Canada Law Journal.

VOL. LVI. TORONTO, MARCH, 1920. No. 3

OF CERTAIN ASPECTS OF THE MECHANICS AND WAGE-EARNERS' LIEN ACT.

As we purpose saying various uncharitable things about this Act, it will probably be of advantage in clearing the ground if we adopt the time-honored practice of the pleader, and begin by admitting anything in our power in its favour.

It is well known that at common law the lien in respect of work done upon property, commonly known in law as a "particular" lien, applied only to personal estate.

That species of lien has been defined to be "a right in one man to retain that which is in his possession belonging to another, until certain demands of him, the person in possession, are satisfied." *Hammonds* v. *Barclay* (1802), 2 East 227, 235.

This lien, as distinguished from a general lien, which, as is well understood, is the lien which attaches to property to secure a general balance of account due from the owner to the possessor, whether in respect of that property or not (*Anglo-Indian Bank* v. *Davies,* L.R. 9 Ch. D. 289) has always found favour in the eye of the law. *Houghton* v. *Matthews,* 1803, 3 B. & P. 485.

While it is quite clear therefore, that, though, in the case of personal property, a lien exists in favour of the mechanic in respect of labour expended upon it (*Houghton* v. *Matthews, sup.*) no smaller lien (independent of statute) exists in the case of realty.

An effort was made to establish a lien of that latter character so long ago as the year 1835, (*Johnson* v. *Crew,* 5 U.C.Q.B. (O.S.) 200), in which case a builder, having performed work on a house, withheld possession, insisting that he was entitled to a lien, and to be paid his account.

The claim failed, however, Robinson, C.J., in delivering judg-

ment, saying: "On general principles, and in ordinary cases, a builder has no lien on the house which he has built or repaired—it would be most incovenient that he should have. The ground on which it stands is inseparable from the house, and such a lien would exclude the owner from his own freehold."

Macaulay, J., in the same case said, "Contractors for such work must rely on the personal liability of their employer under the contract."

We are, accordingly, quite free to admit that, so far as the Act under discussion simply adopts the principles of the common law in respect of the particular lien, and applies it to realty, we see nothing inequitable in it.

We mean by that that if A., a mechanic, has performed services at B's request on certain land owned by B., for which services B. refuses to pay, we see nothing inequitable in allowing A. to register a lien against that land, and to proceed to enforce it for the recovery of his claim.

If the Act stopped ther, there would, so far as we can see, be no valid objection to it. It is when it proceeds much further, and, in its solicitude for the mechanic, gives him the right to register a lien on B.'s land, for a claim which is not an indebtedness of B. at all, but of an entirely different person, that the inequitable aspect of the Act develops.

To the writer the Act has always seemed to be, in many respects, a wholly indenfensible piece of legislation.

It seems difficult to understand why the law should be solicitous to extend special protection to the workman who performs services in respect of real estate by insisting on a mortgage of such real estate (for a lien is virtually a mortgage) to secure his bill, when it does not deem such a course in the least degree necessary in the case of many other classes of artisans.

Why, for instance, should the carpenter who provides doors for your house be entitled to a special mortgage to secure his account therefor, any more than the butcher or baker, both of whom furnish wares much more essential to the comfort and enjoyment of life than any mere woodwork.

If the principle is that the workman is entitled to follow and retain an interest in his wares, and in the object benefitted by his work, why not provide for the butcher and baker a special mortgage, on, let us say, on the stomach of their customer, giving them the right, in case of default of payment, to cast such customer into prison, as under the old law, and exact their pound of flesh?

There seems no more reason why one of these claims should be specially favoured by the Legislature than the other.

Possibly some of our ingenious legislators will even yet devise some form of lien or mortgage, which will apply to the butcher's and the baker's case. Then, no doubt, everybody will be happy.

Then again, why treat mechanics and contractors as in the same class as infants and imbeciles, and require for them special protection, even against themselves.

The Mechanics and Wage-Earners Lien Act, R.S.O.C. 140, as every lawyer will remember, opens as follows:

"Every agreement, verbal or written, express or implied, on the part of any workman, servant, labourer, mechanic or other person employed in any kind of manual labour, intended to be dealt with in this Act, that this Act shall not apply, or that the remedies provided by it shall not be available for the benefit of such persons, shall be null and void."

"(2) This section shall not apply to a manager, officer or foreman, or to any other person whose wages are more than $5.00 a day."

Let it be remembered that every one of these workmen and contractors, before his services were accepted, and when he was desirous of being employed upon the work, was extremely solicitous that it should be *his* services that were accepted and not those of his rival across the way. At that period he would have scouted the idea that it should be necessary that a special mortgage on the employer's realty be provided for him before he entered upon the work. If the owner or contractor has said to him, "Do you want to do this work for me, trusting to my

ability to pay you for it, in the ordinary way, and relying solely on my financial standing?" he would undoubtedly have replied instantly in the affirmative.

It must be remembered also that there is nothing to compel a workman to undertake the job. He can take it or leave it, as he thinks best.

That being the case why not leave the parties to the ordinary law of contract.

As between the owner of the land who is perhaps building a house for the first and only time in his life, and the contractor or workman, who is anxious to be employed upon it, it would seem to be the case that, in the immense majority of cases, it is the contractor or workman, whose ordinary business is to perform services of that kind, who is the practiced hand, while the owner occupies more the position of the novice, and, if any protection at all is to be introduced, it would, in our opinion, be much more appropriately applied to the owner.

But why introduce protection at all?

Why incumber our statute books with these unnecessary and unreasonable enactments?

We are a patient and long-suffering people, and we have become accustomed to seeing our statute books burdened, year after year, with novel and unnecessary legislation at the beck of every experimentalist who has succeeded in finding his way into our legislative halls. But surely there is a limit.

Then again, let us consider the following inequitable aspect of the Act.

Let us suppose a case:

John Jones is a householder, possessing a well-kept lawn. Let us suppose that a handful of rowdies call upon Mr Jones and inform him that they have fallen out among themselves, and have decided to settle the rights and wrongs of the matter by indulging in a limited bout of "rough house," and request that he allow them the use of his lawn for that purpose.

What would John Jones—what would the average man think of such a request? To go a step further, what would the average

man think if he was informed that the law had actually given this band of rowdies the legal right to requisition John Jones' lawn for the above-mentioned purpose.

The average man would undoubtedly characterize it as a high-handed outrage.

Quite so, but that is precisely what the Legislature has done in the case of the Act under discussion.

Let us take the following case:

A., the owner, has scrupulously carried out the terms of his contract, paying B., one of his sub-contractors, all that is due him. B., however, has failed to pay M., one of his workmen. M. resolves to have recourse to his legal remedies. The Legislature has thought fit to enact that in such a case one of M.'s legal remedies shall be the right to register his lien against real estate. One would suppose that as M.'s claim is against B., and not against A., if he is to have the right to register that claim against somebody's real estate, it would be against the real estate of B., his debtor, and not against that of A., who owes him nothing in the matter. But no, the astute Legislature has provided that in such case M. may register his claim against the real estate of the innocent A., the outcome being that the law allows this unsatisfied workman and his fellows, who find themselves in similar cases, to exploit the title roll of the innocent A. for the purpose of fighting out their legal battles.

The result is that, when the smoke has vanished from the cinders, the title roll of the unfortunate A. is left in what may be fairly described as a deplorably filthy state, encumbered with possibly ten to thirty mechanics liens and certificates of *lis pendens* implementing them. Of course the further result is that A. could not possibly sell or mortgage his property till all these iniquitous lines are cleared off.

