Canada Law Journal.

VOL. XLIX. TORONTO, FEBRUARY 15. No. 4.

THE ADVISABILITY OF ESTABLISHING A BANKRUPTCY COURT IN CANADA.

ADDRESS DELIVERED BEFORE THE ONTARIO BAR ASSOCIATION BY JAMES BICKNELL, K.C.

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History of Bankruptcy Laws.

The principle embodied in the want of bankruptcy legislation in Canada is, historically considered, that of slavery. In the most primitive stage of society, indeed, the remedy, if there was any, was probably that of private vengeance. In the next stage we have the condition of things which may be described as private vengeance regulated by the State—the manus injectio of the Romans, whereby the creditor was permitted privately to imprison the debtor and even to kill him. In the next stage we have public imprisonment of the debtor. The debtor was restrained of his liberty, that is, he was restrained as to locality and also as to his liberty to deal with his fellowmen. Later still, in the next stage, the restraint as to locality was removed, but the restraint as to the debtor's dealings with others was, in effect,

retained. Imprisonment for debt is abolished, but, no discharge being granted, the disability as to dealing with others persists. In the last and final stage of development personal restraint entirely disappears, and the honest, but unfortunate, debtor is not only not imprisoned, but is left free to engage unhindered in the activities for which he may have any special skill and aptitude to the benefit of himself, his family, and the State.

A glance at the pages of history is sufficient to verify the evolutionary process here briefly sketched. In all primitive communities of which we have historical record, the rule was that a man must pay his debts in full, and if he could not pay with his property he should answer with the liberty not only of himself, but of his family. The Old Testament contains the story of a woman who sought the help of Elisha, saying, 'thy servant my husband is dead and the creditor is come to take unto him my two children to be bondmen": 2 Kings: 4. 1.

Sir Henry Main said: "Nothing strikes the scholar and jurist more than the severity of ancient systems of law towards the debtor and the extravagant power lodged in the creditor." It brought many early states to the brink of ruin. In Athens a revolution was only averted by the abolition of enslavement for debt. In Rome in the ancient law of the twelve tables every execution was personal and resulted in the bondage of the debtor and a right to the credtior to sell him into slavery or even to kill him. If several creditors had claims upon one and the same debtor the law allowed them to cut the debtor into pieces and divide his body between them. The creditor's right to sell his debtor was abolished in 313 B.C.; nevertheless, imprisonment continued to be the principal method of execution. When the person of the debtor passed into the power of the creditor the same fate befell his whole estate. It was not until the time of Julius Cæsar that a debtor became entitled to immunity from imprisonment on formally giving up everything to his creditors, cessio bonorum. This cessio bonorum marks the commencement of one of the true principles of bankruptcy.

The earliest English statute on the subject of bankruptcy

was passed in 1542. Then, as now, it was found necessary to enact laws for protection against fraudulent traders. The next Act was passed in 1570 and applied only to traders, but provided penalties for the non-disclosure of assets. Neither of these Acts granted any relief to the debtor in the way of a discharge of liability, and although the law expressed in those Acts was modified by new statutes from time to time it was not until 1706 that the principle of granting a discharge to the debtor was introduced. The Act of 1706 provided that a debtor might with the consent of a specified majority of his creditors obtain from the Commissioners, who had the conduct of the bankruptcy proceedings, a certificate which when confirmed by the Lord Chancellor discharged his person and whatever property he might subsequently acquire from all debts which he owed at the time of his bankruptcy. Until 1831 the jurisdiction over bankruptcy estates was exercised either directly by the Lord Chancellor or by Commissioners appointed by him. In that year a Bankruptcy Court was established in England and continued until the jurisdiction was in 1883 tranferred to the High Court and certain County Courts.

In Scotland, where a most simple and practical system of bankruptcy is now in operation, all insolvents were at one time called dyvours and were regarded as fraudulent debtors. In the beginning of the seventeenth century the unfortunate dyvour was clad in party-colored garment, one-half yellow and the other brown, and in this attire was exposed at intervals upon the public pillory. Although this practice long ago fell into disuse it was not abolished by law until 1836.

When the laws of England were introduced into Upper Canada in 1792, the laws respecting bankrupts were excepted, the Statute 32 George III., c. 1, s. 6, enacting: "Provided always and be it enacted by the authority aforesaid that nothing in this Act contained shall introduce any of the laws of England respecting bankrupts." After the union of Upper and Lower Canada, and in 1843, a Bankruptcy Act was enacted which granted a discharge to the debtor from all debts due by him at the date of

the commission and from all claims provable under the commission. This Act was by its terms to continue in force for only two years, but by subsequent enactments passed annually it was continued in force until 1849. The Act applied only to traders and the term "trader" was very strictly defined. In 1844 an Act for the relief of non-traders was passed by which such persons were protected from arrest under civil process. In 1864 a new Insolvent Act was passed which applied in Lower Canada to all persons. This Act was repealed in 1869 and the Insolvent Act of 1869, which applied to traders only, was substituted. The Act of 1869 was by its terms limited to four years, but in 1874 it was continued until the following year, and in 1875 a permanent Act was passed applicable to traders only, and this Act was repealed on the 1st of April, 1880.

In New Brunswick, prior to Confederation, there was no bankruptcy or insolvency law, nor any provision for the distribution of a person's estate other than by ordinary process and there was no law against preferences.

In Nova Scotia a remedial law intended to supplement and mitigate the law of imprisonment for debt was in force before Confederation, and in British Columbia and Vancouver Island the English bankruptcy law of 1849 was in force until those provinces became part of the Dominion.

Present Laws.

In Ontario and the Western provinces very strict laws are now in force prohibiting unjust preferences of one creditor over another. There are also laws abolishing priority between execution creditors. Assignments for the benefit of creditors providing for a ratable distribution of an insolvent debtor's property among his creditors without preference or priority (except claims given by law or statute a preference such as wages) are valid and for certain purposes the assignee is the representative of the creditors. These Acts also contain provisions for the examination of the debtor and for the contestation of creditors' claims. Under these Acts the assignee is in the first place

selected by the debtor, but may be removed and a new assignee appointed upon a vote of the creditors. The creditors are largely at the mercy of the assignee, both as to the administration of the estate, the expenses connected therewith, the scrutiny of claims, the conduct of proceedings for the contestation of securities and the examination of the debtor. In many cases no doubt the creditors prefer to avoid the loss of time and expense which would be involved in scrutinizing the affairs of the estate and are content to take whatever dividend may become payable and to continue to hold their debtor responsible for the unpaid balance of their claims. Unless a creditor wishes to be unduly harsh he omits to obtain judgment for the amount remaining due to him and consequently in due time his claim is barred by the Statutes of Limitation and the debtor becomes free from enforceable liability except to those creditors who have taken the precaution to obtain judgment against him.

The Causes of Failure of Bankruptcy Laws.

It will be seen by reference to the many Bankruptcy Acts which have been passed both in England, the United States and in Canada that bankruptcy legislation has apparently been a series of experiments. This has been due to various causes. The principle of every Bankruptcy Act since the beginning of the eighteenth century has been the same. The difficulty has been in its administration. Some of these difficulties are:—

1. The manufacture of fraudulent claims.

2. The rapacity of trustees.

3. The expense attendant upon the administration of an estate under the official supervision of a Court.

4. The absence of control by creditors.

5. The facility of obtaining the approval of a deed of composition by creditors constituting the requisite majority.

6. The absence of public examination of the debtor.

7. The want of sufficient penalties for dishonest or reckless conduct or for violations of the principles of commercial morality.

Causes of the Repeal of Bankruptcy Legislation in Canada.

The repeal by Parliament in 1880 of the Insolvent Act of 1875 was probably due to an aggregation of evils rather than to any specific cause. Under the Act of 1875 there was no single Bankruptcy Court. The Act was administered in Quebec by the Superior Court, in Manitoba by the Court of Queen's Bench, in Ontario, British Columbia and Prince Edward Island by the County Courts and in Nova Scotia by the Court of Probate, until such time as County Courts should be established in that province. There was no examination of the debtor in open court. True, a debtor was liable to be examined under oath before the assignee and was bound to attest his statements of liabilities and assets under oath. The administration of the estates was committed to a privileged class of persons called official assignees who were appointees under the party system of Government. No effective audit of the accounts of these assignees was provided for and the security required to be given by them for the proper administration of estates committed to their care was nominal. The debtor by obtaining the execution by a majority in number and three-fourths in value of his creditors having proved claims of $100 and upwards could obtain his discharge unless some dissenting creditor chose to intervene and oppose confirmation of the composition upon grounds enumerated in the statutes. Moreover, at the time that the Canadian Parliament dealt with the matter in Canada an agitation was on foot in England to repeal the bankruptcy law of that country. As the dissatisfaction existing in England with the working of the bankruptcy law then in force contributed in no small degreee to the repeal of the Canadian Act—helping as it did to discourage the supporters of bankruptcy legislation here and to confirm the opponents of it in their antagonism—we may digress for a moment to glance at some of the defects in the English Act which gave rise to the aforesaid dissatisfaction and agitation.

