those available for such positions, should be solicited and should have weight.

5. *Judiciary as Arbitrators, Commissioners, etc.*—Members of the judiciary should be suitably rewarded for their service to the state, and should not find it necessary to increase their annual allowances by using their time and impairing their efficiency for the service for which they are appointed, and their duties and privileges should be defined and limited by statute, so as to secure to the state the services intended when the position was accepted and appointment made, namely, that all their time, skill and legal attainments should belong to the state. This meaning of the acceptance and appointment is too often overlooked, and absence from duty as arbitrators, commissioners and the like, has become very prevalent and is conducive of neglect of duty, of adverse criticism, and tends to lessen the esteem and dignity of the position.

6. *Multiplication of Magistrates and Justices.*—It has been called to the attention of the committee that in some Provinces, happily not all, the appointments to these positions have far exceeded reasonable requirements.

7. *Marriage and Divorce.*—That the Parliament of Canada be requested to enact uniform grounds of divorce and the administration of the law be entrusted to superior Provincial Courts, provided that this shall apply only to such Provinces as pass Acts putting the law in force.

8. *Procedure.*—The adoption of the Judicature Act and rules of practice has become so general, that there should be no exception, save probably in Quebec. In most cases the English Judicature Act and Rules of Court have been closely followed, and this procedure in the English speaking Provinces should be made

uniform. A special committee should be appointed to draft a uniform code of practice and procedure. Such committee should be composed of two representatives selected by the executive of each Province, and should meet some days prior to the next annual meeting. A comparison should be made of English and French procedure. There is good in every procedure as well as commonplace. The committee might assemble the good and discard the faulty.

9. *Salaries of Judiciary.*—The minimum salaries to the respective members of the judiciary should be as follows:—

(a) Supreme Court of Canada—	
Chief Justice	$15,000
Justices	12,000
(b) Exchequer Court of Canada—	
Chief Justice	$10,000
Assistant Justice	8,000
(c) Appellate Courts—	
Chief Justice	$12,000
Justices	10,000
(d) Supreme or Superior Courts—	
Chief Justice	$10,000
Justices	9,000
(e) County and District Courts—	
All Judges	$6,000

Having regard to increased jurisdiction, in many of the Provinces, of County and District Courts, and the prevailing tendency to increase such jurisdiction, to the demands made generally on the judiciary as leaders in the administrative life of their respective communities, to the many calls made on them, and to the dignity desirable to be maintained, the salaries fixed many years ago are wholly inadequate. These essentials are increasing the difficulty of securing the leaders at the Bar, when private means are lacking or the desire to serve and to make a name for the honour roll is not sufficiently appealing.

10. *Statutes.*—The annual volume of the Dominion statutes gives a summary of all amendments since the previous consolida-

tion, and also separates public from private Acts and adds a convenient classification of subjects, which practice is a time-saver and is worthy of adoption by all the Provinces in issuing their annual statutes.

11. *Reports.*—The Association as representative of all branches of the legal profession in Canada, and with pride in the manner in which our Courts are discharging their judicial duties, ventures in a spirit, not of criticism but of co-operation, to address to the Courts whose opinions are reported the following comments and suggestions:—

The accumulation of reported cases is the subject of grave concern and with the growth of the population litigation in all the Courts will increase in like proportion, and it is not improbable that in the near future the burden of accumulated precedent will become serious and may jeopardise the doctrine of the sanctity of judicial precedent.

The Association recognizes the joint interest of the Bench and Bar, and does not minimize the responsibility of the Bar for this evil, nor its duty to co-operate in applying the remedy. The Association submits the matter is one for the special cognizance of the judiciary, and no reform can be so effective as those remedies which judicial initiative can supply.

The Association therefore approaches the Courts for consideration, and urges that they seriously address themselves to this problem, and with all respect submits the following suggestions:—

(a) A conscious effort at the shortening of opinions and the recognition of brevity as a cardinal virtue second only to clearness.

(b) An avoidance of multiplied citations and of elaborate discussions of well-settled principles and of lengthy extracts from text books and reports.

(c) The presentation of so much and no more of the facts as are necessary to present the precise question at issue.

(d) A reduction of the number of reasoned opinions and a corresponding increase in the number of memorandum or *per Curiam* decisions, with a brief statement, when necessary, of the points decided and of the ruling authorities.

MARRIED WOMEN'S PROPERTY.

The recent case of *Reid* v. *Morwick*, 42 O.L.R. 224, involved a question which, with all due respect to the Appellate Division, does not appear to us to have been satisfactorily answered. The plaintiff was the execution creditor of a man who it appeared, according to the finding of the majority of the Court, carried on a business in partnership with his wife. The wife's claim to be the sole owner of the business was rejected by the majority of the Court, Maclaren, Magee and Ferguson, JJ.A. (Hodgins, J.A., and Clute, J., dissenting). The conclusion being reached that the business was the partnership business of the husband and wife, it became necessary to determine the effect of section 7 of the Married Women's Property Act. That section provides *inter alia* that: "Every married woman, whether married before or after the passing of this Act, shall have and hold as her separate property, and may dispose of as such, the wages, earnings, money and property gained or acquired by her in any employment, trade or occupation in which she is engaged or which she carries on and in which her husband has no proprietary interest . . . ." This section it will be seen deals specifically with "wages, earnings, money and property gained or acquired" by any married woman "in any trade or occupation in which she is engaged or which she carries on and in which her husband has no proprietary interest." This Act it must be remembered is an alteration of the common law and in so far as the Act does not alter the common law the common law must still govern the rights of property of married women. The section above quoted seems expressly to exclude wages, earnings, money and property gained or acquired by a married woman in a business in which her husband has any proprietary interest, and the proper conclusion would seem to be that if a married woman carries on a business in partnership with her husband then no part of the gains and profits of the business are made the separate property of the wife, and therefore they are governed by the common law and are therefore the sole property of the husband. This conclusion it may be observed does not affect the separate property which the wife may put into such a business by way of

capital, it merely prevents any earnings and profits derived therefrom in any such business from becoming her separate property.

The Appellate Division, however, appears to have reached the conclusion that a partnership may be carried on by husband and wife on the same terms as if the parties were unmarried; but that does not seem to us to be giving a correct interpretation of section 7. According to our view the declaration of law on the finding of fact ought to have been that the husband alone was entitled to the profits of the business and that the same, together with his one-half share in the capital, were liable for the satisfaction of the plaintiff's debt.

HIGHWAYS.

There is an observation of Mr. Justice Riddell in the recent case *Re Toronto and Toronto & York Radial Ry. Co.*, 42 O.L.R. 545, which perhaps is open to question. Referring to Yonge St., the learned Judge says, "the County of York was from 1865 onward the owner in fee of that part of Yonge St. now in controversy." If the learned Judge is correct in this statement, then Yonge St., at the place in question, must have been an exception to the general law of public highways. The common law of highways assumed in the absence of evidence to the contrary that all highways were laid out and dedicated to the public use by the owners of the land on either side thereof, and hence the freehold of the highway was vested in the proprietors of the land on either side *ad medium filum;* and we imagine it must have been in deference to this principle of the common law that our earliest Municipal Acts, in dealing with the question, declared that the soil and freehold of every highway laid and according to law "shall be vested in Her Majesty Her heirs and successors": See C.S.U.C., c. 54, s. 314. This provision in varying forms continued to be the law down to the year 1913, when, by the revision of the Municipal Act, 3-4 Geo. 5, c. 43, s. 433, a change was made, and the soil and freehold of highways were then vested in the municipalities. If Yonge St. was subject to the ordinary law, therefore, it would not be until the year 1913, that the soil and freehold could have been vested in any municipality, and by

that time the County of York had ceased to be the municipality having jurisdiction over the road at the place in question, and therefore it would never at any time have been entitled to the soil and freehold. Whether Yonge Street was or was not an exception to the general rule we are not prepared to say; the learned Judge says that the history of that street is curious, and possibly its legal status may have differed from other streets. Until the change above referred to was made, the municipalities, as a general rule had merely a possessory and controlling right over public highways laid out by the Crown.

WHEN IS A ROCK NOT A ROCK.

In the case of *Mills* v. *Continental Bag and Paper Co.* certain contractors agreed "to do all the excavating, and remove all material, except rock, from the site of the factory building of the owners in Ottawa, remove same from the premises, and dispose of same as they may see fit;" the price being $1 per cubic yard for all material so removed. During the work the contractors encountered some large boulders, and removed them. Their claim was for payment of the extra cost thereof, upon the ground that their contract did not include removing them. The County Court Judge held that boulders were not "rock" within the meaning of the contract. He discarded evidence given as to the practice or custom in Ottawa. The Court of Appeal held that boulders were "rock," and, that being so, the contractors' contention was correct, and allowed the appeal.