It may be said that the owner is obliged by the Act to retain a certain percentage of the contract money for the purpose of protecting these workmen, and it is only fair that the workmen should have this means of following that.

But is it reasonable that the title roll to a valuable estate

should be marred and encumbered by these petty liens when the owner has been absolutely innocent of any default?

Since writing the above the writer, in delving in the records of our law journals, has discovered the following evidence that this Act has, on more than one occasion, similarly affected the sensibilities of our profession in years gone by.

In the CANADA LAW JOURNAL of 1876 (12 C.L.J.) at p. 300 we find the following expression of opinion: "At least one clause of the Mechanics' Lien Act (that most absurd and hurtful of all illogical legislation) wears a most threatening aspect, portending the necessity of many a pitched battle on every word of it ere it be fully subdued to the uses of the much enduring public."

And in the edition of 1877 (13 C.L.J., p. 8) the following well merited compliment is paid to the Act: "The manifest injustice to which our present mode of tinkering statutes sometimes leads is well illustrated by the case of *Walker* v. *Walton*. (13 C.L.J. 8, 24 Grant 209, 1 A.R. 579). In that case the plaintiff acquired a lien under the Mechanics' Lien Act of 1873, and duly registered his lien as required by that Act. The plaintiff, however, had given the defendant credit which did not expire until after the passing of the Mechanics' Lien Act of 1874; he consequently had not commenced a suit before that Act came into operation.

"Under the Act of 1873, section 4, it would have been sufficient to keep the plaintiff's claim alive if he had commenced his suit and registered a *lis pendens* within 90 days after the period of credit expired. The 14th section of the Act of 1874, however, provides 'that every lien shall absolutely cease to exist after the expiration of thirty days after the work shall have been completed . . . unless in the meantime proceedings shall have been instituted to realize the claim under the provisions of this Act, and a certificate thereof is duly registered, &c.' And the 20th section comes in with the usual, although unnecessary declaration that all Acts inconsistent with the provisions of this Act are hereby repealed.

"Under this legislation, the Court of Chancery has been driven to hold that although the plaintiff up to the time of the passing of the Act of 1874, had a perfectly good lien equivalent, in point of fact, to a mortgage on the property for the amount of the debt, yet the moment that Act came into operation, that lien was blotted out, because he did not fulfil the condition which the Legislature had imposed by the Act of 1874, of taking proceedings under the statute, which, at the time fixed for taking the proceedings had not even been passed.

"We commend this instance of *ex post facto* legislation and the taking away of vested rights by Act of Parliament, to the attention of the House at its present session.

"So much for this kind of legislation. But as to the subject matter involved, probably the best thing to do would be to repeal the Mechanics' Lien Act in toto. The enactment is in itself unnecessary and illogical, the wording is obscure, and its provisions unintelligible and contradictory. The Act has resulted in more harm than good to the honest and prudent mechanic. The legislation on this subject, though following in a measure a somewhat similar law in some of the United States took its origin here, and probably there also, in an improper bid on the part of politicians for the votes of what is called the 'working class.' It is scarcely to be wondered at, under these circumstances, that a provision conceived in such a spirit, and so carelessly carried out should lead occasionally to results as unjust as they are absurd". And in the same volume, at p. 93, Scrutator writes as follows: "I fully concur in your views upon these Acts contained in your November number. More wretched specimens of legislative workmanship could not easily be found.

"For example, the 4th clause of the Act of 1874, respecting mortgaged lands. The last six lines are clothed in extraordinary verbiage. I have no doubt the intended meaning was that the claim of the mortgagee should be restricted to the value of the lands irrespective of the improvements made by the mechanic. The clause is too long for insertion, but if any of your readers

will take the trouble to turn to the clause he will find the extraordinary method taken to confound the intention.

"A decree was issued lately at the instance of a mechanic, for the sale of the lot on which the improvements had been made, on which a previous mortgage existed, and the consideration of the decree and of the Acts caused considerable bewilderment. To add to this the decree declared that the plaintiff should, in the first place, be paid his costs and then his claim. It happened, however, that another mechanic had a lien, and under the 9th clause it is declared that all lien-holders in their class shall rank *pari passu*, and the proceeds of the sale be distributed among them *pro rata*. Under the decree the plaintiff would take everything and leave nothing for the second lien-holder.

"In another case a lien-holder, to the amount of $32.00, was made a party in the Master's office, although it was scarcely to be presumed from his position, as a workman, that he would be disposed to redeem a mortgage of some $1,200 which was ahead of him.

"I think it will be found necessary to repeal the Acts in toto."

Mr. W. B. Wallace (now his Honor Judge Wallace) in his work on Mechanics' Lien Laws in Canada (2nd edition, p. 4), says, referring to this Act:—

"The legislative germ introduced in Ontario in 1873 gave little promise of long life or future development. It was an exasperation to the owners of real estate, and in many cases was a disappointment to persons claiming a lien. It was publicly stigmatized as being of profit to no one save the lawyers, and it was suspected of being the offspring of the wanton wooing of the workingman's vote. The Act was vigorously condemned in the press by suitors who had invoked it unsuccessfully," and at p. 5, referring to the consolidation of the Mechanics' Lien Acts in 1877 (R.S.O. 1877, ch. 120) he adds: "there appeared to be general dissatisfaction with the statute."

So much for the inequalities and injustice of the Act. We shall hope, in a future issue, to examine the decisions.

F. P. BETTS.

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

We are glad to be able to give to our readers, so soon after the meeting of the Ontario Bar Association, the major portion of the address of Mr. Gagné, K.C., of Montreal, as a contribution to the literature on the above subject.

As will be seen, the Quebec Bar (for we presume Mr. Gagné speaks with some authority) are in favour of the retention of the Judicial Committee as the final Court of Appeal from the Dominion.

We do not need to reiterate our opinion to the same effect. Doubtless, judging from recent events, there will be a full discussion of this subject, for it is stated that the Farmer Government of Ontario have in view some project to do away with, or to make some radical changes in the right of appeal to the Privy Council. We cannot, of course, discuss this until their proposition has been formulated.

It seems strange that a Government that has only just got into the saddle, the members of which, with the exception of the Attorney-General, have had very little experience in Governmental matters and constitutional law, who will have their hands more than full in dealing with the subjects which are proclaimed from the hustings as needing immediate action, and being subjects with which they have some familiarity should at the beginning of their career attempt to deal with a subject of this importance. Suggestions have been made at various times in relation to this, but so far have come to nothing, and we trust that this inaction may so continue. Men of much more experience and larger education have failed to see their way to do away with a right of ancient date which helps to bind the Empire together. Surely every lover of his country ought logically to see that if the Empire is to continue in its solidarity, every break in the unity and uniformity of its parts is a step in the wrong direction. The law in all the Provinces should, as far as possible, be the same. Those who desire to see the national spirit of Canada increase ought surely to see that this can best and only be done by closer union between all the Pro-

vinces, and by binding them together by uniformity of law and procedure, rather than by having disjointed units with separate interests and without cohesion.

We wish the new Goveanment well, and believe in their honesty of purpose and sincere desire to serve their country faithfully, and they should have every opportunity to make good, but it would not be well that any action in this matter, if it is eventually decided to take any action, should be the result of mature consideration which means time and research. Why this haste?

We note that the Benchers of the Upper Canada Law Society having met to consider the above suggested action, passed a resolution condemnatory thereof, and appointed a deputation to wait upon the Premiers to express the views of the legal profession of this Province on this subject.