In most respects the English Act of 1869 was an admirable one, but the English practitioner discovered in it what in the slang of the present period may be called a "joker."

Sections 125 and 126 of the Act contained provisions enabling a debtor to present a petition in court for liquidation of his affairs by arrangement or on payment of a composition. On presentation of this petition a meeting of creditors was to be summoned, but the names of the creditors were furnished by the debtor himself. No judicial investigation of the right of these creditors to be deemed creditors was held. A majority in number and value after lodging proof of their claims could by resolution agree to liquidation by arrangement and to the acceptance of the composition. That resolution then became binding on all other creditors without any act of approval by the court, any judicial examination of the debtor, or any judicial examination of the trustees' account. The consequence was that most of the proceedings under that Act were taken under these sections. After the Act had been in force ten years the comptroller in bankruptcy reported 13,000 annual failures in England and Wales, and of these 12,000 were taken under sections 125 and 126. The facilities for fraudulent and collusive arrangements afforded by the Act and the want of effective control over the administration tended to lower the morale of the proceedings and to throw the control of them into the hands of the less scrupulous members of the profession. The demands for reform were frequent and came from all classes of the business community. Thirteen bills dealing with the subject were introduced into the English House of Commons between 1869 and 1879. At length, in 1879, a memorial signed by a large body of bankers and merchants in the City of London, a memorial described as "one of the most influential memorials ever presented to any Government," was forwarded to the Prime Minister. The matter was referred to the President of the Board of Trade, who was Mr. Joseph Chamberlain. Exhaustive inquiries were made under his direction and in 1881 a measure was introduced which with some amendments finally became law under the title of "The Bankruptcy Act of 1883." This Act, with some amendments, is still in force in England and is giving satisfaction. One underlying principle of the Act is—the estate for the creditors, not for the debtor or for the

trustee. The other underlying principle is—commercial morality. The dealings of an insolvent debtor with his estate are not matters which concern only him and his creditors; the community is also vitally interested therein. Therefore, the Act, while just and generous to the honest and unfortunate trader, penalizes the incompetent and dishonest and endeavours to protect the trading community from his incompetency and dishonesty.

Debates of 1879 *and* 1880.

The agitation for the repeal of the English Bankruptcy Act of 1869 synchronized then, as we have said, with the debates in the Canadian House of Commons on the same subject in 1879 and 1880.

In 1879 a resolution was proposed by the leader of the Government to refer three Bills which had been introduced in that session dealing with the question of insolvency legislation to a select committee, whose duty it should be to enquire into and consider all questions of insolvency and bankruptcy. On the debate on this resolution many speakers on both sides of the House strongly opposed the continuance of bankruptcy legislation, but the resolution to refer was, nevertheless, passed, and the Committee was appointed. Later in the same session they brought in their report and proposed the repeal of the old law and the enactment of a new Act. An amendment was moved to approve the report of the Committee in so far as it related to the repeal of the old Act, but not to enact any new law. Somewhat unexpectedly this amendment received an affirmative vote in the House, but was rejected in the Senate. Next year, however, a Bill to repeal the existing Act was again passed in the House, and this time it received the support of a majority in the Senate, and the Insolvent Act of 1875 was repealed.

Thenceforward creditors were compelled to protect themselves against one another by means of the more or less imperfect remedies provided by provincial enactments. Debtors had several courses open to them:—

1. They could leave the country.

2. They could carry on business in the names of their wives and defy their creditors.

3. They could form limited liability companies.

4. They could obtain precarious credit.

5. They could await the Statute of Limitations.

6. They could obtain a discharge from such of their creditors as were willing to grant it and could settle with or pay the others.

The honest, capable man, unwilling to adopt any device derogatory to his manhood was practically prohibited from giving to the community the benefit of his services except as the hired servant of others more fortunate than, but possibly not so capable as, himself.

Objections urged in Parliament.

When the debates in Parliament are examined it will be found that the reasons given for the repeal did not go to the root of the matter. The fault of the law was not so much in its principle as in its administration.

Among the objections were:—

1. The Act gives too great a facility to debtors to make private arrangements with their creditors.

2. The throwing of bankrupt stocks on the market deranges business and militates against the honest trader.

3. The only man who needs protection is the honest, but unfortunate, debtor and to such a debtor the commercial community will be indulgent without a bankruptcy law.

4. A bankruptcy law the benefits of which are enjoyed only by traders, induces a great many people to go into business who otherwise would not.

5. Bankruptcy laws encourage rash speculation and induce a great many improvident persons to go into speculation into which they would not venture if they did not know that they had a chance of getting a discharge from their liabilities if they should be unsuccessful.

6. The Act is too expensive in its operation. In most cases creditors are pleased to enter into deeds of composition in order to get anything at all.

7. The assignees and lawyers are too rapacious and it is to their interest to prolong the proceedings and increase the expense. Under the old system one man, namely, the man with the first execution in the sheriff's hands, got his pay. No one gets it now. Nobody gets paid. They had raised up a class of official assignees who took it all.

8. Confining the operation of a bankruptcy law to traders is class legislation. The Act is detrimental to farmers and other classes of society who are shut out from the privileges of the Act. A trader got a non-trader to endorse his note, and after a while got into difficulties. He would call his creditors together and could get relief from his creditors, but the non-trader who had endorsed his paper must pay up to the last farthing and might be ruined thereby.

9. One reason for the unpopularity of the Act was the absence of proper supervision of the assignees. Were there Government inspectors to supervise all the acts of the assignees things might be otherwise. Many official assignees manage by some means to find out the affairs of persons in business and facilitate their bankruptcy.

10. Another reason for the unpopularity of the Act in Ontario was the permission to creditors to name an assignee outside the province, while there was no power to bring one who had acted improperly to the province to make him disgorge.

11. At a meeting of creditors one or two of those who held the heaviest claims were appointed inspectors, and they took good care of their own interests. They come to an understanding among themselves whilst the less fortunate suffer. The law did not protect those who did work for the merchants—the mechanic, the working man, the professional man, all those who work.

Rural Opposition.

It will be seen from these suggestions urged in the House of Commons debate at the time, that one of the powerful causes operating to bring about the repeal of the Act was the fact that only traders were entitled to its benefits. These objections

were urged more especially by members representing rural constituencies. Repeatedly it was pointed out by such members that the majority of their constituents, farmers, mechanics, and professional men, received no benefit from the Act, though compelled to bear their share of the loss resultant.

Other causes more or less unconnected with the merits of the Act itself that conduced in no small degree to its repeal were:—

Predominance of Quebec.

The fact that in Lower Canada they had a provincial law which enabled a creditor to hold an insolvent's property for the benefit of all creditors. It was pointed out that Clause 766 of the Code of Civil Procedure provided a much more simple, much more expeditious, and much less unjust remedy, and that the inhabitants of Quebec had the great advantage of protecting the unfortunate debtors from the bite or embrace of the official assignee. The strongest opposition came from the Province of Quebec.

Is a Bankruptcy Law Vicious?

The Commons were also influenced, as has been already mentioned, by the fact that in England they had not as yet succeeded in devising a satisfactory bankruptcy procedure. The same thing was at this time also true of the United States. There was in fact much dissatisfaction in both these countries with their existing laws. It was strongly urged that this dissatisfaction proved the contention that all bankruptcy laws were inherently vicious and incapable of successful enforcement, and that it was no use trying to amend them.

Many of the complaints were well founded. Parliament, however, overlooked the fact that no real argument against the principle of bankruptcy laws had been brought forward. The objections, formidable as they were, were not to the substantive, but to the adjective portions of the law. The principle of the bankruptcy law was correct. The method of the administration and enforcement thereof was defective. All that was needed

was the man to find the remedy. The man was found. He was the long-sighted, clear-headed, and capable Joseph Chamberlain, then occupying the position in the English Cabinet of President of the Board of Trade. After exhaustive enquiries he found the remedy, and for nearly thirty years the Act introduced by him, and which became law in 1883, has been administered in England, in such a way as to secure bankrupts' estates for the creditors and justice, not slavery, for honest debtors. Similarly in the United States, after various experiments, Congress upon a careful and exhaustive inquiry into the operation and effect of bankruptcy laws in other countries, enacted a national bankruptcy law in 1898, which, with some amendments made in 1903, has been the law ever since and gives every evidence of being entirely satisfactory to the nation at large.