The writer was interested in this judgment in that he was a railway engineer, before going to law, and lived in a boulder country, in what was supposed to be the track of a wandering glacier in the Ice Age. He ventures to dissent from the above finding of the Court of Appeal. A "boulder" may be a pebble, or it may be a mass as big as a house. It is a foreigner wherever it is found. It would be ridiculous for a contractor to claim extra payment for the removal of a stone a few inches in circumference or even a yard square, but it would be equally unfair to ask him

to remove from the foundation space a boulder occupying a large part of that space, and which could only be removed by blasting. It is unreasonable to suppose that the contracting parties meant that the contractors were to be paid extra for removing boulders, which could be either put on a wagon, or easily removed by ordinary appliances, but that is the effect of the decision of the Court of Appeal. The learned Judge who delivered judgment of the appellate Court searched the dictionaries for the meaning of the word "rock," but not for the meaning of the word "boulder," and the Court holds that all boulders being "rock" must be paid for extra, no matter how small. Boulders are not "rock" in that sense. A small stone surely would not be "rock" within the meaning of the contract, but the Court so holds. What the contracting parties must have meant was, that the contractors should remove, at $1 per cubic yard, all material, stones or otherwise, which could be removed by ordinary appliances, and which did not necessitate the extra cost of blasting, etc, as a preliminary for the purpose of removal.

All this means that the solving of the problem was impossible without evidence of the facts connected with it as to the size of the boulders, and perhaps what was customary in that locality, etc. A just judgment seeking to interpret the contract, and to ascertain the intent of the parties, is not obtainable from a dictionary definition of the word "rock."

We know nothing of the case except what appears in the short report in 15 O.W.R. 131. There may have been some evidence that there were boulders of such a size as to be properly called "rock" within the meaning of the contract. If so it should be mentioned when the case is fully reported.

NOTES FROM THE ENGLISH INNS OF COURT.

"The End of the War."

When does this war come to an end? Numerous statutes, "emergency" and other, which have been placed on the book since August 4th, 1914, are timed to expire at the end of the war. All persons affected by these Acts of Parliament are, therefore,

interested. Again, countless regulations have been made under, and by virtue of, these temporary enactments. If the statute goes, the regulation made in accordance with powers conferred by it must of necessity be affected.

No Statutory Definition.

Strange to say, although phrases like "the end of the war," "during the present war," are constantly used, the Legislature has left the phrase undefined. Possibly, they thought that a certain nebulosity of duration would give added beauty to their emergency legislation. Some statutes have been described as the artistic creations of the Legislature, and did not Mr. Birrell, K.C., M.P., say on one occasion: "Nothing lends such beauty to a landscape painting as a bank of clouds in the background?"

For obvious reasons, the Judges have not yet been asked to say what is meant by "the end of the war." But where Legislatures and Judges have hesitated to tread, certain "mere lawyers," at the bidding of the Attorney-General, have rushed in. Having considered the matter in all its bearings, this legal committee, over which Mr. Justice Atkin presided, came to the following conclusion:—

> We assume that the war will be ended by a treaty or treaties of peace. In order to arrive at the final conclusion of the treaty various stages will probably be required, such as agreements for armistice, cessation of hostilities thereunder, articles of peace, agreement of terms, signature of terms, ratification, exchange, or deposit of ratification.
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> In our opinion, speaking of the legislation generally, the war cannot be said to end until peace is finally and irrevocably obtained; and that point of time cannot be earlier than the date when the treaty of peace is *finally binding* on the respective belligerent parties, and that is the date when ratifications are exchanged.

The italics are mine. It may be asked, when shall an agreement be regarded as finally binding on the Hun? The answer is, that those who make treaties—the high contracting parties, as they are generally called—are not responsible for the *sanction* which is behind the agreement to which the plenipotentiary

attaches his signature. When the Hun broke the treaty with Belgium, he treated it as not binding.

Having regard to the learned opinion set out above, it is obvious that "the end of the war," in the statutory sense, is as yet very far removed. It has taken four-and-a-half years to get Europe into its present mess. How long must it take to draft a final agreement which shall so deal with the multifarious problems created by the war as to enable the treaty to be finally signed and exchanged?

Statutory Rules and Regulations.

But apart from the emergency and other statutes which are of temporary duration, one has to consider the regulations made under these Acts, and, in particular, under the Defence of the Realm Act. As to these, the same committee of lawyers says:—

> In our opinion, the true construction of the section (they were referring to a section in the Defence of the Realm Act) is that the regulations so issued can operate only during the continuance of the war. The purpose expressed is for securing the public safety and the defence of the realm, which we think mean the public safety so far as threatened by our enemies in the present war and the defences of the realm against those enemies. The powers are given by reason of the national emergency, and vest the executive with an authority so wide that we think it must have been intended only to exist during the existence of the emergency. The provisions for the trial and punishment of offences against the regulations by Court Martial are not such as one would expect to remain in force after peace has been restored. This last consideration is obviously not affected by the provisions of the later Defence of the Realm (Amendment) Act, 1915 (5 Geo. V. c. 34). These considerations force us to the conclusion that regulations issued under s. 1 (1) cannot have any valid operation after the termination of the war.

They then add this:—

> The provisions for the trial and punishment of offences against the regulations also cease to have any effect after the termination of the war. It follows that after that date no offence against the regulations could be punished as such, though committed during war, and proceedings against such offenders, though instituted during the war, would automatically pass on its termination.

The general result, therefore, is that, so far as any department of Government or executive officer is exercising any power given by a Defence of the Realm Regulations, such power will be lost on the day of the termination of the war. It follows that if such powers were exercised after that date the individual exercising them would be liable in a civil action for any infringment of rights, whether to person or property, that he might commit, whether wilfully or not.

It is difficult to exaggerate the far-reaching results of the above conclusion. It points clearly to the necessity for passing some special Act which shall enable some of these regulations to be continued.

Property Acquired by the Crown.

There is one power in particular which must be provided for. I refer to the power to *take* possession of land—a power which has been very freely exercised during the war. There is no express power to "keep" possession, but the committee are of opinion that the power to take implies a corresponding power to keep and use. As to property so taken which, in fact, exists in specie at the end of the war, there would be no legal right to detain it from the owner after the date of the termination of the war.

I have said enough to put forward the views of a number of lawyers on these difficult questions, and venture heartily to agree with them. In my opinion, persons concerned will be quite justified in shaping their various courses upon the basis that the law as above stated is the law of the land, and will remain so until varied by the Legis

The Pas[illegible] the Juries.

It was pointed out in these notes some time since that the services of our grand juries had been suspended during the war. The grand jury has for the time being disappeared; yet the country survives it, and there is no evidence that the administration of the criminal law has been in any way prejudiced. Indeed, the trial of persons charged with offences has been expedited by the abolition of what was really a useless, although picturesque, step in the proceedings. We no longer read in our papers "the

Judge's Charge to the Grand Jury." In former days, when jurors were badly educated, it may have been necessary for the Judge to give them some notions as to their duties. Of late years, however, the Judge's charge has generally been a mere waste of time. Indeed, some occupants of the Bench have availed themselves of this opportunity to deal with quasi-political matters, upon which their opinions, howsoever weighty, had better have been left unexpressed.

The Petty Jury.

It is to be observed that the Legislature has not interfered with actual trial by jury in criminal cases, but the fate which has already overtaken the grand jury now threatens the petty jury in civil cases. By s. 1 of the Juries Act, 1918, which received the Royal assent on July 30, "Subject to the provisions of this Act, every action, counterclaim, issue, cause, or matter in the High Court in England requiring to be tried shall be tried by a Judge alone without a jury: *Provided that*, etc." Postponing, for one moment, the consideration of the proviso in which there is some virtue, it will be seen that the Act roundly takes away the right to a jury. Many a would-be litigant has become a litigant in fact because of the knowledge that if once his pitiful story be told to a jury, a verdict would follow as a matter of course. An *argumentum ad hominem* to which a Judge turns a deaf ear may have considerably weight with twelve good laymen and true.

Right to a Jury now Limited.

The right to a jury is, however, expressly preserved in cases of fraud, libel, slander, malicious prosecution, false imprisonment, seduction, or breach of promise; but the party desiring a jury must make an application therefor in accordance with Rules of Court. Again, *in any case*, if the Court or a Judge still thinks there ought to be a jury, he may, on application, make on order for a trial in that form. What has been said applies to trials in the High Court; and, broadly speaking, the right to a jury in the inferior Courts of civil jurisdiction is restricted in a similar way.

Is a Jury Necessary?

Even before the Act just quoted was passed, the number of jury trials had diminished very considerably. During the war, parties to litigation have been easily persuaded to forego their strict rights. The assembling of a jury involves a much greater waste of time than that of the twelve men who are shut up in the jury box; for the panel from which they are drawn is a much larger body. The panel has to appear in Court. Non-appearance when summoned may involve a considerable fine. So far one has heard no complaints of trial by Judge alone; and it may be safely said that in civil cases, generally speaking, juries are not necessary in war time.

The Coroner's Jury.

The changes above referred to are to continue during the present war and for a period of six months thereafter. During this period the functions of the coroner's jury are also suspended, for the same Act provides that a coroner may if he thinks fit himself hold an inquest concerning a death. If the functions of a grand jury were unnecessary, those of the twelve men summoned by a coroner were equally useless in the vast majority of cases. The verdict of a coroner's jury is nearly always perfectly useless, because it binds nobody and leads nowhere. There is nothing done by his jury which the coroner cannot do equally well and with the expenditure of much less public time.

A Jury's Ratio Decidendi.