In his address to the Ontario Bar Association, Mr. Gagné, after some preliminary remarks of a general character, spoke as follows:—

The general influence of the decisions of the Judicial Committee of the Privy Council over our jurisprudence, has been beneficient and good; and we have found the distinguished jurists sitting on that high tribunal surprisingly familiar with the principles and the intricacies of our French civil laws; and in connection with the cases resting on those of our laws coming from the English system, such as wills, evidence and bills of exchange, their interpretation was certainly a distinct help to us, and it has been set down in our jurisprudence as a guide to the future application of our Code. When that interpretation was, to our mind, not consistent with the reading of our legislation, it furnished us the occasion to alter it to suit our conception of the law.

From the viewpoint of practical results we are well satisfied that we have always had full justice, consideration, and a sympathetic hearing.

The jurisprudence established by the Privy Council has been a distinct contribution for the best in stabilizing certain

rules or laws over which there was diversity of views, modifying them sometimes, basing these modifications chiefly on the fundamental principles of law and taking a less prejudicial note of local conditions which tended to weaken these principles.

The present constitution of the Judicial Committee has been handed us largely unchanged for many centuries. It is, on the contrary, like the greater part of the British system of government and laws, the result of the slow and constant evolution of a few elementary principles, and, like them, in order to readily meet the changing conditions of time, place and progress, its constitution was, for the greater part, unwritten, as writing implies a certain degree of stability.

It rested on the power of the King, at one time absolute, over conquered territories, mitigated after a time, and gradually shared by the people, as ability to share government and administration as developed under the Roman Empire, it was the undenied privilege of every Roman citizen to appeal to Cæsar. At all times, and so almost of necessity, the King had to have recourse to advisers to assist him.

After the Norman Conquest we find these divided under two heads: The Magnum Concilium, and the Concilium Commune, and for the citizen who had grievances against the actions of these, a right to appeal to the King, who had supreme appellate jurisdiction, and exercised it through the Curia Regis.

The development of divers branches of government, bringing about the High Courts, directed the above appeals before the appointed Receivers and Criers divided into two groups, one being for Great Britain and the other for her possessions. But the King, jealous of his prerogatives, ordered, in 1495, that no appeal "from the islands, as the possessions were then called, should be to any Court, but only *Au Roi et Consel.*"

The growth of the Colonies in the 17th Century increased the number of these appeals, and thus gradually brought about, through Orders-in-Council in 1667, 1687, 1696, a committee of the Privy Council, to which all the Lords of the Council are appointed, and of which 3 now form a quorum.

The further enlarging of its functions, either by Acts of the British Parliament, or by Governors establishing Courts of law in various possessions, with a right of appeal, determined by an Act in 1833 the formation of the Judicial Committee of the Privy Council, composed of men high in their knowledge of law, and to which are referred all appeals from the Colonial Courts. In 1908, the general rules of procedure were laid down after consultation with the different Colonies. In 1911, the Appellate Jurisdiction Bill provided for a single Court of Appeal sitting in two divisions, enabling six law Lords to devote all their time to the sittings.

Concerning Canada, a member of its Supreme Court, being a Privy Councillor, may sit on this Supreme tribunal of the Empire, and thus bring his knowledge of his country as a contribution to ensure more perfect ruling.

I have rapidly gone over these changes to justify our expectations that more changes are liable to take place, for, being created for the Dominions, we are safe to assume that its elasticity will promptly cause the Judicial Committee to adapt itself to new conditions as they arise.

The Acts determining the right for Canada to go to this appellate tribunal are recorded in our history as early as 1763, when Canada was ceded by France to England. The Royal proclamation constituting and recognising our Courts reserves to all persons who may think themselves aggrieved by the sentence of any of the Courts, the liberty and right to appeal to the Sovereign. The constitution of 1791, and the Act of Union of 1840 do not bring any change to this right, and in 1867, by the British North America Act, the several Provinces were given the right to legislate on certain matters of local interest, with power to constitute their own Courts of justice, and to alter their constitution.

In 1875 a central Court of Appeal was formed, from which there is an appeal of right. That is the Supreme Court of Canada, whose jurisdiction over purely constitutional and other well defined matters was gradually enlarged. Although in-

tended to be a Court of last resort, yet in view of the fact that the parties may, subject to some limitations, appeal to the Privy Council, and because the choice of the Supreme Court is not always agreeable to both parties, care has been taken not to deprive the party brought by the other before the Supreme Court of Canada of his right to appeal in turn to the Privy Council.

On the other hand, the appeal to the Sovereign being a Royal prerogative, the Dominion Parliament can hardly legislate to restrict its exercise.

We are, for various reasons, and in virtue of our philosophical principles, strongly monarchists, and we believe in the Privy Council, as a Supreme authority in matters of law.

Quebec is said to be backward in its doctrine and activity. It is not a bad thing to be conservative at an epoch where experimentation is very popular, and where there is a tendency to destroy the old order, before knowing very definitely what is to replace it.

I have felt justified in bringing that explanation as one of the fundamental reasons for our attachment to the institution of the Privy Council, because it explains at the same time the stability of our people and its *contentment*, a successful antidote to all radical action. I do not claim for one moment that we are alone in holding this belief; but I do claim that these fundamental beliefs form a bond of mutual understanding, and a point of contact between the various communities of this country, where the same beliefs are respected.

The Privy Council is an additional point of contact, and we need more of these points to create common sentiments, a common atmosphere and unity of action. And as far as we lawyers are concerned, it devolves upon us to help to maintain those of our institutions which contribute to the formation of a national spirit, and of a sense of security amid the uncertainties of to-day.

It is therefore up to us to keep in all its glamour, integrity and efficiency that splendid and unique Court whose jurisdiction is more extensive, whether measured by area, population, variety

of nations, creeds, languages or customs, than that hitherto enjoyed by any Court known to civilization.

The finality of judgments of the Supreme Court of Canada was discussed before the Senate in 1916, and although a motion concerning it was withdrawn, it may be interesting to know the grounds set forth for the restriction of appeals to the Privy Council. One was that the appeal to the Privy Council enabled rich persons or corporations to force poor litigants to compromise or to abandon their claims. This is not an argument of principle, and it may apply to any of our Courts; it is moreover one of exception, and the additional provision enabling poor people to plead before the Privy Council in forma pauperis seems to dispose of that objection.

The other is that men residing in Canada and familiar with its customs are in a better position to give justice than Judges 3,000 miles away and ignorant of our customs.

This could equally apply to the Judges of the Supreme Court.

Is a Judge from British Columbia very much more familiar with the conditions of the Nova Scotia fisherman, or a Judge from Alberta very intimate with the Civil Code of the Province of Quebec, the language of its people and its customs?

And are we not rather looking for unfamiliarity with conditions and with the parties in a case, when we desire to have an unbiased decision on a question of principle?

It seems that this very unfamiliarity with the local atmosphere, when there is a Canadian representative Judge in attendance as well as those who plead their case, is an inducement to the Court to maintain in their integrity certain fundamental principles which should not be altered.

A few statistics here regarding appeals to the Judicial Committee of the Privy Council, from the Supreme Court of Canada, may be of interest.

From December, 1903, to 1918, putting aside those cases settled by consent, we have had one hundred and ninety-two demands, or petitions for leave to appeal from judgments of the Supreme Court.

In ninety-five cases leave to appeal has been refused, on the grounds that the appeal was not justified under the above mentioned rules of jurisprudence, leaving ninety-seven appeals. Of this number forty-three were dismissed on the merits, giving fifty-four cases in which the appeal to the Privy Council was justified, in which the judgment of the Supreme Court was not only modified but reversed and judgments from Provincial Courts maintained.