Comparison of Failures in Canada with those in England and in the United States.

That a bankruptcy law does not tend to increase the number of failures is apparent from a comparison between the number of failures in Canada in the past four years as against the number of failures in the United States and England.

Canada.

Year	*Number of Failures*	*Assets*	*Liabilities*	*One failure for every*
1908	1,713	$7,767,207	$17,377,201	3,885
1909	1,581	6,156,9[illegible]	12,724,384	4,325
1910	1,459	6,961,[illegible]47	15,525,134	4,810
1911	1,399	6,399,647	12,799,001	5,000
			Average	4,500

United States.

Year	*Number of Failures*	*Assets*	*Liabilities*	*One failure for every*
1908	15,690	.....	$222,315,684	5,655
1909	12,924	.....	154,603,465	6,995
1910	12,652	.....	201,757,097	7,270
1911	13,241	.....	186,498,823	7,060
			Average	6,745

England and Wales.

Year	Number of Failures	Assets	Liabilities	One failure for every
1907	4,111	£1,917,338	£5,673,623	8,916
1908	4,306	2,103,492	5,509,949	8,040
1909	4,070	2,154,034	5,804,142	8,700
1910	3,880	2,867,068	8,211,678	9,200
			Average	**8,714**

These figures for England and Wales represent the numbers of receiving orders made under the Bankruptcy Act, and do not include cases of insolvency under deeds of arrangement. The exact figures for these latter are not available, but the indications are that if they were included the number of inhabitants to a failure would still be over 5,000. It would appear, therefore, from the foregoing that there are as many or more failures in a country without a bankruptcy law as in analogous countries possessing such an enactment.

English Act of 1883.

The salient features of the English Bankruptcy Act of 1883, may be said to be as follows:—

1. An independent and public investigation of the debtor's conduct.

2. The punishment of commercial misconduct and fraud in the interests of public morality.

3. The summary and inexpensive administration of small estates.

4. Full control by a majority in value of the creditors of the appointment of a trustee and a committee of investigation.

5. Strict investigation of the proofs of debt with regulations as to the proxies and votes of creditors.

6. Provision that no arrangements between creditors and debtors, or compositions by deed or by resolution, should have any force against dissenting creditors, unless confirmed, after full investigation by the Bankruptcy Court.

7. An independent audit and general supervision of the proceedings and control of the funds in all cases.

In 1908, after the law had been in force for 25 years, a Committee of the Board of Trade, after making full enquiry into the working of the English Act, and into those of Germany, France, Australia, Scotland and Ireland, reported that the result of their enquiry did not disclose any dissatisfaction on the part of the commercial community with the main features of the then existing law and procedure. Improvements were suggested in certain minor aspects of the law and certain branches of its administration, but with regard to the general scheme they recommended no change.

It has already been pointed out that other parties are interested in insolvency than the creditors and the debtor.

Unless restrained by legal enactment, the predominant characteristic of the human mind is selfishness. Every man is more or less dominated by what is best for his own interests. It matters little to creditors that it is unsafe to the community that their debtor should be allowed to carry on his trade. On the other hand it also matters little to creditors that their debtor has talents and enterprise, which if allowed free scope, would be of great value to the community. In the one case, if he is willing to offer them five or ten cents more on the dollar than they can collect from his estate they will give him a discharge, and allow him to prey generally upon the community, until he again fails, and pays only a percentage of his debts. In the other case, unless the debtor's friends are willing to come to his aid, and recognizing his talents and enterprise, are willing to contribute out of their own means towards his debts, they are willing that he shall be handicapped with such a load of debt as to deprive the community of his services. His only reliefs are the Statutes of Limitation, the generosity of such of his creditors as recognize both his honesty and ability and, thirdly, the satisfaction of the demands of those sordid individuals who refuse to give a man a chance until they have first extorted the uttermost farthing. The trading community does not sufficiently recognize that the dishonest trader is a menace to the community, nor that it is impossible for the honest man who pays one hundred cents on the

dollars to compete with the man who frequently fails and pays only a percentage of his debts. Many men are reputed to have become rich by so administering their affairs as to fail for a sufficiently large amount

Proposed Remedies.

It would be beyond the scope of this paper to attempt to work out the details of a Canadian bankruptcy law. The English and American Bankruptcy Acts contain sufficiently ample measuring rods to enable a satisfactory Act to be framed.

The particular points to be observed are:—

1. Every debtor must be compelled to submit to a public examination before a judicial tribunal respecting his conduct and he must be compelled to explain the reasonable and probable causes of his failure in business.

2. No man whose failure has not been brought about by misfortune should be entitled to a discharge.

3. All undischarged bankrupts should be incapable of obtaining credit and should be incapable of holding public office and positions of trust.

I would, therefore, suggest:—

1. That there should be enacted in Canada a uniform law, governing all matters coming within the ambit of bankruptcy legislation. Creditors in Toronto or Montreal should be able to know that the remedies against a defaulting debtor resident in Halifax are equally as good and as readily available as the remedies aginst a debtor in Vancouver.

2. The administration of the bankruptcy laws should be committed to the Superior Courts of the various provinces and the judges of the various county and other local courts should be Referees in Bankruptcy.

3. Upon the commission of an act of bankruptcy the creditors should have a summary and speedy remedy against the entire estate of a debtor.

4. The creditors should have the entire control of the administration of assets and should be at liberty to say whether the

assets should be administered under the supervision of the courts or by a trustee of their own choosing.

5. No composition should be effective or should entitle the debtor to a discharge unless first confirmed by the court after full enquiry into (*a*) the conduct of the debtor, (*b*) the claims of the creditors, (*c*) the objections of dissentients, or the expenses attendant thereon.

6. Inasmuch as the state is entitled to the benefit of the services of all its subjects no creditor should be allowed to hold in bondage the soul, body or talents of any of its subjects merely because he has been unfortunate.

7. If a debtor is not able to give an adequate, reasonable and satisfactory account of the transactions causing his failure, his future earnings should be impounded for the benefit of his past creditors until they have been sufficient to pay a reasonable percentage upon the dollar of his creditors' claim.

8. Dishonest and incompetent traders should be stigmatized as undischarged bankrupts and should be incapable of engaging in trade or contracting debts without reasonable prospects of paying them.

9. There should be an official supervision over the accounts of all trustees.

10. A central bureau should be established in each province, presided over by a Superior Court judge by whom all bankruptcies would be supervised, thus ensuring both uniformity and honesty of administration.

11. The guiding principle should be "the estate for the creditors." The procedure should be so simple and expeditious as to produce the speediest and best results.

12. Every debtor should be compelled to submit a full statement of his assets and liabilities and the reasons for his failur the first meeting of his creditors and should thereafter be examined in open court before a judge, in the presence of his creditors, and should thereupon be called upon to answer all questions which might be put to him by counsel or any of his creditors with regard to his affairs, and any prevarication or

failure to make a satisfactory explanation should be punishable as contempt.

13. The bankruptcy law should be available to all debtors, both traders and non-traders.

14. The wage-earner and the possessors of small estates who perhaps have fallen into the hands of 'loan sharks should be enabled to have their estates administered in bankruptcy at a minimum of expense.

15. The present system of appointing assignees has been found in the main to work satisfactorily and subject to the control of creditors should be permitted to continue, but for the administration of small estates and estates over which creditors do not care to take control, a salaried official should be appointed in each province, who would officially supervise all such small bankruptcies and enable justice to be done both to the creditor and the debtor without undue expense.

I should like to conclude this paper by an extract from the report of the committee appointed in 1906 by the English Board of Trade, which report was published in 1908. The committee in its report, speaking in general terms of the bankruptcy law existing in England, says:—

"The evidence and documents placed before us do not disclose any dissatisfaction on the part of the commercial community with the main features of the existing law and procedure; while evidence and statistics from official sources shew that there has been a large reduction in the amount of insolvency throughout the country since the present system came into force. The matters of complaint and suggestions for reform of the law which we have had to deal with have principally related to special incidents of the law and branches of its administration."

THE COURT OF KING'S BENCH IN UPPER CANADA, 1824-1827.

BY THE HONOURABLE MR. JUSTICE RIDDELL, L.H.D., LL.D., ETC.

(*Second Paper.*)

While watchful over the conduct of its own officers, the court did not omit to exercise strict supervision over the inferior courts.