The advocate (although he may hazard a guess) is seldom privileged to know why a jury decides for or against him. I did, however, once meet a special juror who disclosed a secret of the jury box. He had served as a special juror. The case was long and complicated and so difficult to decide that, when the jury came to retire, six were inclined for the plaintiff and six for the defendant. In this dilemma the foreman spoke up and said: "Gentlemen, there are points in this case upon which it appears to be impossible for you to agree. But there is one thing upon which I fancy we

are unanimous. None of us can stand the counsel for the plaintiff at any price? Therefore let the defendant have our verdict." As a result of this somewhat novel method of arriving at a decision the defendant had the verdict.

Temple, October 28, 1918. W. VALENTINE BALL.

KEEPING TRUSTS OFF A TITLE

Mr. Justice Younger has reaffirmed in *Re Soden & Alexander's Contract* (1918, 2 Ch. 258) the ordinary conveyancing device for keeping notice of a trust off the title to land. "It is admitted," said Pearson, J., in *Re Harman and Uxbridge and Rickmansworth Railway Co.* (24 Ch. D. 720), "that, according to a very convenient practice, it is usual, when a mortgage is made to trustees, to keep the trusts off the face of the mortgage deed, and to introduce a recital that the persons who are in fact trustees are entitled to the mortgage money on a joint account, and it is admitted that in such a case the Court has always refused to make any inquiry into the trusts, because to do so would defeat a practice which has been introduced for the benefit of her Majesty's subjects." And the same principle applies to conveyances of land generally. In *Corritt* v. *Real and Personal Advance Co.* (42 Ch. D. 263), Chitty, J., said:—"It appears to me that I am not at liberty to say at this day that where purchasers are dealing with real or leasehold estate, they are not entitled to frame their deed (so long as they do not make any direct misrepresentation on the face of it) according to the ordinary forms used by conveyancers, and according to those forms which disclose a part only of the transaction." These dicta are both by Judges of first instance, though of high reputation. Quite recently the same principle was affirmed by the Court of Appeal in *Re Chafer & Randall's Contract* (60 *Solicitors' Journal*, 444; 1916, 2 Ch. 8), where it was pointed out that on transfers of mortgages held by trustees, and also in the case of conveyances generally of trust property, it was the practice of conveyancers to frame recitals in the deed accounting for the transfer without disclosing the trust; and conveyancers properly abstained from inquiries which, if answered, would oust their client from the position of a purchaser for value obtaining the legal estate in good faith without notice of any trust. —*Solicitors' Journal.*

REVIEW OF CURRENT ENGLISH CASES.

FATHER AND CHILD—LIABILITY OF FATHER FOR MAINTENANCE OF INSANE SON—MAINTENANCE BY SCOTCH PUBLIC AUTHORITY AS PAUPER LUNATIC—FATHER DOMICILED IN ENGLAND.

Coldingham v. *Smith* (1918) 2 K.B. 90. This was an action by a Scotch parish council to recover from the estate of a man who died domiciled in England for the cost of the maintenance of his adult son, who had been maintained by the plaintiffs as a pauper lunatic. Salter, J., who tried the action, held that the case was governed by English law, and that at common law a father is under no legal liability to maintain his adult son; and that it is only by order of justices made under the Statute 43 Elizabeth, c. 2, s. 3, that such liability could arise; and in the absence of any such order the action failed.

LANDLORD AND TENANT—DEMISE OF A PORTION OF A HOUSE, THE REST BEING RETAINED BY LANDLORD—COVENANT BY LANDLORD TO KEEP PREMISES IN TENANTABLE CONDITION—DEFECT IN PREMISES—DAMAGE TO TENANT—LIABILITY OF LANDLORD—NOTICE OF DEFECT.

Melles v. *Holme* (1918) 2 K.B. 100. This was an action by tenants against their landlord to recover damages for breach of a covenant to keep the demised premises in tenantable condition. The demised premises consisted of the first and second floors of a building. The top floor was let by the landlord to another tenant, and there was access to the roof from his premises. The roof was suffered to get out of repair and water in consequence entered the plaintiffs' premises and damaged their goods. The defendant contended that he had no notice of the defect, and was consequently not liable to the plaintiffs; but a Divisional Court (Salter and Roche, JJ.), on an appeal from a County Court, held that the rule exonerating a landlord from liability under a covenant to keep premises in a tenantable condition, unless he has express notice of the defect, does not apply to the case where he lets only a portion of the premises, and retains in his own control the portion, the defective condition of which causes the damage; judgment in favour of the plaintiffs was therefore awarded.

HIRE-PURCHASE AGREEMENT—OPTION TO PURCHASE—SALE BY HIRER—REPUDIATION OF AGREEMENT—DETINUE—CONVERSION —DAMAGES.

Whiteley v. *Hilt* (1918) 2 K.B. 115. This was an appeal from a County Court. The facts were simple. The plaintiffs let a piano on the terms of a hire-purchase agreement to a Miss Nolan. By the terms of the agreement Miss Nolan had an option to purchase the piano by instalments, but was to remain a bailee until all the instalments were paid. She had the right at any time to terminate the agreement by returning the piano to the plaintiff. Miss Nolan paid several instalments of purchase money, but before all were paid she sold the piano to the defendant, who purchased innocently and without any notice of the hire-purchase agreement, Miss Nolan at the time of sale having made a false statutory declaration that the piano was her property. The defendant having refused to deliver up the piano to the plaintiffs she was sued for detinue and alternatively for conversion. The defendant paid into Court a sum sufficient to cover the unpaid instalments of the purchase money, and the County Court Judge held that that sum was sufficient to satisfy the plaintiffs' claim and gave judgment for the defendant, but a Divisional Court (Salter and Roche, JJ.) held that the sale by Miss Nolan, whereby she intended to pass the whole property in the piano without reference to the agreement, amounted in law to a repudiation by her of the agreement, and therefore she had no right in the chattel which she could legally transfer, and, therefore, that the plaintiffs were entitled to a return of the piano, or its full value.

CONTRACT—BUILDING CONTRACT—EXTRAS—WRITTEN ORDER OF ENGINEER—CONDITION PRECEDENT—DISPUTES ARISING OUT OF CONTRACT—ARBITRATION—POWER OF ARBITRATORS—USER OF RAILWAY—LIABILITY FOR TAXES.

In re Nott & Cardiff (1918) 2 K.B. 146. This was an appeal from the order of Bray, J., made on an appeal from the award of an arbitrator, on two points. The arbitration took place under a contract for the building of a reservoir which provided that the contractors were not to be liable to pay for extras unless instructions for them was given by the written order of the engineer. The first question was whether the arbitrators had any power to dispense with the written order of the engineer for extras. Bray, J., held that they had; but the majority of the Court of Appeal (Pickford, L.J., and Neville, J.) held that they had not (Bankes, L.J., dissenting). The contract also provided that the contractors

might for the purposes of the work use a railway owned by the contractors, but contained no provision as to the payment of the taxes on the railway while so used. The contractors used the railway, were assessed as occupiers, and paid the taxes, and claimed to recover them from the contractees. Bray, J., held that they were entitled to do this; but the Court of Appeal held that there was no implied undertaking by the contractees to repay the contractors the taxes so paid by them.

LANDLORD AND TENANT—LEASE—COVENANT TO PAY OUTGOINGS AND KEEP PREMISES IN REPAIR—COLLATERAL AGREEMENT BY LANDLORD TO PUT DRAINS IN REPAIR—ORDER BY SANITARY AUTHORITY TO LESSOR TO PUT DRAINS IN REPAIR—LIABILITY OF LESSEE.

Henman v. *Berliner* (1918) 2 K.B. 236. This was an action by landlord against tenant to enforce a covenant in a lease whereby the lessee covenanted to pay all outgoings, and keep the premises in repair. There was a collateral agreement by the landlord with the tenant to put the drains in repair. This agreement the landlord had neglected to carry out, and in consequence of sickness having broken out on the demised premises the sanitary authority ordered the landlord to put the drains in repair. This was accordingly done, and the amount so expended the landlord now claimed to recover as an outgoing, and as also being due to the defendant's breach of the covenant to repair. Sankey, J., who tried the action, held that the plaintiff was not entitled to recover, (1) because the outgoing was occasioned by the plaintiff's own neglect to carry out the agreement to repair the drains, and (2) because the defendant's covenant to keep in repair did not apply to the drains until the landlord had first put them in repair as agreed.

CONTRACT—PUBLIC POLICY—COMMISSION TO OBTAIN BENEFIT FROM GOVERNMENT—ILLEGALITY NOT PLEADED—DUTY OF COURT.

Montefiore v. *Menday Motor Co.* (1918) 2 K.B. 241. This action was brought to recover a commission on an alleged procuring of a loan to the defendant company. It turned out at the trial that the plaintiff was a member of a Government Board concerned with aircraft production and that the agreement sued on was in effect an agreement on the part of the plaintiff to use his influence on the Board to procure an advance to be made to the defendant company, but Sherman, J., who tried the action, held that it was the duty of the Court, as a matter of public policy, to take notice

of, and refuse to give effect to, any such contract, and he therefore dismissed the action with costs. The defendants counterclaimed for repayment of the part of the commission which they had paid, on the ground of failure of consideration, and this also was dismissed with costs.

PRINCIPAL AND AGENT—CHARTERPARTY—CONTRACT BY PARTY "AS CHARTERERS"—CLAIM OF UNDISCLOSED PRINCIPAL TO BENEFIT OF CONTRACT.