Quebec is the only Province which did not pass an Order-in-Council making changes. But Quebec is conservative in spite of other nominal qualifications. She relies on the Royal proclamation of 1763, and that scrap of paper has still for her people all the authority and the prestige of the Royal signature. So when codifying her laws, we simply inserted in her Code of Civil Procedure, having regard to the existence of the Supreme Court of Canada, that an appeal lies of right from the Court of King's Bench either to the Supreme Court of Canada, or to the Privy Council, with the usual limitations, and we let it go at that.

As far as Quebec is concerned, it may be stated that taking into consideration the obstacles in the way, we have been rather in favour of the Privy Council, although our laws are different from those of Great Britain, and are based on the French law and the Roman system, but we have found British justice and fair play to be more than mere words, when they seemed to be denied us in our own country. We, therefore, believe in it and desire no radical changes in that respect.

THE BOARD OF COMMERCE.

Some five months ago we were glad to speak in terms of commendation of the Act which brought the Board of Commerce into existence. It was referred to, as in truth it is, as a Court, a Court of record, having the powers incident to all Courts, and in some respects even greater than possessed by ordinary Courts of justice. It was stated to be a desirable and necessary forum

under the conditions at present existing. The Government was commended for its formation, and the hope was expressed that it would justify its existence shortly after it commenced its duties. The chairman, the only member of the Board of judicial experience, resigned. The reason given for this has not been accepted by the public as the real moving cause. But however that may be, the condition of things as the present working out of the functions of the Court, as portrayed in the public press, is most unsatisfactory and unseemly. In point of fact these words are too mild, for the Court occasionaly ceases to be an orderly Court of justice, and assumes an aspect unknown in our Courts of justice. Where the fault lies we know not. The Judges may be right in their rulings, we assume they are, but the result is what people look at. This is not conducive to the proper administration of justice, very much the contrary, and tends to bring the administration of justice into contempt; a very serious matter. It is for the Government without delay to apply the proper remedy. The Court is a most useful one. It should be thoroughly organized and then supported.

ONTARIO BAR ASSOCIATION.

FOURTEENTH ANNUAL MEETING.*

The Fourteenth Annual Meeting of the Ontario Bar Association was held at Osgoode Hall on March 3rd and 4th, 1920, and included many features of outstanding interest to members of the profession and others.

The chair was occupied by Mr. N. B. Gash, K.C., the retiring President. His address on "Need of Uniformity in Divorce Laws" represented a great deal of careful research and valuable information. It revealed the anamolous conditions which exist and have existed for many years in Canada in regard to this important subject.

* We are indebted for this report to Mr. A. A. Macdonald, Recording Secretary of the Association, an office which he fills with great credit to himself and benefit to the Association.

The afternoon session on Wednesday, March 3rd, was devoted to the presentation of reports, including the report of the Law Reform Committee, presented by Mr. A. J. R. Snow, K.C., Convenor; Legislation, by Mr. R. J. Maclennan in the absence of Mr. F. D. Kerr, Convenor; Legal Ethics, by Mr. F. King, Convenor; and Legal History, by Mr. W. S. Herrington, K.C., Convenor.

Mr. Snow's report on Law Reform dealt with some outstanding matters requiring attention in the interest of the public, with special recommendations on the following matters:—

(1) The status of the Workmen's Compensation Board, and its autocratic attitude in refusing to recognize solicitors in cases coming before that Board for attention, and its discourtesy in refusing to answer enquiries and communications from solicitors on behalf of their clients. It was pointed out that this Board, as at present constituted, is absolutely independent of Governmental or other control or supervision of any kind, and is one of the most undemocratic bodies to be found in any country to-day. The Committee recommended (*inter alia*) that the workingman should be given a right of appeal to a Judge from the decision of the Board, and a right to call evidence in support of his claim for compensation, and that lawyers be allowed to present claims to the Board, as many claimants are not able to do so with justice to themselves.

(2) The establishment of a Divorce Court in Ontario.

(3) An increase in the salaries of Ontario Supreme Court Judges, which, though fixed in 1872, have not been raised since that time.

(4) The prohibition of Crown Attorneys in cities of over 100,000 population from engaging in private practice or entering into partnership so as to get the benefit of legal business coming to the partnership firm through the Crown Attorney's instrumentality.

(5) The retirement of Magistrates on their attaining the age of 70 years.

The recommendations contained in this report met with much favour, and it was unanimously adopted.

The review of Dominion and Provincial legislation was largely the handiwork of Mr. F. D. Kerr, of Peterbrough, and Mr. R. J. Maclennan, of Toronto, and covered not only the salient points in all outstanding legislation of the Province and Dominion during the past year, but in addition gave a comprehensive and concise resume of the concurrent legislation in the different Provinces throughout the Dominion, topically arranged under the headings of Labour, Health, Soldiers, Women and Children, Farmers, Education, Good Roads, Judicature, Forests and Liquor Prohibition, so as to afford a graphic presentation of the progress of the times. Space will not permit of anything like due reference to this valuable document, and a wider service will be rendered if perchance a copy may be placed in the hands of every member of the Association.

In a very happy address, Mr. Francis King reported for the Committee on Legal Ethics. His report was also in writing, and dealt in an interesting manner with the much mooted question as to whether a Code of Ethics is or is not desirable. To quote from Mr. King's report: "Some men deplore the obvious and axiomatic character of the provisions of fixed and definite codes, and are inclined to paraphrase the leading paragraphs of a certain important code in such terms as these: (1) Don't bribe the Judge. (2) Don't mislead your client. (3) Don't jump at conclusions. . . . (6) Don't embezzle. (7) Don't be guilty of fraud. (8) Don't charge too much. (9) Don't charge too little, etc."

The report of Mr. W. S. Herrington, K.C., of Napanee, on Legal History, was full of information, gathered together in a logical and effective manner, and was one of the most complete documents of its kind that the Bar of this Province can boast. While its author was careful to emphasize that references to the names of the members of the profession who have died on active service were not intended to be exhaustive or to include all cases worthy of mention, but rather to serve as types, much information has been gathered that will be cherished by all members of the profession whose privilege it was to know the

men whose names and elegies adorn this report, viz: Major Featherston Aylesworth, Major Jeffrey Bull, Lieut.-Col. George Taylor Denison, Jr., Lieut.-Col. Frederick Holmes Hopkins, Major James Miles Langstaff, Flight-Lieut. Roderick Ward Maclennan, Major-General Malcolm Smith Mercer, C.B., Major John Redmond Walsingham Meredith, Lieut.-Col. Samuel Simpson Sharpe, D.S.O., M.P.; Lieut. Matthew Maurice Wilson, Lieut.-Col. A. A. Miller, Major Charles A. Moss, K.C. This report is one of the truly historic documents of the Association.

The Thursday programme included an address by Hon. N. W. Rowell, K.C., on the League of Nations; an address by Hon. Chief Justice Olson of the Municipal Court of Chicago on the Psychopathic Laboratory of that Court; an address by Mr. Horace J. Gagné, K.C., B.C.L., of Montreal, Que., on the right of appeal to the Judicial Committee of the Privy Council; and a paper by Hon. Mr. Justice Hodgins on "The Law from a Preventive Standpoint," read, in the author's absence, by His Honor Judge Denton. Of one and all of these addresses it may be said that they were well worthy of the effort of the members of the profession who filled Convocation from all parts of the Province to hear them. Chief Justice Olson, of the Municipal Court, of Chicago, and President of the American Judicature Society, was the honored guest of the Association. It is hoped that copies of his address will be available at a later date, by the kindness of the learned Chief Justice. It is certain that his address opened up a new field to many of those present, and effectively revealed the futility and injustice of some of the principles which still prevail in the administration of justice in criminal Courts, having regard especially to the cases of mental defectives. The theme included considerations of heredity, immigration, etc., and the Chief Justice related some very striking experiences in the course of the creation and operation of the Court, one of the romances of judicial history.