The first courts in Upper Canada were the four courts of Common Pleas, one for each of the districts into which what afterwards became Upper Canada had been divided by Lord Dorchester by proclamation, July 24th, 1788, viz.:—Luneburg, Mecklenburg, Nassau and Hesse. These courts were abolished in 1794 by 34 George III., c. 2, and new district courts for each district were organised in the same session, c. 5; these later on, in 1849, became County Courts. Before this time, *i.e.*, in 1792, by 32 George III., c. 6, inferior courts called Courts of Requests had been constituted to be presided over by one or more justices of the peace and afterwards by Commissioners; these ultimately gave way to Division Courts. There were also courts of General Quarter Sessions of the Peace, composed in fact of the justices of the peace of the district, with large criminal jurisdiction, particulars of which may be found in Blackstone's Commentaries, Book IV. pp. 271 et seqq. These have become the General Sessions in which the County Court judge is in fact the only presiding officer, although in theory, the magistrates are sitting with him. Commissions of Oyer and Terminer and General Gaol Delivery also issued. Over all these courts, the Court of King's Bench, instituted in 1794 by 34 George III. C. 1, exercised authority.

We have seen how a judge of a District Court was punished for taxing too high fees to an attorney; and there are many other instances of the court exercising its supervisory jurisdiction (see Blackstone's Comm. Book III., pp. 42, seqq.).

In Easter term, 4 George IV., May 14th, 1824, (Praes. Powell, C.J., Campbell and Boulton, J.J.) "*E. Edmunds* v.

Harnack; Motion for a mandamus nisi to David McGregor Rogers, Esq., judge of the District Court of Newcastle, commanding him to enter final judgment upon the interlocutory judgment and assessment of damages in this cause now pending in his court; J. B. Macaulay, Granted and issued."

No further proceedings were taken in court in this case; it is probable that judgment was entered up properly on service of the mandamus nisi. Mr. Rogers was also member of Parliament and registrar of deeds.

In Easter Term, 4 George IV., May 1, 1824, (Praes. Powell, C.J., Campbell and Boulton, JJ.): "*The King* v. *Bullock et al.* Motion for a rule to shew cause why an attachment should not issue against Richard Bullock and Sheldon Hanby, Esquires, Commissioners of the Court of Requests in the district of Newcastle, for corruptly giving judgment against the defendant in a suit of *Samuel Heath* v. *Isaac Brown*, for £2 1s. 10d., D. & C.; J. Macaulay; granted and issued." ("D. & C." means of course, "Damages and Costs.") Nothing further was done in this case; it is probable the defendant found he had made a mistake.

In Hilary Term, 5 George IV., January 27, 1825 (Praes. Powell, C.J., Campbell and Boulton, JJ.): "*Jas. & Wm. Allan* ats. *Henry Woodside* in the District Court. Motion for a writ of certiorari, directed to the judge of the Newcastle District Court to remove the proceedings in this cause into this court; G. Boulton; not granted." With this may be compared *In re Erb* (No. 2), 1908, 16 O.L.R. 597. ("ats." means "at the suit of.")

In Easter Term, 7 George IV. April 19th, 1826, (Praes. Campbell, C.J. and Sherwood, J.) "*In re Edward McBride, Esq.* Motion for a rule to shew cause why a mandamus should not issue to the justices of the peace in the Niagara district directing them to grant the usual order upon the treasurer of the said district for the wages of Edward McBride, Esq., a member representing the town of Niagara in the district of Niagara in Provincial Parliament; J .B. Macaulay, Esq. for E. McBride, Esq. The court not prepared to give any order on this motion:" April 29th, 1826, "Stands for judgment:" Nov. 14th, 1826, "Stands for

further argument:" Nov. 14th, 1826, "Refused." This was a very curious case; in 1793 the Act, 33 George III., c. 3, provided for the payment of wages to the members of the House of Assembly by the district in which their riding was situated. At the time of the passing of this Act, no town had any member in the assembly. By the Act of 1820, 60 George III., c. 2, towns of 1,000 population or over, in which the Quarter Sessions were held, were given a member. Niagara elected Edward McBride —the magistrates refused to give an order to the treasurer to pay him the wages he claimed, and he applied to the court—but after two arguments and much consideration, his application was refused. The reasons will be found in Taylor's Reports, p. 542. It was not till 1835 that members for towns were paid wages like their fellow-members who represented counties, 5 William IV., c. 6.

In Trinity Term, 7 George IV., June 20th, 1826, (Praes. Campbell, C.J., and Sherwood, J.) "*The King* v. *John Eagleston, Elizabeth Slingsland and Peter Ball*; Indictment for a nuisance in stopping the King's highway. Motion for a rule to shew cause why a mandamus should not issue to the magistrates of the Niagara district in Quarter Sessions assembled, commanding them to pass judgment against defendants upon the above indictment on the verdict rendered at the last Court of General Quarter Sessions of the Peace, holden in and for the Niagara district; J. B. Robinson, Esq., for prosecutors. Granted and issued to J. B. Macaulay, Esq." In Michaelmas Term, 7 George IV., Nov. 18th, 1826, this rule was made absolute on motion of J. B. Macaulay, Esq., (Praes. Campbell, C.J., Boulton and Sherwood, JJ.).

Macaulay was the son of Dr. Macaulay, Inspector-General of Hospitals; himself an ensign in the 98th Regiment of Foot, he took part in the war of 1812, as lieutenant in the Glengarry Fencibles. He was present at Ogdensburg, Lundy's Lane and Fort Erie. Called to the Bar in 1822, he afterwards became a Justice of the King's Bench; and when the Court of Common Pleas was organized in 1849, he was the first chief justice of

that Court. He resigned in 1856, and next year was knighted, and appointed a judge of the Court of Error and Appeal. He died in 1859, at Toronto, at the age of 66.

The result of the rule being made absolute was that the magistrates were compelled to pass sentence upon those convicted of a public nuisance.

A case a little earlier, in July 1823, may be mentioned here. There was a Presbyterian congregation at Lancaster or Williamstown, which desired a pastor. A number of the members signed a subscription paper promising to pay $6 each per annum towards a minister's salary. A minister came out from Scotland on the faith of this promise, but some did not pay. Thereupon the elders and committee of the church sued one of them, Wood, in the Court of Requests; McIntyre was one of the commissioners who sat in the court: he was one of the elders of the church and one of those to whom the promise was made. McKenzie was another commissioner; he also was interested to the extent that he was bound to pay the minister's salary. McMaster the third commissioner was also interested, but refused to sit. McIntyre and McKenzie sat and gave judgment against Wood. An attachment was moved for against all three along with Alexander Fraser, a fourth commissioner, who did not sit at all. The court ordered an attachment to issue against McIntyre and McKenzie. They were brought from the other end of the province to Toronto at their own expense, a distance of nearly three hundred miles, and, making due submission, were discharged, but made to pay all the costs of the proceedings. See Taylor's Reports 1823-1824, pp. 21, 85, seqq.

There are many instances of certiorari for the purpose of quashing convictions: but these are not different, in substance, from what we see every day at Osgoode Hall at the present time.

Certain of the proceedings look exceedingly strange to a modern barrister. Many entries are found like the following:—

In Easter Term, 7 George IV., April 17, 1826, (Praes. The Chief Justice, Powell). "*Isaac Swayze* v. *John Bissell*; Motion

for the usual allowance of five shillings, defendant being an insolvent debtor in the gaol of the Niagara District; J. B. Macaulay, Esq. for defendant. Granted and issued."

The unfortunate defendant had had a judgment entered against him, and the plaintiff had caused a writ of ca. sa. to be issued under the then existing practice, under which the defendant was arrested by the sheriff and committed to the common gaol till he should pay the debt—this "arrest on final process" was a not unusual proceeding. The district should not be called upon to support a debtor in gaol and often the debtor himself could not. Much suffering was the result as any reader of Dickens will have seen; Mr. Jingle's lot was not unique. Accordingly the Provincial Act was passed (1805), 45 George III., C. 7, which provided "that if any prisoner in execution for debt shall apply to the court whence such execution issued and make oath that he or she is not worth five pounds, the plaintiff at whose suit, he or she is detained, shall be ordered by the court . . . to pay to the defendant . . . the sum of five shillings weekly maintenance . . . in advance . . . on failure of which the court . . . shall order the defendant to be released." Many stories were told of releases under this Act—one of the favourites and one I have heard from old Canadians scores of times, is that after an order of this kind had been made, the plaintiff one morning unfortunately paid as part of the five shillings, a bad half-penny, whereupon the defendant, being in the Cobourg gaol, applied to the court, and the court was forced to release him from custody. There is much virtue in a "shall."

The court went so far as to decide that it was no excuse for the non-payment of the allowance that the defendant had become possessed of property subsequent to his obtaining his order for allowance; *Williams* v. *Crosby* (1823), Taylor 16. But where a defendant had applied to the court for his release, and, expecting to succeed in this application, had while the application was pending, refused to accept the weekly allowance, he was not allowed the arrears when his application failed: *Moran* v. *Maloy* (1827), Taylor, 563, ignorantia legis neminem excusat.