Redebiaktiebolaget v. *Hani* (1918) 2 K.B. 247. In this case a firm of Hansen Bros. had entered into a charterparty with the plaintiff. In the charterparty Hansen Bros. were described "as charterers" and by the terms of the charterparty the charterers were to give the owners notice at which port and about which day the vessel would be re-delivered. If dissatisfied with the officers the charterers might make complaint with a view to changes being made; and the "charterers" were to furnish the captain from time to time with all necessary instructions. The charterparty provided for arbitration in case of any disputes arising under the charterparty. On ani claimed the benefit of the charterparty as being the undisclosed principal of Hansen Bros., and claimed the right to institute arbitration proceedings thereunder; the present action was brought to restrain him from taking such proceedings. Rowlatt, J., who tried the action, held that the contract must be taken to have been made by Hansen Bros. as principals, and that Hani was not entitled to intervene and claim the benefit of it; that the words "as charterers" were not mere words of description, but a term of the contract.

RAILWAY COMPANY—REFRESHMENT ROOMS—OPTION OF RENTING —CHOSE IN ACTION—ASSIGNABILITY—UNCERTAINTY—ULTRA VIRES.

County Hotel and Wine Co. v. *London and N.W. Ry.* (1918) 2 K.B. 251. This was an action to enforce an option to rent the refreshment rooms at a railway station. The option was contained in a lease for 999 years of a piece of land adjacent to the station, which provided that the tenant or occupier of the hotel to be erected on the demised premises should have the option of renting the refreshment rooms at the station, subject to the rules to be fixed by the committee for the management of the station. The lease was made in 1853 by the defendants' predecessors in title of the railway, and was made to the plaintiffs' predecessors in title, and the plaintiffs claimed to be entitled to the benefit of the option

as assignees thereof. McCardie, J., tried the action and he held that the option was a chose in action and as such assignable; but he held that the plaintiffs could not enforce it for two reasons: (1) because it was uncertain in its terms, and (2) because it was *ultra vires* of the defendants' predecessors in title, as a public railway company, to grant any such option, so as to deprive themselves of the power to furnish refreshment to travellers upon the railway.

PRACTICE—COSTS—TAXATION—PARTY AND PARTY BILL OF COSTS—DETAILS TO BE STATED IN—CONFUSION OF ITEMS—PAYMENTS TO FOREIGN LAWYERS—PROOF OF REASONABLENESS OF PAYMENTS—ATTENDANCES ON COUNSEL WHEN NO COUNSEL FEE CHARGED.

Slingsby v. *Attorney-General* (1918) P. 236. This was an appeal from an order of Coleridge, J., made on an appeal from a taxing officer. The proceedings were instituted by an infant by his next friend for a declaration of legitimacy, and had failed and the next friend was ordered to pay the costs of the persons cited. One of the items objected to was £1,365 for "Instructions for brief." Another was for £3,980 paid to American lawyers. The taxing officer had allowed the first item at £735 and the second at £1,993. Coleridge, J., had affirmed this taxation: the Court of Appeal (Eady and Bankes, L.JJ., and Neville, J.) however was of the opinion that although the discretion of a taxing officer is not interfered with unless it is seen that he acted on a wrong principle, yet in this case it did not appear that the bill was framed in such a way as to enable the taxing officer properly to exercise his discretion. As to the item for "Instructions for brief," it not having given any details of the matters involved, the length of documents required to be perused (in cases in which perusal had not been previously charged), nor the names of the witnesses attended, the places to which journeys had been made and the time occupied in each, and the amount of travelling expenses. And as regarded the second item they held that the burden of proof was on the parties bringing in the bill to shew affirmatively that the charges paid to the American lawyers were reasonable and that the taxing officer could not properly allow such charges merely on proof of payment, or because the other side had not produced evidence to shew that the charge was excessive. They also held that no charge should be allowed for attendance on counsel where no counsel fee is paid.

WILL—CONSTRUCTION—GIFT OF A "CLEAR ANNUITY"—INCOME TAX.

In re Loveless, Farrer v. *Loveless* (1918) 2 Ch. 1. In this case the simple question was whether a gift in a will of "a clear annuity" of £2,000 entitled the annuitant to the full amount free of income tax. Eve, J., decided that it did not; and the Court of Appeal (Eady and Bankes, L.JJ. and Neville, J.) affirmed his decision.

MASTER AND SERVANT—AGREEMENT OF SERVICE—ALTERATION IN AGREEMENT—ALLEGED FORGERY—ACTION TO ENFORCE AGREEMENT—COMPROMISE OF ACTION—ORIGINAL AGREEMENT DESTROYED—AFFIDAVITS TAKEN OFF FILES—SUBSEQUENT USER BY PLAINTIFFS OF COPIES OF ALLEGED FORGERY—IMPLIED CONDITION—INJUNCTION.

Jones v. *Trinder* (1918) 2 Ch. 7. This was an action for an injunction to restrain the defendants from making use of certain documents to the prejudice of the plaintiff. The facts were as follows: In 1916, the defendants (a firm of solicitors) brought an action against the present plaintiff to enforce an agreement. This agreement had been altered and it was claimed and denied that the alteration was a forgery by the plaintiff in this action. That action was compromised and by agreement of the parties the document sued on was destroyed, and the affidavits in reference to the alleged forgery were ordered to be taken off the files. In 1918, the plaintiff in the present action applied to the Law Society for admission as a solicitor, and the defendants lodged an objection against his admission, and exhibited a photograph of the alleged forgery, and copies of the affidavits which had been taken off the files in the former action, and the object of the present action was to restrain the defendants from so doing. Neville, J., who heard the motion for an interim injunction, held that there was no implied condition in the settlement of the former action, that no use whatever was to be made of any copy of the destroyed documents, and he accordingly refused the motion, and his judgment was affirmed by the Court of Appeal (Eady and Bankes, L.JJ.).

LANDLORD AND TENANT—RESERVATION OF RENT FOR SERVICES OF HOUSEKEEPER—AGREEMENT BY LANDLORD TO FURNISH HOUSEKEEPER—AGREEMENT RUNNING WITH REVERSION—REMEDY FOR BREACH OF AGREEMENT TO FURNISH HOUSEKEEPER—SPECIFIC PERFORMANCE—DAMAGES—CONVEYANCING ACT, 1881 (44-45 VICT. c. 11) s. 11—(R.S.O. c. 155, s. 7.).

B. nes v. *City of London Realty Co.* (1913) 2 Ch. 18. Five actions relating to the same matters were tried together. Each

action was brought against the same defendants and the plaintiffs in each case were tenants of different parts of the same building, of which the defendants were the landlords. Three of the plaintiffs held under leases made by the defendants' predecessors in title; they were in writing but not under seal; they provided for the rental of certain rooms and reserved a rent for the rooms and also a certain sum for the services of a housekeeper to be appointed by the landlord. Two of the plaintiffs claimed under leases made by the defendants themselves, which contained an express agreement on the part of the defendants to appoint and pay a housekeeper to be in attendance at certain specified hours for cleaning the rooms let. The resident housekeeper had quitted without notice and, owing to the war, the defendants had been unable to get another resident housekeeper, but had put the building in charge of a person who was in charge of another building about 57 yards away, who was, however, unable to give the attendance at the times specified in two of the leases made by the defendants. The actions were for specific performance of the agreement. As regarded the agreements made by the defendants' predecessors in title two questions arose, (1) did the reservation of rent for housekeeping services involve an implied correlative agreement by the lessor to provide such services; and Sargant, J., was of the opinion that it did—and (2) such agreement not being under seal, did the obligation bind the reversioners, and the learned Judge held that it did, as being in the nature of a covenant "with reference to the subject-matter of the lease" within the meaning of the Conveyancing Act, 1881 (44-45 Vict. c. 11) s. 11 (see R.S.O. c. 155, s. 7), but these two points it did not become necessary to decide, as the learned Judge held that the leases made by the defendants' predecessors in title did not require that the lessors should appoint a resident housekeeper, and the services which the lessors had in fact supplied were a sufficient compliance with the terms of those leases, and these actions were accordingly dismissed; but in regard to the leases which the defendants had themselves made, the learned Judge held that there was a breach of the agreement for the services at the specified hours agreed: but that the Court could not decree specific performance, but that damages was all the relief these plaintiffs were entitled to.

GIFT IN TERMS OF JOINT TENANCY—GIFT OVER OF "SHARE"—JOINT TENANCY OR TENANCY IN COMMON.

In re Schofield, Baker v. *Cheffins* (1918) 2 Ch. 64. This case involves the construction of a will whereby the testator gave all his

real and personal property to his widow for her life and after her death gave certain houses to his three grandchildren by name, subject to a further life interest in favour of their mother, and, in the event of the death of either of them, directed his or her "share" to go to the survivors. One grandchild died in the mother's lifetime, but after the death of the testator's widow. Younger, J., held that the gift over was limited to the case of death in the lifetime of the testator's widow, but that notwithstanding the use of the word "share," the three grandchildren took as joint tenants and not as tenants in common.