A sad feature of this meeting was the absence from their wonted places of two men who have for many years rendered yeomen's service to the Association, and who have since passed

away, Mr. G. S. Gibbons, of London, and Mr. C. F. Ritchie, of Toronto. Mr. Ritchie held the important office of Treasurer of the Association at the time of his death, which took place after an illness of a few hours' duration, and within less than one month before the annual meeting. Resolutions of condolence and sympathy to the families of Mr. Gibbons and Mr. Ritchie were passed by the members present.

The Executive Council hope to be able to put into the hands of all the members of this Association in printed form the text of some of the able addresses already referred to, along with some of the valuable reports which were presented, and to which only the briefest reference has here been made. The usefulness of these documents will be greatly increased if this can be accomplished.

The annual meeting was brought to a close by a banquet at the King Edward Hotel on Thursday evening, March 4th, at which Mr. Gash, K.C., presided, accompanied by Hon. Chief Justice Olson, Hon. W. E. Raney, K.C., Attorney-General for Ontario; Hon. N. W. Rowell, K.C.; Sir James Aikens, K.C., Lieutenant-Governor of Manitoba; Hon. Mr. Justice Riddell, Mr. H. J. Gagné, K.C., B.C.L., and Mr. E. Douglas Armour, K.C., all of whom delivered admirable addresses.

Not the least enhancing feature of the banquet was the presence, for the first time in the history of the Association, of thirteen lady Barristers and Barristers-to-be, who entered into the spirit of the occasion with all the grace and interest which is ever peculiarly theirs. The thanks of this Association is largely due to Miss Laura Denton, B.A., the popular President of the Women's Bar Association, for this welcome establishment of a precedent which it is hoped will be faithfully followed hereafter, and, like other precedents, be given increasing deference with the passing of the years.

The officers and members of the Council for the ensuing year are as follows: Honorary, President, Hon. W. E. Raney, K.C., Attorney-General for Ontario; President, J. H. Rodd, Windsor; Vice-Presidents—R. J. Maclennan, Toronto; Francis

King, Kingston; Frank D. Kerr, Peterboro; Archivist, W. S. Herrington, K.C., Napanee; Recording Secretary, A. A. Macdonald, Toronto; Treasurer, H. F. Parkinson, Toronto; Corresponding Secretary, W. J. Beaton, Toronto. Toronto Members of Council—Frank Denton, K.C.; A. J. R. Snow, K.C.; J. M. Clark, K.C.; J. H. Spence, Daniel Urquhart, W. K. Murphy, Thomas Rowan, H. S. White, W. D. Gregory, Daniel O'Connell. Others members of Council—W. S. Ormison, Uxbridge; W. K. Kerr, Cobourg; O. L. Lewis, K.C., Chatham; Nicol Jeffrey, Guelph; J. S. Davis, Smithville; W. S. MacBrayne, Hamilton; W. T. Henderson, K.C., Brantford; V. A. Sinclair, Tillsonburg; J. B. McKillop, K.C., London; R. J. Towers, Sarnia; Col. W. N. Ponton, K.C., Belleville; Harold Fisher, Ottawa; George McGaughey, North Bay; S. G. McKay, K.C., Woodstock; F. P. Betts, K.C., London; W. K. Cameron, St. Thomas; W. A. J. Bell, K.C., Barrie; W. H. Wright, Owen Sound; J. A. Stewart, Perth; Geo. A. Stiles, Cornwall; F. H. Thompson, K.C., Stratford; A. C. Kingstone, St. Catharines; Chas. Garrow, Goderich; T. D. Cowper, Welland; H. A. Burbidge, Hamilton; L. V. O'Connor, Lindsay.

CONSTRUCTION OF RULES BY JUDGES WHO FRAME THEM.

It has recently been said by Mr. Justice Middleton in *Oliver* v. *Frankford Canning Co.*, 17 O.W.N. 407, that motions for judgment under *Rule* 62 may now be made in Chambers and that the Master in Chambers has jurisdiction to entertain such motions; and that the note to the contrary in Holmested's Judicature Act, p. 411, is not to be relied on.

This is not an actual decision, but a mere dictum; but it is a dictum of the learned Judge by whom the *Rules* as they now stand were revised; the learned Judge has therefor the advantage of approaching the intrepretation of the *Rules* as they now stand, with the added knowledge of what he meant; whereas a commentator or practitioner can only interpret them by what they actually say.

Primâ facie the giving of judgment in any case must be the act of the Court; but there are exceptions to the rule which the Court creates, *e.g.*, where on a certain state of facts the judgment goes as of course, the Court by its Rules delegates the duty to one of its officers; it also in certain simple cases, which are not of course, but involve the exercise of a judicial discretion, also delegates to judicial officers a right to decide the case and give judgment; but unless this right is very plainly and explicitly conferred on an officer of the Court he can have no inherent right by virtue of his office to exercise judicial functions.

Rule 62 contains no statement in itself as to what forum the motion is to be made *prim facie*, therefore it must be to the Court. But the learned Judge says that "*Rule* 207 (7) which assizes motions for judgments under *Rules* 57 to 62" to Chambers includes motions under *Rule* 62, and that they are not included in the matters excluded by *Rule* 208 from the jurisdiction of the Master in Chambers. And this no doubt is probably what the learned Judge may have intended when he framed the *Rules*. But it may be well to point out that another Judge having to construe the *Rules* merely by what they actually say, might be driven to a different conclusion—because whatever Mr. Justice Middleton may have meant by the expression "Rules 57 to 62" in *Rule* 207 (8), he has himself in another Rule used a like expression, in which it is perfectly clear that the word "to" is not inclusive but exclusive. For example in *Rule* (j) the expression occurs "Rules 11 to 31" and when you come to refer to Rule 31 it is quite plain to see that *Rule* 31 is not intended to be included—and another Judge might say that the expression Rules "57 to 62" must be construed in like manner.

We venture, therefore, respectfully to think that the matter may need further consideration before it is concluded that anyone but a Judge in Court has jurisdiction to pronounce a judgment under *Rule* 62.

EJUSDEM GENERIS RULE.

The rule—or doctrine, as it is often called—of *ejusdem generis* is not a rule of law at all, nor is it even embodied in any epigrammatic maxim, but is simply a working rule of construction embodying a particular application of two maxims which are themselves rules of construction—namely, *Verba generalia restringuntur ad habilitatem rei vel personae* and *Noscitur a sociis.* In plain English, in construing documents you must always have regard to the context of any word, and, if general words are used, you may restrict their meaning so as to make them apply to the subject-matter of the document; as a consequence of these rules, a general word or expression following particular words or expressions must often be, if that appears to be the intention gathered from other parts of the document, restricted in meaning so as to refer to things of the same kind—*ejusdem generis*—as are referred to by the particular words or expressions. This seems a reasonably accurate way of stating the *ejusdem generis* doctrine as acted upon at the present day. The rule is certainly not a principle of law, nor even to be applied without reference to the context. To say, as is said in an American case, that "the doctrine of *ejusdem generis* is as rock-ribbed in the law of this State (Missouri) as any principle ever announced" (*Ex parte Neet,* 1900, 80 Am. St. Rep. 638, 641) is going much further than English, and probably most American, lawyers would assent to.