It appears from the Term Book, Hilary Term, 7 George IV., Jan. 2nd, 1827, that this judgment was given by the full court, Campbell, C.J., Boulton and Sherwood, JJ., and that the defendant lost six weeks' allowance by his caution.

The Statute of 1822, 2 George IV., C. 8, allowed interrogatories to be exhibited to a defendant in execution, which he must answer on oath shewing his property and his disposition of it, etc. This put a stop to a certain amount of fraudulent concealment of property.

WILLIAM RENWICK RIDDELL.

POOR SUITORS.

No provision is made by the Ontario Rules of Practice for the case of poor Suitors. Possibly the former Chancery practice as to suing in formâ pauperis prevails, under the combined effect of the Jud. Act, s. 128, and s. 58 (13). But this is not absolutely certain, and there is no case, that we are aware of, in which the question has been raised.

It seems desirable that explicit provision should be made by the Rules on the subject. In England, recently, a very hard case was carried up to the House of Lords by the plaintiff in formâ pauperis and the judgment of the court below reversed: *Lloyd* v. *Grace,* 1912, A.C. 716. In that case the plaintiff, a poor woman, had gone to a solicitor's office to consult about her property, and under the fraudulent advice of the managing clerk of the firm, she transferred to him all her property and he then made away with it, and the poor woman was reduced to poverty. —She brought an action against the firm of solicitors, which was dismissed by the lower courts on the ground that the clerk in taking the conveyance to himself was not acting within the scope of his authority; but the House of Lords held that he was, and that the defendant was liable to make good the loss occasioned by his clerk's fraud. But for the provisions of the English practice enabling proceedings to be taken formâ pauperis this gross wrong would have been unredressed.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

CHURCH OF ENGLAND CURATE — EMPLOYMENT — CONTRACT OF SERVICE—MASTER AND SERVANT.

In re National Insurance Act (1912) 2 Ch. 563. This was a case arising under the National Insurance Act and may be noticed briefly for the fact that it is a judicial decision of Parker, J., that the status of an English incumbent and his curates, and of the bishop and a curate, is not that of employer and employed, whether the curate be formally licensed under the bishop's seal or is acting under the bishop's temporary permission—but the curate is a person holding an ecclesiastical office, and he is not in the position of a person whose duties and rights are defined by contract.

COMPANY — PREFERENCE SHARES — DISTRIBUTION OF PROFITS — ORDINARY SHARES—RIGHTS OF PREFERENCE AND ORDINARY SHAREHOLDERS INTER SE.

Will v. *United Lankat Plantations Co.* (1912) 2 Ch. 571. This was a contest between preferential and ordinary shareholders of a limited company—the former claiming that, after the ordinary shareholders had been paid a dividend equal to that paid on the preferential shares, then any surplus profits were divisible between both classes of shareholders. Joyce, J., gave effect to this contention, but the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) reversed his decision, holding that where preference shares are given a fixed preferential dividend at a specified rate the right of the holders of such shares to any further dividend is impliedly negatived.

COMPANY—MEMORANDUM OF ASSOCIATION—BUSINESS OF LIFE INSURANCE PROHIBITED—INVESTMENT POLICY—PROVISION FOR RETURN OF PREMIUMS IN EVENT OF DEATH BEFORE FIXED PERIOD—ULTRA VIRES.

Joseph v. *Law Integrity Insurance Co.* (1912) 2 Ch. 581. In this case the question was whether certain policies issued by the defendants were ultra vires of the company which was incorporated to carry on every kind of insurance and guarantee business except the business of life insurance. The company

had issued a number of "investment" policies which were in one or other of two forms. The first form which was described as an investment policy purported for a weekly premium of 6s. to secure £22 10s., namely, £6 at the end of five years, £7 10s. at the end of ten years and £9 at the end of fifteen years, and the policy was made a charge on the assets of the company and provided that in the event of the death of the assured before the fifth year all premiums would be returned in full, and after the fifth and tenth years all premiums paid since the last payment by the company would be returned. The other form of policy purported to secure the payment of a specified sum at the end of a fixed term in consideration of a weekly premium and was also made a charge on the assets of the company and provided that in case the assured died before the date when the sum would become payable, a percentage of the premiums received should be payable to the representatives or assigns of the assured. The Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) held on appeal from the Vice-Chancellor of the County Palatine of Lancaster that both forms of policies were policies of life insurance, and therefore ultra vires, and were also illegal because the company had not made the deposit required from life insurance companies.

DESIGN—INFRINGEMENT—PATENTS AND DESIGNS ACT—1907 (7 Edw. 7, c. 29) s. 60—COPYRIGHT.

Haddon v. *Bannerman* (1912) 2 Ch. 602. This was an action for an injunction and damages for infringement of the plaintiff's registered design. The Patents and Designs Act, 1907, provides "During the continuance of copyright in any design it shall not be lawful for any person for the purposes of sale to apply or caused to be applied to any article in any class of goods in which the design is registered the design or any fraudulent or obvious imitation thereof except with license or written consent of the registered proprietor, or to do anything with a view to enable the des n to be so applied." The plaintiffs were registered proprietors of a design for type metal letters, the claim being for the pattern. The defendants were manufacturers of matrices and moulds in which types are cast and had recently sold and delivered to the India Office in London matrices for casting type of the plaintiffs' registered pattern, for purposes of sale in India. It was admitted that the matrices were for shipment to Madras and that the design would not be

applied to any type in the United Kingdom, and Warrington, J., held that although the copyright in the design afforded no protection to the plaintiffs in India, still the acts of the defendants in England were in contravention of the above mentioned section of the Patent and Designs Act.

WILL—SPECIFIC GIFT OF FOREIGN PROPERTY—COSTS OF REALIZATION—POWER—DIVISIBILITY OF POWER—PERPETUITY.

In re De Sommery Coelenbier v. *De Sommery* (1912) 2 Ch. 622. This was a case turning on the construction of a will. the testatrix, who was domiciled and died in England, gave all her real and residuary personal estate except her shares in a certain French company to her executors "my trustees" upon trust for sale and to hold the net proceeds after payment of her debts, and funeral and testamentary expenses, to pay a charitable legacy, and to divide the residue into thirteen parts as to two of such parts upon trust "to pay the capital or income thereof or neither to my nephew Eugene, or to apply the capital or income or any part thereof either for his benefit or for the benefit of his wife or any child or children of his as my trustees in their absolute and uncontrolled discretion consider desirable" —and she gave the 21 shares in the French company to "my trustees" upon trust for certain persons. Some of the shares were charged with the payment of certain legacies. Shortly after the testatrix's death the trustees sold some of the shares and applied the proceeds in paying a legacy charged on seven of the shares, and in completing their title according to French law the trustees paid succession duty claimed by the French government and incurred certain costs. One of the questions Parker, J., was called on to decide was whether the succession duty and costs thus paid were a charge on the general estate or were payable out of the shares, and he decided that the trustees being also executors must as such have assented to the gift of the shares to themselves and after such assent held the shares as trustees and not executors and that the French duty and costs must be borne by the shares. The other question was as to the validity of the power of appointment in favour of the nephew Eugene. And as to this it was held that there were two powers vested in the trustees for the time being of the will, first to pay either capital or income to Eugene which was only capable of being exercised during his life, and secondly, a power to apply either capital or income for the benefit of E., his wife

or children, which, if valid, would be exercisable beyond the period allowed by law; and that therefore the first power must be held to be good, but the second must be rejected as invalid.

HIGHWAY—DEDICATION—DEPOSITED PLAN—USER BY PUBLIC—ADJOINING OWNER—RIGHT OF ACCESS TO HIGHWAY.

Tottenham v. *Rowley* (1912) 2 Ch. 633. This was an action by a municipal body to restrain the obstruction of a highway by the defendants. The facts were, that the defendant had laid out a building estate and deposited a plan with the plaintiffs on which the road in question was indicated, forty feet wide. One-half of this road was subsequencly made up and metalled by the defendant and the other half was left as a footpath. Thereafter the public used the road and as a rule preferred the part which was metalled. The plaintiffs owned property on the unmetalled side of the road and opened an entrance therefrom into the highway, which the defendant obstructed. The Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.), affirming Joyce, J., held that the deposit of the plan coupled with the subsequent use of the road by the public constituted a sufficient dedication of the whole highway and not merely of the metalled portion, and that the plaintiffs had a right of access thereto as claimed, and that notwithstanding that the unmetalled portion might be intended to be appropriated as a footpath, the plaintiffs had a right to cross it on foot or with vehicles at reasonable times and to a reasonable extent. As the Master of the Rolls puts it, "It is not open to the defendant to say 'I intended to dedicate to the public without giving any right to the adjoining owner.' He doubts whether any such dedication is possible in law. If it is, it must be made out on the clearest evidence, which he held was not forthcoming in the present case.