RAISING LEGACY DUTY—DISCRETION OF TRUSTEES TO MAKE ADVANCEMENT—REFUSAL OF ONE OF SEVERAL TRUSTEES TO EXERCISE DISCRETION—POWER OF COURT TO DISPENSE WITH CONSENT OF TRUSTEE REFUSING TO EXERCISE DISCRETION.

Klug v. *Klug* (1918) 2 Ch. 67. In this case under a will the trustees had a discretionary power of advancement to a legatee. The legatee being unable out of her income to discharge the succession duty payable in respect of her legacy, applied to the trustees to assist her by the exercise of their discretionary power of advancement. One of the trustees was the mother of the legatee, and because the legatee had married without her consent, she refused to exercise her discretionary power. In these circumstances application was made to the Court for authority to make the required advancement without the concurrence of the mother, and Neville, J., made the order.

SOLICITOR—ACTION—SOLICITOR RETAINED EMPLOYING ANOTHER SOLICITOR TO ACT FOR HIS CLIENTS WITHOUT THEIR KNOWLEDGE —CLAIM FOR COSTS—RETAINER—ADOPTION—RATIFICATION.

In re Becket, Purnell v. *Paine* (1918) 2 Ch. 72. In this case a claim was preferred against the plaintiffs for costs incurred in the following circumstances: The plaintiffs retained a solicitor named Southgate to bring an action against a company, and Southgate, without any authority from the plaintiffs, handed the business over to one Lewis, who issued the writ, and delivered the pleadings and entered into negotiations with the defendants for a compromise. Before the compromise was completed, for reasons in no way connected with the action, the plaintiffs declined to employ Southgate any longer as their solicitor, and thereafter another firm acted as their solicitors in the action, and subsequently an agreement of compromise was concluded and in 1910 an order was made sanctioning the agreement. Southgate died in 1912, and it was not

until after his death that the plaintiffs had any knowledge that Lewis had assumed to act as their solicitor, or even as the agent of Southgate. Mr. Lewis in 1913, having set up a claim for costs, and brought in a bill for taxation, the plaintiffs denied any retainer. The taxing officer allowed the objection and adjourned the taxation to enable Mr. Lewis to take proceedings to establish his claim. Mr. Lewis did not take any proceedings but in 1916 the estate of which the plaintiffs were trustees, having become distributable, he notified the plaintiffs not to distribute without providing for payment of his costs. The present proceedings were thereupon instituted to determine whether or not he had any claim against the plaintiffs in respect of the costs in question. It appeared that Southgate was personally indebted to the plaintiffs in a sum exceeding the costs claimed by Lewis. Peterson, J., held and the Court of Appeal (Eady and Bankes, L.JJ., and Neville, J.,)agreed with him that Lewis had no claim against the plaintiffs, and that on the evidence there had been no adoption or ratification by the plaintiffs of his acting as their solicitor.

WILL—SOLDIER ON ACTIVE SERVICE—INFANCY OF TESTATOR—EXERCISE OF POWER OF APPOINTMENT—VALIDITY OF WILL—WILLS ACT, 1837 (1 VICT. c. 26) s.s. 7, 11—(R.S.O. c. 120, s. 14).

In re Wernher, Wernher v. *Beit* (1918) 2 Ch. 82. This was an appeal from the decision of Younger, J. (1918) 1 Ch. 339 (noted *ante* p. 269); and the Court of Appeal (Eady and Bankes, L.JJ., and Neville. J.) affirmed his judgment giving effect to such a will because after the decision a statute had been passed to remove any doubt as to the capacity of soldiers under 21 to make a will of personalty: see 7-8 Geo. V. c. 58, s. 1. It was contended that, notwithstanding that Act, it did not enable the testator to execute a power of appointment by will, but the Court of Appeal held that the power to make a will necessarily involved the power also to make an appointment thereby of any personal estate over which he had a disposing power.

GIFT TO "CHILDREN" OF DECEASED PERSON—NO CHILDREN LIVING AT DATE OF WILL—GRANDCHILDREN LIVING AT DEATH OF TESTATOR—INTESTACY.

In re Atkinson, Pybus v. *Boyd* (1918) 2 Ch. 138. In this case Younger, J., decided that there is no rule of construction that if a legacy is given to "children" of a person who at the date of the will, to the knowledge of the testator, had no children living, grandchildren will take; but it is always a question to be determined

upon the particular terms of the will in question, and in this case he held that the terms of the will did not authorize that construction.

ADMINISTRATION — SPECIFIC LEGACY OF STOCKS — LEGATEE INDEBTED TO TESTATOR—CLAIM OF EXECUTOR TO RETAIN DEBT OUT OF LEGACY.

In re Savage Cull v. *Howard* (1918) 2 Ch. 146. The right of an executor to retain a debt due by a legatee to the testator out of the legacy was in question in this case, and Sargant, J., held that such right does not exist as regards a specific legacy. In this case the specific legacy was of stocks readily convertible into money; but the learned Judge was of the opinion that the right of retainer only existed in regard to pecuniary legacies.

ACCUMULATION—PROVISION FOR RAISING PORTIONS—ACCUMULATION ACT, 1800 (39-40 GEO. III. c. 98) s. 2—(R.S.O. c. 110, s. 3).

In re Elliott, Public Trustee v. *Pinder* (1918) 2 Ch. 150. By the Accumulation Act, s. 2 (see R.S.O. c. 110, s. 3), the Act is not to extend to any provision for raising portions for any child of any grantor settlor or devisor or for any child of any person taking an interest under the conveyance settlement or devise. In the present case a testator who died in 1891 directed his trustees to pay the income of his residuary estate to his wife for life, and after her death to set apart £8,000, and out of the interest on the sum, pay his daughter £60 a year; and to add the surplus interest to the capital and after the daughter's death to hold the £8,000 and the accumulations upon trust to pay the income to the daughter's only child, and after her decease that the fund should fall into the residue. This provision for accumulation Sargant, J., held was not a provision for raising a portion within the meaning of the Act, and therefore was invalid.

VENDOR AND PURCHASER—OPEN CONTRACT TO PURCHASE LAND—SPECIFIC PERFORMANCE—VENDOR'S ACTION—INQUIRY AS TO TITLE—OBJECTIONS—PURCHASER'S KNOWLEDGE OF INCURABLE DEFECTS—WAIVER—ADMISSIBILITY OF EVIDENCE ON REFERENCE.

McGrory v. *Alderdale Estate Co.* (1918) A.C. 503. This was an action by vendors for specific performance of an open contract to purchase land. The defendant set up that the alleged contract

was null and void, but failed in his defence, and judgment was pronounced for specific performance with a reference as to title in the usual terms. On the reference the defendant set up three objections to the title: (1) that the vendors had no title to the minerals; (2) that the land was traversed by a public sewer; (3) that a public footpath crossed it. The plaintiffs thereupon adduced evidence to shew that the defendant had purchased with the knowledge of all of these defects. On appeal the Vice-Chancellor of Lancaster held that the evidence was inadmissible on the reference, and that any claim of that nature on the part of the plaintiffs should have been alleged in the pleadings and proved at the trial of the action. The Court of Appeal reversed this decision and held that, as the question of title only came in issue for the first time on the reference, the vendors were entitled to adduce the evidence in answer to the defendants' objections. The House of Lords, however (Lord Finlay, L.C., and Lords Haldane, Shaw, and Atkinson), have unanimously reversed the decision of the Court of Appeal, holding with the Vice-Chancellor that where a vendor seeks to modify the terms of an open contract on any such grounds the case must be made on the pleadings and proved at the trial, and the reason they give is because it is for the Court and not the officer to whom the question of title is referred to say what the contract between the parties is; and where such a case is made out the terms of the reference should be varied accordingly. This case seems to afford a very conclusive argument against the correctness of the view apparently entertained by some Judges in Ontario to the effect that a vendor's action to enforce a contract for the purchase of land can be sued for as a mere money demand, and as such be specially indorsed. This point we have discussed on a previous page: see *ante* p. 122: and see *McMillan* v. *Pink*, 14 O.W.N. 212.

COMPANY—MEMORANDUM OF ASSOCIATION—CONSTRUCTION—STATEMENT OF OBJECTS—ULTRA VIRES—COMPANIES CONSOLIDATION ACT, 1908 (8 EDW. VII. c. 69) s. 3—(R.S.O. c. 178, s. 6 (2) (*b*).)—(R.S.C. c. 79, s. 7 (*b*).)

Cotman v. *Brougham* (1918) A.C. 514. This was an appeal from the decision of the Court of Appeal in the case *sub nom In re Cuban Oil Co.* (1917) 1 Ch. 477 (noted *ante* vol. 53, p. 265). The proceedings were originally instituted to remove the name of the Essequibo Rubber Co. from the list of contributories of the Cuban Oil Co. on the ground that the Essequibo Company had no power to underwrite the shares of the Cuban Oil Co. in respect of

which the Essequibo Co. had been placed on the list. The Court of Appeal found that the memorandum of association of the Essequibo Co. was sufficiently wide to authorize it to engage in almost any kind of business a company could engage in, and that, construed according to its literal meaning, it authorized the underwriting of the shares, which was therefore held to be *intra vires* of the Essequibo Co., and with that conclusion the House of Lords (Lord Finlay, L.C., and Lords Atkinson, Parker, and Wrenbury) agreed.