The doctrine, in fact, amounts to little more than a presumption to be acted on in construing documents of every kind. It is more often called in aid of the interpretation of statutes than of other documents, but is also frequently relied on in regard to deeds of conveyances, wills, and powers of attorney. It is under the doctrine of *ejusdem generis* that the general words in a deed or will, following an enumeration of particular things or a description of a particular thing, often are so restricted as to have practically no meaning at all, the practice having arisen of throwing in these general words in order to guard against accidental omissions in the particular enumeration or description. In many penal statutes the doctrine has been relied on for restricting general words within a narrow compass, but here this restriction seems

to have been induced (possibly unconsciously) by the application of the broad principle which always construes penal statutes strictly and by a judicial disinclination to create new offences unless absolutely compelled by the most explicit language of the Legislature.

The modern tendency of the Courts is not to regard the doctrine of *ejusdem generis* as important, but in all cases to look for indications elsewhere in the document of an intention to use general words in the restricted sense, if the doctrine is to be applied. In the absence any such indication, the doctrine is not treated as a mere rule of thumb, though no doubt it was so treated formerly. It was said by Lord Loreburn, when Lord Chancellor, that "it is impossible to lay down any exhaustive rules for the application of the doctrine of *ejusdem generis*," but there "may be great danger in loosely applying it": (*Larsen* v. *Sylvester*, 99 L.T. Rep. 94; (1908) A.C. 295). In this case it was held by the House of Lords that the insertion of the words "of what kind soever" in a charter-party was intended to, and did, exclude the doctrine of *ejusdem generis*. *Anderson* v. *Anderson*, in the Court of Appeal (72 L.T. Rep. 313; (1895) 1 Q.B. 749), illustrates the modern tendency referred to in relation to a voluntary deed of settlement. The deed contained a gift of a house with its "furniture, plate," etc., and "other goods, chattels, and effects" on the premises. The words last quoted were held to include horses and carriages, and the *ejusdem generis* doctrine was held not to apply. Lord Esher, M.R., said: "The doctrine of *ejusdem generis* is not one to be at all extended." Lord Justice Lopes thought the doctrine "a good servant, but a bad master." The effect of not applying the doctrine in this case was to uphold the gift of everything in the house to the donee. In a later case where the doctrine was applied, the effect of its application was to prevent the forfeiture by a tenant of machinery placed on demised premises: (*Lambourne* v. *McLennan*, 88 L.T. Rep. 748; (1903) 2 Ch. 268). Here the Court of Appeal held that the general words in a covenant to deliver up at the end of the term everything on the premises should be applied only to articles possessing the characteristic of irremovability, and they also thought the covenant should be construed in this way apart from the doctrine of *ejusdem generis*.

It is sometimes said that such and such a case is an "exception" to the *ejusdem generis* rule. This seems an incorrect way of looking at the matter, and in such cases it should rather be said that on the construction of the document the generality of the words in question could not be restricted. *Ivison* v. *Gassiot* (1853, 3 D.M. & G. 958) is an illustration of this. A debtor assigned all his stock-in-trade, etc., and "effects whatsoever and wheresoever" to his creditors, "except the wearing apparel" of the assignor. The question was whether his contingent interest in the residue of a testator's estate passed by the deed. It was held that it did pass. Lord Justice Knight Bruce said, referring to the absence of any "restrictive context": "I have looked in vain for such a context, and, not finding it, I must hold that the words ought to be understood . . . as including this property." Lord Justice Turner said the effect of the exception of the wearing apparel was "that all the assignor's property, with that exception, was intended to pass." The mention of the exception, in fact, strengthened the literal meaning of the general words, according to the maxim *Exceptio firmat regulam in casibus non exceptis*—or The exception proves the rule.

The application of the doctrine of *ejusdem generis* to the construction of statutes has been raised in the Courts quite recently with regard to more than one statute—the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915 and the Customs Consolidation Act 1876. Neither of these is a penal Act, but both may be classed as remedial, and it seems possible that, in regard to the restriction of general words under the doctrine of *ejusdem generis*, there may be a distinction between remedial and penal Acts. In the case of a remedial Act the natural tendency of the judiciary is to make the scope of the statute as wide as reasonably may be, and so give an extensive meaning to general words. The natural tendency in the case of a penal Act is just the contrary—to restrict the scope of the statute and give a narrow meaning to general words, so that punishment may not be inflicted unless the Act alleged to be penal is in the plainest terms declared by the Legislature to be so.

A good example of a penal statute—outside ordinary criminal statutes—is the Sunday Observance Act 1677. The persons to

whom sec. 1 applies are "tradesman, artificer, workman, labourer, or other person whatsoever." A barber has been held not to be an "other person" *ejusdem generis* with "tradesman," etc., and so not within the scope of the section: (*Palmer* v. *Snow*, 82 L.T. Rep. 199; (1900) 1 Q.B. 725). The Customs Consolidation Act 1876 affords, in sec. 43, an illustration of a non-penal enactment as to which it is not yet settled whether the *ejusdem generis* doctrine applies or not. The section runs: "The importation of arms, ammunition, gunpowder, or any other goods may be prohibited by proclamation or Order in Council." Though King's Bench Division in Ireland thought the doctrine did not apply, and that the enactment covered goods of other kinds besides arms, though this was not the actual point raised for decision: (*Hunter* v. *Coleman*, 1914, 2 I.R. 372). Mr. Justice Sankey has recently decided that the section does not apply to goods other than arms and things *ejusdem generis* with arms, etc. (*Attorney-General* v. *Brown*, *post*, page 24), so that the English and Irish Courts are at variance on this point. But Mr. Justice Sankey's decision is under appeal, and no more can now be said about it. Whatever the meaning of sec. 43 may eventually be held to be, it is quite certain that the *ejusdem generis* doctrine will play very little part in arriving at that meaning, and that there will be no question of the bald construction of the words of the section apart from a voluminous context and lengthy history.

The Increase of Rent and Mortgage Interest (War Restrictions) Act 1915 has been mentioned as illustrating the *ejusdem generis* doctrine. The question arose under sec. 1 (3), by which an order for recovery of possession of houses of a certain class cannot be made except on certain specified grounds, "or on some other ground which may be deemed satisfactorily by the Court," and in *Stovin* v. *Fairbrass* (121 L.T. Rep. 172; (1919) W.N. 216) the Court of Appeal was divided as to the proper construction of the general words "on some other ground," etc. Lords Justices Bankes and Atkins held that the general words must be taken to be limited by the preceeding enumeration of specified grounds on which an order might be made, so that a corresponding limit was thus placed on the discretion of the Court. Lord Justice Scrutton dissented and thought the general words should be construed

without being limited by reference to the preceding words, and that no limit was placed on the discretion of the Court. This is in effect saying that the majority thought the *ejusdem generis* rule did apply, and that the dissentient Judge thought it did not. But the expression *ejusdem generis* does not occur in the reported judgments, and all express mention of the doctrine seems to have been carefully avoided. Lord Justice Bankes said there was "an insuperable difficulty in defining the limitation to be placed on these general words," thus almost echoing in substance the observation of Lord Loreburn in *Larsen* v. *Sylvester* (*sup.*) as to the impossibility of laying down exhaustive rules for the application of the *ejusdem generis* doctrine.

The Increase of Rent, etc., Act 1915 has now been amended by the Increase of Rent, etc. (Amendment), Act 1919 (assented to on the 23rd Dec. last), and sec. 1 (3) is replaced by other provisions leaving no discretion to the Court on "other grounds," but this does not, of course, affect the value of the judgments in *Stovin* v. *Fairbrass* for the present purpose. These judgments justify the statement that the *ejusdem generis* doctrine as an actual rule of construction is of much diminished importance at the present day. It might, in fact well be allowed to fall into disuse as a separate rule, being merely an illustration of the maxims *Verba generalia restringuntur*, etc., and *Noscitur a sociis*, already quoted. As *Stovin* v. *Fairbrass* shews, the doctrine itself is not abrogated and can be applied without being referred to as a substantive rule. In *Larsen* v. *Sylvester* (*sup.*) Lord Robertson observes that "both in law and also as matter of literary criticism it is perfectly sound."