JOINT TENANCY—CHOSE IN ACTION—POLICY ON TWO LIVES IN FAVOUR OF SURVIVOR—PREMIUMS PAID BY ONE JOINT TENANT AT THE REQUEST OF ANOTHER—SET OFF—EQUITY—LIEN—ASSIGNMENT BY ONE JOINT TENANT.

In re McKerrell, McKerrell v. *Gowans* (1912) 2 Ch. 648. This was a proceeding to determine the rights to a policy of insurance. The policy in question had been effected by a husband and his wife on their respective lives, the amount insured being payable to the survivor of them. Each party was to pay

half the premiums; but the wife, at her husband's request, from time to time paid his moiety which he was unable to pay. The husband eventually made a general assignment of his property for the benefit of creditors and thereafter died. The assignment did not specifically mention the policy and no notice of the assignment was given to the insurance company. At the time of the husband's death the aggregate of the premiums paid by the wife on his behalf exceeded one-half the net balance of the policy money after payment of certain prior charges thereon effected by both husband and wife. Joyce, J., doubted whether the husband's assignment passed any interest whatever in the policy save such as he might have had therein if he had survived his wife—but that, even if it did, the plaintiff, the wife, was as survivor legally entitled to the policy and any claim the assignee could have would be merely equitable, and he could only get relief on the terms of doing equity and allowing to the plaintiff to set off the premiums paid by her for her husband, for which she was also equitably entitled to a lien on the policy moneys.

FRAUDULENT CONVEYANCE—VALUABLE CONSIDERATION — ANTECEDENT DEBT—13 ELIZ. C. 5, S. 6—(1 GEO. V. C. 24, SS. 1, 5, ONT.).

In *Glegg* v. *Bromley* (1912) 3 K.B. 474, the point in controversy was whether an assignment of a judgment debt in consideration of an antecedent debt owing to the assignee was void under the Statute of Elizabeth. The facts were as follows. Mrs. Glegg was plaintiff in action against one Hay for alleged false representation and she was also plaintiff in the present action claiming damages for an alleged slander. On May 21, 1910, Mrs. Glegg being then indebted to her husband in a large sum of money, by deed, reciting the indebtedness and his requirement of security therefor, assigned to him all sums of money which she might become entitled to by virtue of any verdict, compromise or agreement in the action of *Glegg* v. *Bromley*. On 6th June, 1910, the action of *Glegg* v. *Hay*, was dismissed with costs taxed at £218. On 7th July, 1910, the action of *Glegg* v. *Bromley* was tried and the plaintiff recovered a verdict for £200. Mr. Hay then obtained a garnishee order attaching the damages to satisfy debt due to him for costs. The husband of Mrs. Glegg claimed them under his assignment and the question therefore was whether this assignment was valid as

against him under the Statute of Elizabeth (1 Geo. V. c. 24, ss. 1, 5, Ont.). The Divisional Court (Coleridge, and Hamilton, JJ.), held that the antecedent debt due to the husband was not of itself a valuable consideration under the Statute of Elizabeth (1 Geo. V. c. 24, s. 5, Ont.), and that the rule that in garnishee proceedings the attaching creditor in general only takes such rights as the judgment debtor has, does not preclude the attaching creditor from impeaching an assignment by the judgment debtor of the debt sought to be attached, as fraudulent, although at the date of the assignment he had not recovered his judgment on which his garnishee proceedings are based; and they gave judgment in favour of the attaching creditor. The Court of Appeal (Williams, Moulton, L.J., and Parker, J.), however, reversed this decision and although they concede that the mere existence of an antecedent debt is not of itself good consideration for a conveyance under the Statute of Elizabeth, yet where, as in this case, it appears that the debtor has received forbearance and also has advanced further sums to the debtor, that such forbearance and subsequent advances coupled together constituted a good consideration within the statute. The Court of Appeal also held that, although the assignment of a tort would be invalid, yet, the assignment of damages recovered in respect of a tort was not open to objection. The judgment of the Divisional Court was therefore reversed and the assignment was upheld.

LANDLORD AND TENANT—LEASE—COVENANT NOT TO LET "ADJOINING SHOPS" FOR CERTAIN PURPOSES—MEANING OF "ADJOINING."

Cave v. *Horsell* (1912) 3 K.B. 533, is one of those cases which illustrate the fact that words are sometimes used in contracts in other senses than those given in dictionaries. In the present case a lessor covenanted with his lessee not to let "any of the adjoining shops" belonging to him for certain specified purposes during the continuance of the lease. The lessor owned five shops numbered 2 to 6. No. 4 was let to the plaintiff. Strictly speaking the adjoining shops were Nos. 3 and 5. During the term the lessor let No. 6 for one of the purposes specified, and the question was, whether this amounted to a breach of the covenant. Phillimore, J., who tried the action held that it did; and the Court of Appeal (Williams, Moulton and Buckley, L.JJ.) affirmed his decision; Williams, L.J., however, dissented. The majority of

the court were of the opinion that the word "adjoining" was not restricted to those houses immediately contiguous to No. 5, but, in the circumstances included the other two houses owned by the lessor. Williams, L.J., on the other hand, was in favour of the restricted interpretation, thinking the case was governed by *Ind. Coope & Co.* v. *Hamblin*, 84 L.T. 168.

CRIMINAL LAW—INDECENT ASSAULT—CONSENT — DIRECTION TO JURY.

The King v. *May* (1912) 3 K.B. 572. This was an appeal against a conviction for an indecent assault, on the ground that the judge omitted to give any direction to the jury on the question of consent on the part of the prosecutrix. But, it appearing to the Court of Criminal Appeal (Lord Alverstone, C.J., and Channell, Phillimore, Avory, and Horridge, JJ.) that there was no evidence from which the jury could reasonably infer any consent on the part of the prosecutrix, it was held not to be necessary for the judge at the trial to give any direction on that point.

MASTER AND SERVANT—NEGLIGENCE OF SERVANT—SCOPE OF EMPLOYMENT—SERVANT ACTING UNDER UNAUTHORISED ORDER OF GENERAL MANAGER—LIABILITY OF MASTER.

Irwin v. *Waterloo Taxi-Cab Co.* (1912) 3 K.B. 588. In this case the plaintiff was injured owing to the negligence of the defendants' servant in driving a taxi-cab belonging to them. The defendants sought to escape liability on the ground that at the time the negligent act took place the servant was driving the general manager of the defendant company on his private business, and not that of the company, and that the manager had no right to use the defendants' vehicles for that purpose. The action was tried by Pickford, J., and a jury, and judgment was given in favour of the plaintiff, which was upheld by the Court of Appeal (Williams, Moulton, and Buckley, L.JJ.), on the ground that the driver was acting within the scope of his employment in obeying the orders of the manager, even though the manager was exceeding his authority in giving the orders; because by the defendants' directions the driver was bound to obey the manager. The fact that the particular vehicle in question was by agreement of the defendants with a customer to be reserved for that customer's exclusive use, which fact was unknown to the driver, was held to be immaterial.

INSURANCE—CONCEALMENT OF MATERIAL FACT— ASSIGNMENT OF POLICY—ASSIGNEE FOR VALUE WITHOUT NOTICE—DEFENCE ARISING OUT OF CONTRACT.

Pickersgill v. *London and Provincial M. & G. Ins. Co.* (1912) 3 K.B. 614. The plaintiffs in this case were the builders of a vessel of which Brown & Co. were the owners, who agreed to transfer to the plaintiffs all policies of insurance effected by them on the vessel as security for the price. Brown & Co. effected insurances and assigned the policies to the plaintiffs. In effecting these insurances they concealed from the underwriters material facts. The plaintiffs took the assignment without notice. The Marine Insurance Act, 1906, provides, that an assignee of a policy of marine insurance may sue thereon in his own name, but that the defendant may set up any defence arising out of the contract, and it was held by Hamilton, J., who tried the action, that the non-disclosure of material facts being a breach of the condition precedent to the liability of the underwriters on the policies, was a defence arising out of the contract, and as such available to the defendants in bar of the action: see Ont. Jud. Act, s. 58 (5).

MANDAMUS—PREROGATIVE WRIT—COMMAND TO REPAIR BRIDGE—VAGUENESS OF COMMAND—RETURN TO WRIT.