INSURANCE (MARINE)—GOODS—SALE "EX SHIP"—CRAFT AND RAFT RISK—POLICY EFFECTED BY SELLERS—LOSS OF GOODS ON RAFT AFTER DELIVERY—BUYER'S INTEREST NOT COVERED.

Yangtze Insurance Ass'n. v. *Lukmanjee* (1918) A.C. 585. This was an action on a policy of marine insurance. The plaintiff had purchased a quantity of teak logs in Ceylon to be delivered "ex ship" payment against documents. The sellers shipped 382 logs of which 144 were in part fulfilment of the contract with the plaintiff. The buyers insured all the logs which were identified by marks, and the policy was expressed to be made for all persons to whom the goods should appertain in part or in all, and covered craft and raft risks. The 144 logs were delivered to the plaintiff from the ship and were thereafter lost while afloat in the form of rafts, by being driven out to sea in a gale. The plaintiff claimed that the loss was covered by the policy. The Courts of Ceylon so held, and gave judgment for the plaintiff; but the Judicial Committee of the Privy Council (Lords Parker and Sumner, and Sir A. Channell) held that there was no evidence that the policy was effected on behalf of the plaintiff, or to cover his interest, and, therefore, that the action was not maintainable.

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Fitzpatrick, C.J., and Idington, Anglin, Brodeur, JJ. and Cassels, J. (*ad hoc*).] [42 D.L.R. 131.

HOSSACK v. SHAW.

Interest—Loans—Stipulated rate—Only till maturity—Explicit terms necessary to carry beyond—Voluntary payments—Recovery back.

A stipulation for interest at a certain rate on a loan "until paid" imports a contract to pay interest at the specified rate only until the maturity of the loan. To carry the contract for the stipulated rate beyond the maturity of the loan, explicit terms so providing must be made. Payments at the higher rate voluntarily made can not be recovered back.

J. M. Ferguson and *Coffey* for defendant (appellant).

W. J. McCallum for plaintiff (respondent).

INTEREST ON LOANS BY BANKS.

Prior to the statute 29 and 30 Vict., c. 10 (1866) a bank exacting a higher rate of interest and discount than 7% was liable under the law of the late province of Canada to the penalties and forfeitures of C.S.C., 1859, c. 58—these having been kept in force as regards banks after they were repealed against individuals. *Drake* v. *Bank of Toronto* (1862), 9 Gr. 116, 133. The first mentioned statute enacted that no bank should be liable to any penalty or forfeiture for usury under C.S.C., c. 58, but that the amount of interest or commission should remain as limited thereby. It was held that the amending statute relieved the bank not only from the penal consequences of contravening the former Act, but also from the loss or forfeiture of the money advanced and of the security received. *Commercial Bank* v. *Cotton* (1867), 17 U.C.C.P. 447.

In 1867 the provision was enacted which was re-enacted by the general banking Act of 1871, and from there transcribed into the Act of 1890, as s. 80, in the following words:

"80. The bank shall not be liable to incur any penalty or forfeiture for usury and may stipulate for, take, reserve or exact any rate of interest or discount not exceeding seven per cent. per annum, and may receive and take in advance any such rate, but no higher rate of interest shall be recoverable

by the bank; and the bank may allow any rate of interest whatever upon money deposited with it."

In the revision of 1906 the first clause of the section just quoted was omitted, and the remainder of the section was re-enacted in the present ss. 91 and 92. Sub-secs. 2 and 3 of s. 91 were added in 1913. (a) A bank failing to make the returns directed by the section is liable to a penalty under s. 147C.

In 1872 a further statute relating to interest was passed. It recited the provisions of the Act of 1871 (s. 80 of the Act of 1890 above referred to), and recited further that in some of the provinces of Canada laws might be in force imposing penalties on parties other than banks for taking, or stipulating, or paying more than a certain rate of interest, and that doubts might arise as to the effect of such laws in certain cases as to parties, other than the bank, to negotiable securities discounted or otherwise acquired and held by any bank. The statute then enacted the provisions which were afterwards re-enacted in the Bank Act of 1890, as s. 81. This section was omitted from the Bank Act in the revision of 1906. It became practically obsolete in 1890, when by 53 Vict., c. 34, the various provincial statutes relating to interest and usury consolidated in R.S.C., (1886) c. 127, secs. 9 to 30, were repealed. *Cf.* s. 59 of the Bills of Exchange Act.

The Interest Act (R.S.C. 1906, c. 120), provides (ss. 2 and 3): "2. Except as otherwise provided by this or by any other Act of the Parliament of Canada, any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon. 3 Except as to liabilities existing immediately before the seventh day of July, one thousand nine hundred, whenever any interest is payable by the agreement of parties or by law, and no rate is fixed by such agreement or by law, the rate of interest shall be five per centum per annum." Prior to July 7, 1900, the rate in such cases was 6%. The expression "liabilities existing" means liabilities for interest, so that interest falling due on or after July 7, 1900, where no rate is fixed by agreement or by law, is payable at the rate of 5% notwithstanding that it is payable in respect of a debt, agreement or transaction arising before that date. *Plenderleith* v. *Parsons* (1907), 14 O.L.R. 619. *Cf. Kerr* v. *Colquhoun* (1911), 2 O.W.N. 521.

The Money-Lenders' Act (R.S.C. 1906 c. 122), which limits the rate of interest in certain cases, applies only to "money-lenders" as defined in the Act and to loans of less than $500.

There is, then, no law now in force which renders a bank "liable to incur any penalty or forfeiture for usury."

If a bank retains or debits the debtor's account with interest in excess of seven per cent., the debtor is entitled to recover back the excess or is entitled to credit for the excess so charged in an action by the bank. *Canadian Bank of Commerce* v. *McDonald* (1906), 3 W.L.R. 90, at 101, *et seq.*; *Banque de St. Hyacinthe* v. *Sarrazin*, 2 Que. S.C. 96. To allow recovery back of such interest is not in effect to enforce a penalty or forfeiture for usury; it is not proceeding for usury, though the action is brought on account of usury. *Laurentowski* v. *Dorion* (1868), L.R. 2 P.C. 291, at 314.

A bank may stipulate for any rate of interest or discount whatever

without thereby invalidating the contract of loan or pledge. *Quinlan* v. *Gordon* (1861), 20 Gr. (appendix) 1; *Adams* v. *Bank of Montreal* (1899), 8 B.C.R. at p. 316, 1 Com. L.R. at p. 250; 32 Can. S.C.R. 719. It has been held that the contract is valid except in so far as it stipulates for more than 7%, and that the stipulation for a higher rate than 7% is unenforceable by action though not illegal, and that if the bank is obliged to sue for the interest, it cannot recover the excess. *Bank of Montreal* v. *Hartman* (1905), 12 B.C.R. 375; *Williams* v. *Canadian Bank of Commerce* (1907), 13 B.C.R. 70. But in *Bank of British North America* v. *Bossuyt* (1903), 15 Man. L.R. 266, Richards, J., held that if a bank stipulates for more than 7% it can recover nothing in respect of the stipulation for interest, although the express stipulation would not prevent the bank from recovering 5% if the transaction were such that a contract to pay interest might be implied. The correctness of the view of the statute taken in the last mentioned case is virtually established by the recent case of *McHugh* v. *Union Bank of Canada*, 10 D.L.R. 562, [1913] A.C. 299, 316 (reversing 44 Can. S.C.R. 473), in which it was held that notwithstanding prior dealings between the bank and its customer by which he had for a number of years acquiesced in the payment to the bank of interest on advances at a higher rate than seven per cent., the rate limited by the Bank Act R.S.C. (1906), c. 29, s. 91, his subsequent mortgage to the bank settling the balance of undebtedness and containing a stipulation for the like excessive interest contravenes s. 91 of the Bank Act, R.S.C. (1906), c. 29, and the insertion by the bank of such a stipulation was *ultra vires* on its part and the stipulation itself was inoperative; the interest collectable in respect of such mortgage must be calculated at the rate of five per cent., as being the legal rate where no special rate has been legally fixed, and not the intermediate rate of seven per cent. for which the bank was entitled to contract.

In *Northern Crown Bank* v. *Great West Lumber Co.*, 11 D.L.R. 395, a bank had charged on loans more than seven per cent. the maximum rate of interest or discount allowed by the Bank Act. The court following *McHugh* v. *Union Bank*, held that the stipulation was *ultra vires* and inoperative See also *McKinnon* v. *Lewthwaite* (1914), 20 D.L.R. 220, in which the Court of Appeal for British Columbia disapproved of *Plenderleith* v. *Parsons*, 14 O.L.R. 619, and held that the interest after maturity by way of liquidated damages upon a promissory note maturing prior to July 7, 1900, not made with interest, which is to be allowed under the Bills of Exchange Act and the Interest Act, R.S.C. (1906), c. 120, s. 2, is six per cent. from the date of maturity to the entry of judgment although the latter took place subsequent to the passing of the Interest Act, July 7, 1900, whereby the legal rate was reduced from six to two per cent; the exception by that Act as to "liabilities" existing at the time of its passing has reference to the debt and not the accrued interest to that date, and the interest rate on then existing debts on which 6% would be allowed therefore was not reduced to five per cent, even as to interest to be computed from and after July 7, 1900. See also *Canadian Northern Investment Co.* v. *Cameron* (Alta.), 32 D.L.R. 54, reversed 38 D.L.R. 428; *Stubbs* v. *Reliance Mortgage Co.* (Man.), 32 D.L.R. 57, annotated, reversed 38 D.L.R. 435, also annotated.