—*Law Times.*

THE FREEDOM OF THE SEAS.

M. Clemenceau, in his recent speech in the French Chamber of Deputies in explanation of the Treaty of Peace, in a singularly noble passage said: "As regards the freedom of the seas, England had no need to demand it of anyone. She already had it, and there was no one to dispute it with her." M. Clemenceau, albeit unconsciously, echoed a celebrated declaration of Queen Elizabeth nearly three centuries and a half ago. When Mendoza, the envoy

of Spain at the English Court, complained to Queen Elizabeth of the intrusion of English vessels into the waters of the Indies, she admonished him that "the use of the sea and air is common to all; neither can a title to the ocean belong to any people or private persons forasmuch as neither nature nor public use and custom prevented any possession thereof." Grotius gave sanction to Queen Elizabeth's declaration by reviving in his Mare Clausum, published in 1609, the old doctrine of Roman law that there can be no property in anything without occupation, to which the vagrant waters of the ocean cannot be subjected. The broad statement that the sea could not be made the subject of property Grotius no doubt qualified at a later day by the necessary admission that such limited portions of it as gulfs and marginal waters may be when bearing the proper relation to the adjacent land. As thus modified, the Grotian doctrine, which was an enunciation of Queen Elizabeth's declaration, has become the rule, after much contention, of modern international morality.—*Ex.*

LAWYERS' LYRICS.

By whom the following lines were written, or to what learned Judge they refer, we have no knowledge whatever; but, as it is well for all of us to see ourselves as others see us, even Judges on the Bench, we publish them in the hope that the right person, if still in the land of the living, may see them and smilingly forgive the unknown author. They were scribbled many years ago, apparently by some weary counsel waiting for his case, on a piece of blotting paper on the barristers' desk, in one of the Courts at Osgoode Hall, Toronto.

The original document was handed to the writer and is now before us. We shall be glad to give it to the author on application. In the meantime we take the liberty of publishing it:—

"How pleasant to know the C. J.,
Hear him talk in his amiable way;
'Tis his innocent joy
To tease and annoy,
And make you pay costs of the day."

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

SOLICITOR—BILL OF COSTS—RETAINER TO CONDUCT LITIGATION—SUBSEQUENT CHAMPERTOUS AGREEMENT—ILLEGALITY—CHAMPERTY.

Wild v. *Simpson* (1919) 2 K.B. 544. This was an action by a solicitor to recover a bill of costs. The defendant contested the action on the ground that after a retainer to conduct litigation on the usual terms, the plaintiff had made a champertous agreement with the defendant whereby he was not, in case the action did not succeed, to look to the defendant for anything but disbursements, and if the action succeeded he was to get a percentage on the amount recovered. In the result the defendant recovered judgment for a large sum. The plaintiff claimed to be entitled to recover under the original retainer his taxable costs, and that he was not to be prejudiced by the subsequent illegal agreement. Rowlatt, J., who tried the action, gave judgment in favour of the plaintiff; but the majority of the Court of Appeal (Bankes and Atkin, L.JJ.) reversed his decision, but Duke, L.J., dissented. The majority of the Court thought that the original retainer had been so varied by the subsequent agreement that the plaintiff was compelled to have recourse thereto, and that the plaintiff's claim thereby become so tainted with illegality that he could not recover anything. Duke, L.J., on the other hand, thought that though the champertous agreement was illegal, the plaintiff might nevertheless recover his proper taxable costs and that the defendant's right to be relieved from the champertous agreement depended on himself "doing equity," which in this case would be payment of taxable costs. Atkin, J., we may observe, remarked that as a retainer is a retainer for a complete action, if the solicitor before it is complete is prevented, by an illegal agreement, from completing the services lawfully, he cannot even recover on a *quantum meruit*, and he said: "If a cab is engaged to drive to a particular destination and halfway the driver is informed by his fare that he is proceeding thither to execute a burglary, and the driver proceeds, can he recover the fare, or half of it? I think not." As a large amount is at stake, the case may possibly be carried further.

PRACTICE—COSTS—TWO DEFENDANTS REPRESENTED BY SAME SOLICITOR—ONE DEFENDANT SUCCESSFUL, AND THE OTHER UNSUCCESSFUL—PLAINTIFF'S LIABILITY FOR COSTS.

Ellingsen v. *Det Skandinaviske Compani* (1919) 2 K.B. 567. A simple point of practice was in question in this case. The action was against two defendants both of whom were represented by the same solicitor but on separate retainers, the action was dismissed as against one defendant with costs, and the plaintiff succeeded against the other with costs. The successful company had agreed to pay their solicitors the costs incurred on behalf of the unsuccessful defendant. On the taxation of the successful defendants' costs the taxing officer held that they were entitled to tax as against the plaintiff only one-half of the items incurred for the benefit of both defendants. And this decision was affirmed by Bailhache, J., and also by the Court of Appeal (Bankes, Scrutton, and Atkin, L.JJ.). It may be observed that the decision turns on the fact that the retainer of the defendants' solicitor was not a joint retainer by the defendants, but a separate retainer by each. If the retainer had been joint, *semble*, the successful defendants being liable to the solicitor for the whole costs, would have been entitled to tax them against the plaintiff.

HUSBAND AND WIFE—CONTRACT—TEMPORARY SEPARATION ALLOWANCE FOR MAINTENANCE OF WIFE—DOMESTIC ARRANGEMENT—NO RESULTING CONTRACT.

Balfour v. *Balfour* (1919) 2 K.B. 571. This was an action by a wife against her husband to enforce an agreement by the husband to pay her £30 per month for maintenance, she agreeing to support herself and not to call upon him for any further maintenance. The agreement was made in the following circumstances. The parties were married in 1900 and went to reside in Ceylon where defendant held a Government appointment. In 1915 the parties returned to England. In 1916 the defendant returned to Ceylon, leaving the plaintiff in England where she had to remain under medical advice. The plaintiff alleged that before his departure the agreement in question was made by the defendant. The parties remaining apart, the plaintiff subsequently obtained a decree *nisi* for the restitution of conjugal rights, and an order for alimony. Sargant, J., who tried the action held the agreement to be proved, and that it was actionable. The Court of Appeal (Warrington, Duke and Atkin, L.JJ), however, held that the agreement merely amounted to a domestic arrangement, and gave no cause of action. The Court of Appeal, however,

unanimously concede that a contract of the kind alleged might be validly made between husband and wife. Their decision is therefore based on the fact that the agreement in this particular case did not in the circumstances constitute a contract.

SALE OF GOODS—DELIVERY BY INSTALMENTS—FAILURE OF BUYER TO MAKE PUNCTUAL PAYMENT—NO INFERENCE OF REPUDIATION—REFUSAL OF SELLER TO MAKE FURTHER DELIVERIES—MITIGATION OF DAMAGES—ALTERNATIVE OFFER OF SELLER—DUTY OF BUYER TO ACCEPT.