Rex v. *Wilts and Berks Canal Co.* (1912), 3 K.B. 623. This was an application for a prerogative writ of mandamus requiring the defendants, a canal company, to repair and maintain a certain bridge in fulfilment of their public duty in that behalf. It was objected that the rule nisi was too vague and that the defendants would not know what they were required to do if the writ were granted as asked. Lord Alverstone, C.J., however, held that the command to repair the bridge in question was prima facie sufficiently explicit, and he granted it in the terms asked, leaving it to the defendants to raise the question on the return of the writ if so advised.

SHIPPING — CHARTER PARTY — CONTRACT OF AFFREIGHTMENT—DEAD FREIGHT—LIEN—UNSEAWORTHINESS—DEVIATION.

Kish v. *Taylor & Co.* (1912) A.C. 604. This was an appeal from the judgment of the Court of Appeal (1911) 1 K.B. 625 (noted ante vol. 47, p. 265), reversing a judgment of Walton, J. (1910) 2 K.B. 309 (noted ante vol. 46, p. 612). The action

was brought by shipowners against the holders of bills of lading to enforce a lien on the goods mentioned therein for dead freight. The facts being that the Mississippi Transportation Co. had chartered the plaintiff's vessel to proceed to Mobile and Pensacola and there load a full and complete cargo of timber to be discharged at ports in Europe. The vessel proceeded to Mobile and Pensacola, but the charterers failed to provide more than about eight-thirteenths of her full cargo. In order to mitigate the loss the Master procured cargo from other sources at less remunerative rates than provided by the charter party. Some of this additional cargo was loaded on deck, whereby the vessel became unseaworthy and part of it had to be jettisoned; and the vessel had to put into Halifax for repairs. The charter party provided for the payment of dead freight and gave the shipowners a lien on the cargo therefor. Notwithstanding these misfortunes the defendant's goods were delivered in time and in good order. The defendants contended that when the vessel became unseaworthy that was a breach of warranty which put an end to the charter party, and also that the deviation into the port of Halifax put an end to the contract, because it was rendered necessary by the plaintiff's own act in having rendered the ship unseaworthy by overloading it, and therefore that the plaintiffs could not recover under the charter party but only as common carriers. The Court of Appeal gave effect to these contentions, but the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, and Atkinson) reversed their decision, holding that a contract of affreightment is not put an end to by deviation rendered necessary by unseaworthiness however it may arise.

ADMIRALTY—SHIP—COLLISION—TUG AND TOW—TUG IN COLLISION WITH THIRD VESSEL—TUG AND THIRD VESSEL—ADMIRALTY RULE AS TO DIVISION OF LOSS.

The Devonshire v. *The Leslie* (1912) A.C. 634. This was an admiralty case in which the question at issue was whether or not there is any principle of admiralty law which precludes an innocent vessel damaged by collision through the fault of two other ships, from recovering the whole loss from either of the delinquent ships. The House of Lords (Lord Haldane, L.C., and Lords Halsbury, Ashbourne, Macnaghten, and Atkinson) (affirming the Court of Appeal (1912) P. 21, noted ante vol. 48, p. 230) answer that question in the negative. The facts were that The Leslie, a dumb barge (i.e., a vessel having no propelling

apparatus), being in tow of a tug which had the sole control of the navigation, met The Devonshire, and the tug attempted to cross her bows; both the tug and The Devonshire were in fault, and The Leslie collided with The Devonshire and was damaged, and from her owners, the owners of The Leslie claimed to recover the full damages; the owners of the tug not being parties to the action. The owners of The Devonshire claimed that they were only liable for a moiety. The rule invoked by the defendants applies, as their Lordships hold, as between two ships, both to blame, and has no application to an innocent ship damaged by collision through the fault of other vessels. Their Lordships also hold that The Leslie was not identified with the tug, so as to be in any way prejudiced by its negligence, and on this point the cases of *Thorogood* v. *Bryan,* 8 C.B. 115; *The Bernina,* 13 App. Cas. 1, and *The Drumlanrig* (1911) A.C. 16, are discussed.

WILL—LEGACY—REVERSIONARY FUND—NO TIME FIXED FOR PAYMENT OF LEGACY—DATE FROM WHICH INTEREST ON LEGACY RUNS.

Walford v. *Walford* (1912) A.C. 658. This was an appeal on a somewhat insignificant point, viz., from what date interest on a demonstrative legacy begins to run where no time is fixed for payment; but as the legacy was for £10,000 the amount involved was possibly large. By the will in question the testator, who was entitled to a fund in reversion expectant on the death of his father, appointed to him under the will of his mother, subject to his father's life interest, bequeathed to his sister £10,000 to be paid out of the estate and effects inherited by him from his mother; and the residue of his estate inherited by him from his mother and of all his estate and effects then in his possession he gave to other persons. On the death of the father the question was raised from what date the £10,000 carried interest. The Court of Appeal held as no date was named for payment and no direction express or implied postponing payment till the calling in of the reversionary fund, it bore interest one year from the testator's death (1912) 1 Ch. 219 (noted ante vol. 48, p. 258) and this decision was affirmed by the House of Lords (Lord Haldane, L.C., and Lords Halsbury, Ashbourne, Macnaghten, and Atkinson).

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

N.S.] DUNN *v.* EATON. [Oct. 29, 1912.

Appeal—Final judgment—Reference.

In an action claiming rescission of a contract for the sale of timber lands and other equitable relief and, in the alternative, damages for deceit, the trial judge held that it was a case for damages only and gave judgment accordingly and referred to a referee matters arising out of a counterclaim, ordering him also to take an account of moneys paid, an inquiry as to liens and incumbrances and as to the quantity of standing timber on the lands and other proper accounts. Further consideration of the cause was reserved. This judgment was affirmed by the full court and the defendants sought to appeal to the Supreme Court of Canada.

Held, that the action tried and determined was the common law action for deceit only; that the judgment given therein was not a final judgment within the meaning of that term in the Supreme Court Act; and that the court had no jurisdiction to entertain the appeal. *Clarke* v. *Goodall,* 44 S.C.R. 284, and *Crown Life* v. *Skinner,* 44 S.C.R. 616, followed.

Appeal dismissed with costs

Currey, K.C., for appellants. *Rogers,* K.C., for respondents.

Que.] TWO MOUNTAINS ELECTION CASE. [Oct. 29, 1912.

Dominion election—Nomination—Identification of candidate—Powers of Returning Officer.

The failure in the paper nominating a candidate for election to the House of Commons to identify him by addition, residence or description, is a substantial defect and the nomination should be rejected. DUFF and IDINGTON, JJ., dissenting.

The returning officer may reject such nomination after the

time for nominating candidates has expired, and may declare another whose papers are sufficient, elected by acclamation.

Appeal dismissed with costs, DUFF, J., dissenting.

Mignault, K.C., and *Atwater*, K.C., for appellant. *Perron*, K.C., and *Genest*, for respondent.

Ont.] HESSELTINE *v.* NELLES. [Dec. 10, 1912.

Appeal—Final judgment—Further directions—Master's report.

On the trial before the Chancellor of Ontario of an action claiming damages for breach of contract, judgment was given for the plaintiffs with a reference to the Master to ascertain the amount of damages, further directions being reserved. This judgment was affirmed by the Court of Appeal. The Master then made his report which, on appeal to the Chief Justice of the common pleas, was varied by reduction of the amount awarded. The Chancellor then pronounced a formal judgment or further directions in favour of the plaintiffs for the damages as reduced. The defendants appealed from the judgments of the Chief Justice and the Chancellor and the two appeals were, by order, heard together but not formally consolidated. Both judgments were affirmed by the Court of Appeal and the defendants sought to appeal from the judgment affirming them and also from the original judgment sustaining the decision at the trial having applied without success to the court below for an extension of time to appeal from the latter judgment; see *Nelles* v. *Hesseltine*, 27 O.L.R. 97.

Held, BRODEUR, J., dissenting, that the only judgment from which an appeal would lie was that affirming the judgment of the Chancellor on further directions; that the Chancellor could not review the original judgment of the Court of Appeal nor that varying the Master's report, and the Court of Appeal was equally unable to review them on the appeal from the Chancellor's decision; and the Supreme Court being able to give only the judgment that the Court of Appeal should have given, was likewise debarred from reviewing these earlier decisions.

Appeal dismissed with costs

Nesbitt, K.C., and *Matthew Wilson*, K.C., for appellants. *Holman*, K.C., for respondents.

Ont.] [Dec. 10, 1912.

KLINE *v.* DOMINION FIRE INS. CO.

Fire insurance—Removal of goods—Consent—Binder—Authority of agent.