The section does not authorize the charging of compound interest at 7%. Where the bank makes a discount or an advance for a specified time, it may deduct the interest in advance. In other cases, where there is an overdraft, and payments are made, interest should be reckoned up to the date of each payment, and the sum paid should be applied to the discharge of the interest in the first place and any surplus that may remain to the discharge of so much of the principal. The fact that the customer has month by month confirmed the statements contained in the pass book does not amount to a ratification of or acquiescence in a charge of compound interest. *Montgomery* v. *Ryan* (1907), 16 O.L.R. 75, C.A., Maclaren, J.A., at p. 102; *cf.* Clute, J., at p. 88.

If the debtor voluntarily pays the excess of interest over 7% as, *e.g.*, by giving his cheque to the bank for such excess as shewn by the bank's monthly statement, he cannot recover back the excess and is not entitled in an action by the bank to have the amount of the excess so paid applied on account of the principal or on account of the interest calculated at 7% only. *Canadian Bank of Commerce* v. *McDonald*, *supra*; *Bank of B.N.A.* v. *Bossuyt*, *supra*; *Quinlan* v. *Gordon*, *supra*; *Hutton* v. *Federal Bank* (1883), 9 P.R. (Ont.), at p. 581. The dictum of Pagnuelo, J., in *Banque de St. Hyacinthe* v. *Sarrazin* *supra*, to the effect that the prohibition of the Act is one "of public order," and that, therefore, a person who has paid to a bank interest in excess of the rate fixed by the Act, may recover back the excess, was not necessary to the decision of the case. In that case the excess of interest was retained by the bank, but was not in any other sense *paid* by the debtor. In *McHugh* v. *Union Bank of Canada*, 10 D.L.R. 562, [1913] A.C. 299, 316, it was held that the borrower must be taken to have known that the bank had no right to stipulate for and no power to recover interest at a higher rate than 7%, but that when he voluntarily assented to a settlement of accounts which was equivalent to payment of interest at a higher rate, he had no right to recover back any excess which he had thus voluntarily paid.

It has been held that a third party, *e.g.*, an execution creditor of the debtor, is not entitled to compel the bank to account for interest charged by it in excess of 7%. *Benallack* v. *Bank of B.N.A.*, 1905, judgment of the Territorial Court of the Yukon Territory (cf. 36 Can. S.C.R. 120), as explained in *Ritchie* v. *Canadian Bank of Commerce* (1905), 1 W.L.R. 499, at 501.

A bank may also receive and retain, in addition to the discount, the collection or agency charges authorized by secs. 93 and 94.

In *Royal Canadian Bank* v. *Shaw* (1871), 21 U.C.C.P. 455, it was held, under a similar section, that on a note bearing no rate of interest on its face and discounted at 8%, the bank could charge only 6% (which was then the rate of interest where no rate was fixed by agreement or law), notwithstanding a provision of the bank's charter permitting it to charge the same rate after maturity that it had charged on discounting the note.

If a negotiable instrument or other document provides for payment of interest at a given rate and there is no unequivocal stipulation that in the event of default in payment interest shall be paid after maturity at the same rate or at some other named rate, then the rate mentioned is payable only during the currency of the instrument. An agreement to pay interest at a

given rate upon the principal "until paid" or "until such principal money and interest sh ll be fully paid and satisfied" means merely that interest is to be paid at such rate until the day fixed for payment, and not that it is to be paid at the same rate after maturity. *St. John* v. *Rykert* (1884), 10 Can. S.C.R. 278; *People's Loan and Deposit Co.* v. *Grant* (1890), 18 Can. S.C.R. 262.

After maturity interest is payable not *qua* interest under the contract but *qua* damages for the wrongful detention of the money, and the rate payable in the absence of an unequivocal stipulation to the contrary is 5% (if the liability as to interest, *Plenderleith* v. *Parsons* (1907), 14 O.L.R. 619, accrued on or after the 7th of July, 1900, otherwise 6%.) *Cf.*, however, the opinion expressed in *Powell* v. *Peck* (1888), 15 A.R. (Ont.), 138, at 147, that the rate stipulated for during the currency of the agreement may, *primâ facie*, be adopted as the reasonable rate of interest payable by way of damages for detention. As shewing the leaning of the courts towards construing an agreement as one providing only for payment *ad diem* and not for payment *post diem*, see *Biggs* v. *Freehold Loan and Savings Co.* (1900), 31 Can. S.C.R. 13, reversing 26 A.R. (Ont.) 232.

THIRD DIVISION COURT—DISTRICT OF KENORA.

Chapple, J.] [Kenora, Sept. 21.

DIXON v. TOWN OF DRYDEN.

Poll tax—Liability for—Liability notwithstanding name appears on assessment roll—Must be assessed for the purposes of taxation—All male inhabitants over twenty-one years of age and under sixty years of age must pay taxes either under the "Assessment Act" or "The Statute Labour Act."

The plaintiff was a resident of the town of Dryden, being between the ages of twenty-one and sixty, and the tenant of a house which is assessed for $800.00 to the owner who pays the taxes and was assessed on the assessment roll for this and other properties of which he was the owner. The plaintiff's name did not appear on the assessment roll as being assessed together with the owner for this property, but was entered on a subsequent page of the assessment roll as a manhood franchise voter, without being assessed for any property or income whatever. The plaintiff claimed that because he was a tenant of property assessed on the assessment roll that he was not liable for poll-tax under s. 4 of the Statute Labour Act, c. 196, R.S.O. 1911.

CHAPPLE, J., *held* that the plaintiff ,not being assessed on the assessment roll *for the purposes of taxation*, is not exempt from the

payment of poll-tax under the provisions of s. 4 of the Statute Labour Act, and that the same was property collected by the defendant municipality.

Fred Ball for plaintiff. *J. F. MacGillivray*, K.C. for defendant.

Bench and Bar.

Courtesies of Counsel.

The pernicious habit of counsel taking briefs without due regard to the probability of being able to appear at the proper time and place should be discouraged. Recently Mr. A., K.C., refused a brief for an outside circuit, because he had one to attend to in Toronto, on the same day. On appearing in court in this case a junior, on the other side asked for a postponement because his senior, Mr. B., K.C., was engaged on an outside case, which happened to be the one in which Mr. A. had refused a retainer. Mr. A's thoughts on the subject were probably not as fit for publication as his remarks when the unexpected application was made. It certainly was a little irritating. We hope the postponement was refused and the junior given an opportunity to distinguish himself in absence of his senior.

Appointments to Office.

George Farar Gibson of the City of Quebec, K.C. to be a Puisne judge of the Superior Court for the Province of Quebec, vice Hon. John Charles McCorkill, retired. (Nov. 7.)

John Gunion Rutherford of the City of Calgary, C.M.G., and Simon James McLean of the City of Ottawa, to be members of the Board of Commissioners for Canada. (Nov. 8.)

Lloyd Harris of the City of Brantford Ontario, to be Chairman of the Canadian Mission in London. (Nov. 8.)

Apices Juris.

CONVENIENT DISABILITIES.

By Marvin Leslie Hayward.

"They tell me," began the little widow timidly, "that you never take a case unless you are satisfied that your client is in the absolute right of the matter, and that when you do you never fail to win."

"Some kind friend must have been overrating my slight ability," laughed Frazer MacKenzie, "but that is partly right. I pledged myself when I was admitted to the Bar that I'd let the other fellows handle the ordinary cases, but that I'd never let a wrong go unrighted if I could puzzle any way out."

"I'm afraid it's useless to take up your time," hesitated the widow.

"Tell me your story," urged MacKenzie, "and I'll soon tell you whether I can do anything or not."

"I am Mrs. Leslie Franklin, and I was formerly Miss Mabel Trafford of this city," she explained. "About twelve years ago my father died and left me a building on the corner of Duke and Valley streets."

"And you sold the property for a fraction of its actual value?" queried MacKenzie.

"Yes, and to make matters worse it was father's brother, John Trafford, who tricked me into giving it away. He told me that insurance and taxes were high and that business was moving away from that part of the city, and I gave him a deed of it for $10,000."

"The old scoundrel," exclaimed the lawyer. "He's the biggest crook in the Province, and I've been waiting for a chance to get something on him. How old were you when you gave him the deed?" he snapped.

"Father died when I was nineteen," replied Mrs. Franklin, "and I think it was about six months after that that I signed the deed."

"How long ago was that?"

"About twelve years."

"Where have you been during that time?"

"We have been in the West practically the whole time," was the reply. "I invested all the money I received from the land here in city lots in Vancouver, and a slump in real estate came just about the time of my husband's death. I was unable to keep up the payments and lost practically everything."

"I would be delighted to help you if there was any chance," MacKenzie assured her, "but while the law is that a deed given by an infant, that is, a person under twenty-one years of age, is not good, still the deed must be objected to by the infant after coming of age, otherwise it is perfectly valid and binding. The objection must be made, however, I am sorry to say, within a reasonable time. What is a reasonable time will of course depend upon the circumstances of each particular case, but three years would probably be the outside limit. As you have waited twelve years your right to object to the deed is gone and there is absolutely nothing which I can see that you can do."

"That's exactly what all the other lawyers told me," admitted the widow, "but I have heard so much about the hopeless cases that you had won that I thought possibly you might be able to do something after all," she said wistfully.

MacKenzie rose and walked across to the narrow window, where he stood gazing thoughtfully at the moving throngs on Prince Albert Street. Here was just such a case as he had been hoping for and it assayed one hundred per cent. justice, as he would have expressed it, but he was forced to admit that there seemed absolutely no way out of the dilemma. When the Courts had laid down that an infant must object to a deed within, say, three years after coming of age, it would be absolutely useless to attempt to disturb a deed which had not been objected to for a period of twelve years. Still, he hated to give up. As he had told Mrs. Franklin, he had been looking for years for a chance to even up with John Trafford, and as his wandering gaze travelled from the broad glass front of the Regal Bank past McCain's brokerage office to Smith & Baker's jewellery store the large sign in the window, "Marriage Licenses and Wedding Rings for Sale," caught his attention.

He whirled round with an eager light in his eyes.

"How old were you when you were married?" he demanded sharply.

"Nineteen."

"How long has your husband been dead?" still more eagerly.

"Nearly three months."

"That's great," exclaimed the delighted MacKenzie, but paused at the shocked look on the widow's face, "I mean that the circumstances give us a fighting chance at least to recover your property," he amended.

"I was sure you would be able to do something, unless all my friends were mistaken," declared the widow, "for they all say that no person ever came to you with a case where they had justice on their side that you could not win for them no matter what the law might be. 'The Guardian of the Good' is what they call you," she added shyly.

"Well, I'll try to live up to my reputation in this case at least," declared MacKenzie heartily, "and the sooner we start in the better."

"I leave the matter entirely in your hands," Mrs. Franklin assured him, and after a little more conversation she departed with a happier look upon her face than at any time since the Vancouver papers announced her husband's death in the obituary columns and advertised her property for sale for taxes on the next page.

MacKenzie lost no time, and early the following week as John Trafford was sitting in his office scanning with lively satisfaction the rent roll of the property which he had bought from his niece twelve years before, the Sheriff entered, handed him a folded paper, and at the same time held up another for his inspection.

"This is the original and that is the copy," said the Sheriff, indicating the paper which he had handed to Trafford.

"What in the devil does this mean," blustered Trafford.

"Read it and see," replied the Sheriff as he walked out.

"'In the Supreme Court, King's Bench Division. Mabel Franklin vs John Trafford. The plaintiff's action is for the recovery of the premises situate on the corner of Duke and Valley Streets, in the City of Saint John in the City and County of Saint John in the Province of New Brunswick'," he read.

"Mabel Franklin. Why that's my niece and the land that she claims is the same that I bought and paid her for twelve years ago. It must be some 'gum game' and I'd better see Brewster right away."

Ten minutes later Trafford had explained the circumstances to Daniel M. Brewster, his attorney, who listened attentively to Trafford's statement.

"And you say you bought this land from your niece and paid her for it and got the deed twelve years ago," suggested Brewster.

"I do."

"And she was under age at the time?"

"She was, but she was perfectly willing to sell."

"That is of no importance. Has she at any time since giving the deed raised any objection or made any demand on you for the land?" queried the lawyer.

"Not a word. This is the first thing I ever heard about it," replied Trafford positively.

"Then I'll put in a defence and we'll fight it out," suggested Brewster.

"Can we win?" quavered Trafford.

"I'll guarantee that the case won't last half an hour. The law is right in our favor and they haven't the ghost of a chance," Brewster assured him.

"Then what does MacKenzie mean by starting suit?" demurred Trafford.

"Oh, he's capable of anything, and he is continually taking up these hopeless cases," replied Brewster a trifle dubiously.

Three months later the case came to trial at the March Circuit Court before Judge Roberts, who before his elevation to the Bench had been known as the greatest real property lawyer in the Province.

MacKenzie and the timid looking little widow sat on one side of the long attorney's table, facing Trafford and the portly and pompous Brewster, who regarded MacKenzie and his shrinking client with a ghoulish sneer.

"Mabel Franklin vs. John Trafford," said the Judge. "Mr. MacKenzie for the plaintiff."

"May it please your Honour," began MacKenzie as he rose and faced the Court, "in this case the plaintiff, Mrs. Franklin, seeks to recover from the defendant Trafford a lot of land on the corner of Duke and Valley Streets in this city. The property in question was devised to Mrs. Franklin—then Miss Mabel Trafford—by the will of her late father. Twelve years ago Miss Trafford, then being nineteen years of age, conveyed this property to the defendant Trafford."

"And you claim that the deed was invalid on account of your client being under age, when it was signed," suggested the Judge.

"Exactly."

"We are willing to admit that Miss Trafford was under age when she gave the deed if my learned friend will admit certain other facts," interrupted Brewster.

"What are they?" queried MacKenzie tolerantly.

"We want you to admit that since giving the deed twelve years ago Mrs. Franklin has made no claim to the land and has not attempted in any way to repudiate the sale," said Brewster.

"Certainly," agreed MacKenzie, "if you will agree that Mrs. Franklin was married a few months after giving the deed and that her husband died a few months before this suit was started."

"There's no objection to that," declared Brewster with a triumphant wink at Trafford.

"We ask for a verdict for the plaintiff," said MacKenzie nonchalantly.

Brewster rose to his feet with a studied sneer on his fat face.

"The case is really too simple to call for argument," he began, "as the law is well settled that the deed of an infant is not void but is merely voidable by the infant on attaining his or her majority. If authority for that elementary proposition is necessary I would cite the case of McDonald v. The Restigouche Salmon Club, 33 New Brunswick Reports, page 472."

"That is good and elementary law, Mr. Brewster," agreed the Judge.

"It is also good law," argued Brewster, "that the deed must be repudiated within a reasonable time after the infant becomes of age, or the silence will affirm the deed. This is also laid down in the McDonald case which I just cited."

"No one can dispute that," interrupted Judge Roberts.

Brewster flung a triumphant glance at Trafford which plainly said, "I told you so."

"Then," he continued, "in the McDonald case the N.B. Supreme Court, relying on Foley v. Canada Permanent Loan Co., 4 Ontario Reports 38, held that under ordinary circumstances three years is a reasonable time in which the infant should object to the deed. In this case we have on record the admission of the plaintiff's solicitor"—with a supercilious smile at MacKenzie—"that the plaintiff in this case waited twelve years before objecting to the deed. I would therefore ask for a verdict for the defendant with costs."

"Have you anything to say, Mr. MacKenzie?" queried the Judge.

"I admit everything my learned friend says," began MacKenzie, "and his law perfectly good—as far as it goes."

"You'll find it goes pretty far," interrupted Brewster.

"My argument is that the infant is not required by the law to object to the deed until attaining the age of twenty-one," continued MacKenzie.

"That is very elementary," smiled the Judge.

"And the reason for that is that until he is twenty-one the infant is under the legal disability of infancy and is not required to disaffirm the deed until the disability of infancy is removed," argued MacKenzie.

"Correct," agreed the Judge.

"Now," continued MacKenzie, "there are other legal disabilities beside infancy—marriage, for instance,"

Brewster was smiling confidently, but Judge Roberts leaned forward, a keen look on his thin face.

"Proceed, Mr. MacKenzie," he urged.

"In this case the plaintiff married while she was still an infant, that is, before the disability of infancy was removed she was under the disability of marriage, so that she was really under a legal disability until her husband died. Therefore, she was not bound to object to this deed until after her husband's death, and as that event occurred about three months ago I think this suit was brought

in ample time, as my learned friend admits that three years is the limit under ordinary circumstances."

Brewster gasped and gazed open-mouthed at his smiling opponent, while the Judge frankly looked his surprise.

"Have you any authority for that proposition?" he snapped.

MacKenzie handed up a calf-bound volume to the Judge.

"In the case of Gaskins v. Allen, at page 426 of the report I just gave you," declared MacKenzie, "the Supreme Court of North Carolina held that where a married woman had been under the disabilities of infancy and marriage she was not required to object to the deed until both disabilities were removed, and in that case the Court permitted a widow to disaffirm a deed three years after her husband's death and twenty-two years after she came of age."

"Under the circumstances," said the judge, as he closed the volume with an air of finality, "I adopt the clear and lucid reasoning of the Carolina Court, as the point has never been passed upon by any English or Canadian Court. There will be judgment for the plaintiff with costs."

The clerk closed the Court. The dazed and disgusted Brewster and his profane client departed, and the little widow turned to MacKenzie with an uncontrollable little catch in her voice and made a brave attempt to express her gratitude.

"Never mind thanking me," said MacKenzie heartily, "for it was such a beautiful little point that I ought to pay you for the privilege of handling the case."

[The alleged fact that the Canadian Judge followed the American decision is necessary to make the story end happily, as all stories should; but, as a matter of law, we have grave doubts whether a Canadian Court would decide as Judge Roberts is supposed to have done. We apologise to Dr. Morse for using the title "Apices Juris," but it is appropriate and reminds us of his brilliant brochure of that name, which we presume all our readers have seen. ED. C.L.J.]

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