Kline Bros. & Co., through the agents in New York of the respondent company, obtained insurance of a stock of tobacco in a certain building in Quincy, Flo., and afterwards obtained the consent of the company to its removal to another building. Later, again, they wished to return it to the original location and an insurance firm in New York was instructed to procure the necessary consent. This firm, on Jan. 4th, 1909, prepared a "binder," a temporary document intended to license the removal until formally authorized by the company, and took it to the firm which had been agents of respondents when the policy issued, but had then ceased to be such, where it was initialled by one of their clerks on his own responsibility entirely. On March 19th, 1909, the stock was destroyed by fire in the original location and shortly after a formal consent to its removal back was indorsed on the policy, the respondents then not knowing of the loss. In an action to recover the insurance:

Held, affirming the judgment of the Court of Appeal, 25 O.L.R. 534, that the "binder" was issued without authority; that even if the insurance firm by whose clerk it was initialled had been respondents' agents at the time, they had, under the terms of the policy, no authority to execute, and authority would not be presumed in favour of the insured as it might be in case of an original application for a policy; and that it was not ratified by the endorsement on the policy as the company could not ratify after the loss.

Appeal dismissed with costs.

D. L. McCarthy, K.C., for appellants. *Hamilton Cassels,* K.C., for respondents.

N.B.] [Dec. 10, 1912.

GUIMOND *v.* FIDELITY-PHOENIX FIRE INS. CO.

Fire insurance—Insurance on lumber—Conditions—Warranty—Railway on lot—Security to bank—Chattel mortgage.

A policy insuring against loss by fire a quantity of sawn lumber in a specified location contained a warranty by the

assured "that no railway passes through the lot on which said lumber is piled, or within 200 feet."

Held, that a railway partly constructed and hauling freight through the said lot, though not authorized to run passenger cars and do general business, is a "railway" within the meaning of the warranty.

A condition of the policy was that if the subject of insurance be personal property, and be, or become encumbered by a chattel mortgage, it should be void.

Held, per DUFF, J. A security receipt under the Bank Act given to a bank for advances is not a chattel mortgage within the meaning of this condition.

Appeal dismissed with costs.

Hazen, K.C. and *F. Taylor*, for appellants. *Teed*, K.C. and *Fairweather*, for respondents.

N.S.] IN RE MCNUTT. [Dec. 13, 1912.

Habeas corpus—Supreme Court Act, s. 39(c)—Criminal charge —Prosecution under Provincial Act—Application for writ —Judge's order.

By sec. 39(*c*) of the Supreme Court Act an appeal is given "from the judgment in any case of procedings for or upon a writ of habeas corpus . . . not arising out of a criminal charge."

Held, per FITZPATRICK, C.J., and ANGLIN, JJ., that a trial and conviction for keeping liquor for sale contrary to the provisions of the Nova Scotia Temperance Act, are procedings on a criminal charge and no appeal lies from the refusal of a writ of habeas corpus to discharge the accused from imprisonment on such conviction. DUFF, J., contra. BRODEUR, J., hesitante.

By the Liberty of the Subject Act of Nova Scotia on application to the court or a judge for a writ of habeas corpus an order may be made calling on the keeper of the gaol or prison to return to the court or judge whether or not the person named is detained therein with the day and cause of his detention.

Held, per IDINGTON and BRODEUR, JJ. that such order is not a proceding for or upon a writ of habeas corpus from which an appeal lies under said sec. 39(*c*). DUFF, J., contra.

Mr. JUSTICE DUFF, held that an appeal would lie in this case but that it must fail on the merits.

Appeal quashed without costs.

Power, K.C., and *Vernon*, for appellant. *Ralston*, contra.

Province of Ontario.

HIGH COURT OF JUSTICE.

Boyd, C., Latchford, and Middleton, JJ.] [Dec. 21, 1912.

CONNOR *v.* PRINCESS THEATRE.

Savage animal—Kept in yard adjoining theatre where performance given—Yard no part of theatre premises—Liability of proprietors of theatre.

The general rule of law is, that if a person, whether owner or not, harbours a dangerous animal, or allows it to be on and resort to his premises and such animal causes damage to another, the person harbouring the animal is liable to an action for the damages. See *McKone* v. *Wood* (1831), 5 C. & P. 1; *May* v. *Burdett,* (1846), 9 Q.B. 101 approved of in *Baker* v. *Snell* (1908), 2 K.B. at p. 355.

In this case it was sought to attach liability to managers of the theatre, where the owner of the monkey was engaged. The premises adjoining the theatre on which the monkey was when it bit the plaintiff's child was not the premises of the defendant, nor under their control. Neither the defendants nor the performers had a right to use the yard, therefore, the monkey could not be said to be harboured by the defendants, and no liability attached to them.

A. M. Lewis, for the plaintiff. *H. McKenna,* for defendants.

Province of Nova Scotia.

SUPREME COURT.

Graham, E.J.] [November 5, 1912.

MCGREGOR *v.* THE ST. CROIX LUMBER CO.

Company—Disposal of whole of undertaking—Agreement for, held ultra vires in absence of special resolution—Companies Act, R.S.N.S. 1900, *c.* 128, *amended by N.S. Acts,* 1912, *c.* 47—*Giving by legislature of express power prohibits deviation.*

Under the Nova Scotia Companies Act, R.S.N.S. c. 128, as amended by N.S. Acts of 1912, c. 47, a company, whether incor-

porated before or after the passage of the latter Act, may dispose of the whole of its undertaking. The sale referred to is not limited to sales for shares, debentures or securities of other companies carrying on a business of a similar character, but covers sales for money as well. Nevertheless, the procedure prescribed must be strictly followed.

An agreement entered into by the directors of a company for the sale of the undertaking to another company, although ratified by a resolution passed at a meeting of shareholders, is ultra vires and cannot be enforced in the absence of the special resolution called for by the amending Act, s. 5, as defined by s. 93 of the Companies Act.

Where the legislature gives a company express power, within certain limits, to do a special thing it is to be taken primâ facie to prohibit by implication any deviation from the power so given.

Mellish, K.C., *Burchell*, K.C., and *J. L. Ralston*, for plaintiff. *Rogers*, K.C., and *J. M. Davidson*, for defendant.

Full Court.] [Feb. 5.

ATTORNEY GENERAL OF CANADA *v.* CITY OF SYDNEY.

Militia Act, 1886 —*R.S.C.* 1886, *c.* 41, *s.* 34—*Militia called out in aid of civil power in case of riot—Claim against municipality—Statutory liability—Construction of statute—Words "senior officer," "locality," "district."*

Where a liability imposed upon a municipality is purely statutory a substantial compliance with the requirements of the statute which alone creates the liability is essential to the existence of the liability.

The Act respecting the militia and defence of Canada, R.S.C. (1886) c. 41, s. 34 made provision for the calling out of the active militia in aid of the civil power in any case in which a riot or other emergency requiring such service occurred or was anticipated as likely to occur, etc. And, further, "the senior officer of the active militia present at any locality shall call out the same or such portion thereof as he considers necessary, etc."

The militia having been called out by the officer in command of military district No. 9, in pursuance of a requisition addressed to him for that purpose.

Held, 1. The words "senior officer of the active militia present at any locality" mean the senior officer at or nearest the place where the riot has occurred or is anticipated and not the senior officer of the district.

2. Where two such words as district and locality occur in the same statute it is a safe, though not an inflexible rule, that they should not be construed as meaning the same thing.

3. A subsequent statute is of assistance in construing a previous statute on the same subject.

F. McDonald, K.C., for defendant, appellant. *Macilreith*, K.C., for plaintiff, respondent.

Book Reviews.

The Law of Torts. By J. F. CLERK and W. H. B. LINDSELL. Sixth edition by WYATT PAINE, Barrister-at-law, London: Sweet & Maxwell, Limited, 3 Chancery Lane. 1912. 1018 pages.

This edition has been published as a companion volume to the latest edition of Chitty on Contracts, the combined treatise forming a compendious statement of the various legal obligations arising ex delicto or ex contractu.

This is a great law book. It is not surprising, therefore, that in three years a new edition has been called for, and it is fortunate for the profession, as well as for the publishers, that a legal writer of such marked ability as Mr. Wyatt Paine was selected to do the editing. The field of law this treatise covers is a very wide one; and, owing to the rapid and continuous changes in the business life of to-day and the innumerable developments in matters of transportation, manufacturing of mechanical and scientific appliances, varied trade relations and legislation, the law varies from day to day, and the litigation which thus arises decides new problems of right and wrong. All this has added to the labour of the editor and necessarily increased the size of the volume.

This book is so well and so favourably known to the profession that it needs no commendation from us. The publisher's part of the work has been done in their usual excellent style.