Payzu v. *Saunders* (1919) 2 K.B. 581. This was an action for breach of a contract for the sale of goods. The goods in question were to be delivered by instalments; and payment was to be made for each instalment within a month of delivery less 2½ per cent. discount. The first instalment was delivered and the plaintiffs failed to make punctual payment therefor, and the defendant in the erroneous belief that the plaintiffs' failure to make punctual payment was due to lack of means, refused to deliver any more of the goods under the contract, but notwithstanding the market price of the goods had risen, offered to deliver the goods at the contract price if the defendants would pay cash on delivery. The plaintiffs did not accept this offer, but brought the action for breach of contract. McCardie, J., who tried the action, held that the failure to make prompt payment for the first instalment did not warrant the inference that the plaintiff had repudiated the contract, and that the defendant was liable for damages; but he held that it was the duty of the plaintiffs to mitigate the damages and should therefore have accepted the defendants' alternative offer. He therefore held that the plaintiffs' damages must not in this case be estimated at the difference between the contract price and the market price at the date of the breach, but such loss as the plaintiffs would have suffered if they had accepted the defendants' offer; and with this conclusion the Court of Appeal (Bankes and Scrutton, L.JJ., and Eve., J.) agreed.

SALE OF GOODS—MEMORANDUM IN WRITING—LETTER REPUDIATING CONTRACT—SOLICITOR'S LETTER—"AGENT IN THAT BEHALF"—SALE OF GOODS ACT, 1893 (56-57 VICT., C. 71), S. 4—(STATUTE OF FRAUDS, R.S.O., C. 102, S. 12).

Thirkell v. *Cambi* (1919) 2 K.B. 590. This was an action to recover the price of goods sold. The defence set up was, that there was no sufficient memorandum within the Sale of Goods

Act, 1893, s. 4 (R.S.O., c. 102, s. 12). On the making of the alleged sale a sale note giving particulars signed by the plaintiff was sent to the defendant also an invoice for the goods. The plaintiffs drew on the defendant for the price, the defendant refused to accept, alleging the goods had not been delivered at the place agreed on. No place of delivery was mentioned in the sale note. Correspondence took place between the solicitors of the parties and the defendant's solicitor wrote a letter to the plaintiffs' solicitor—*Cambi* v. *Thirkell:* "Your letters to my client Mr. I. Combi relating to this matter have been handed to me. I am instructed to inform you that the terms upon which the goods were agreed to be purchased were not carried out by your client." The letters referred to contained particulars of the alleged sale, and it was contended that the defendant's solicitor's letter by its reference to them constituted a sufficient note in writing. But Bailhache, J., who tried the action, held that there was no sufficient memorandum and the Court of Appeal (Bankes and Scrutton, L.JJ., and Eve, J.) affirmed his decision, being of the opinion that the solicitor's letter did not admit but repudiated the fact that the letters referred to contained the terms of the agreement between the parties; although the Court conceded that if the letter in question had admitted that the letters referred to did in fact contain the terms of the agreement, a repudiation of liability thereunder would not have prevented it operating as a sufficient note in writing under the statute. The Court also thought the letter was insufficient on the ground that the plaintiff had not proved that the solicitor was the agent authorised on the defendant's behalf to sign the memorandum.

GAMING—CHEQUES GIVEN FOR RACING BETS—CHEQUES INDORSED BY PAYEE—CHEQUES PAID INTO BANKING ACCOUNT STANDING IN NAME OF PAYEE'S WIFE—WHETHER WIFE AN "INDORSEE" OR "HOLDER"—GAMING ACT, 1835 (5-6 W. IV., c. 41), ss. 1, 2—(R.S.O., c. 217, s. 3).

Dey v. *Mayo* (1919) 2 K.B. 622. In this action the plaintiff sued to recover £852 0s. 8d., being the amount of five cheques drawn in favour of the defendant or order and crossed "account payee, not negotiable." The cheques were given in payment of racing bets, won by the defendant from the plaintiff—they were indorsed by the defendant in blank and paid into a banking account kept in the wife's name and duly honoured. It was found as a fact that the banking account was in fact the defendant's though operated in his wife's name as his agent. By the Gaming

Act, 1835, sec. 2, money paid to any indorsee, holder or assignee of a bill given for any consideration declared to be void is recoverable as money paid to the use of the person to whom such bill was given. Avory, J., held that the wife was not a "holder" or "indorsee" of the bill within the meaning of the statute, neither was the banker an indorsee of the bill, and payment to him was not within the Act, because he merely collected the amount of the bills as agent of the defendant. It was therefore held that the payment was tantamount to payment to the defendant himself and therefore not recoverable.

INSURANCE (MARINE)—PARTIAL LOSS—DAMAGE UNREPAIRED—SUBSEQUENT TOTAL LOSS DURING CURRENCY OF POLICY—MERGER OF PARTIAL LOSS IN TOTAL LOSS.

Wilson Shipping Co. v. *British and Foreign Ins. Co.* (1919) 2 K.B. 643. This was an action on a policy of marine insurance to recover damages for a partial loss, the vessel having subsequently become a total loss. The policy in question was a time policy whereby the defendants insured the plaintiffs' vessel against marine risks only. The vessel was under charter to the Admiralty whereby the Admiralty contracted to pay for loss by war risk. During the currency of the policy the vessel sustained damages by marine risk to the extent of £1,770. This damage was not repaired; and on a subsequent voyage during the currency of the policy the vessel became a total loss, and the Admiralty in consequence of the unrepaired damage paid the plaintiffs £1,770 less for the vessel than they would otherwise have done—and it was for this £1,770 that the plaintiffs now brought the action. Bailhache, J., who tried it, held that the plaintiffs could not succeed because the partial loss had been marged in the total loss. He thus states what he finds to be the law on the subject: "Whether an underwriter is, or is not, liable for unrepaired damage cannot be ascertained until the expiration of the policy. If before the expiration of the policy there is a total loss he is not liable to pay for the earlier unrepaired damage sustained during the currency of the same policy, and it makes no difference whether the total loss falls on him or is due to an excepted peril against which the owner is insured or uninsured . . . The question in every case must be, did the total loss happen before the underwriter's liability for the unrepaired damage accrued? If yes, he is not liable: if no he is liable." The basis of the decision in this case is, therefore, that the defendant's liability for the unrepaired damage had not actually accrued before the total loss happened.

POLICY—"WARLIKE OPERATIONS"—LOSS OF SHIP—NAVIGATING WITHOUT LIGHTS UNDER ORDERS OF ADMIRALITY.

Britain S.S. Co. v. *The King* (1919) 2 K.B. 670. This was an appeal from a decision of Bailhache, J. (1919) 1 K.B. 575 (noted *ante*, vol. 55, page 266), in which the question was whether a loss occasioned by a vessel navigating without lights under Admiralty orders was a loss occasioned by "Warlike operations." Bailhache, J., held that it was not, and the Court of Appeal (Warrington, Duke, and Atkin, L.JJ.) have affirmed his decision.

INSURANCE (MARINE)—WAR RISK—WARLIKE OPERATIONS—SHIP LOST WHILE SAILING IN CONVOY.

British India Steam Navigation Co. v. *Green* (1919) 2 K.B. 670. This was also an appeal from a judgment of Bailhache, J. (1919) 1 K.B. 632 (noted *ante*, vol. 55, page 311). The action was to recover on a policy of insurance "against all consequences of hostilities or warlike operations by or against the King's enemies." The vessel in question was lost while sailing in convoy, she stranded and was subsequently torpedoed by the enemy. It was not shewn that the stranding was due to any negligence of the King's officer in command of the convoy. Bailhache held that in this case, notwithstanding the vessel would, apart from the torpedoing, have been a total loss, that it was due to "warlike operations," and the plaintiffs were entitled to recover, the Court of Appeal (Warrington, Duke and Atkin, L.JJ.) have, however, held that the loss was not due to warlike operations, but was a marine risk.

SHIP—CHARTERPARTY—CONTRACT TO LOAD PARTICULAR CARGO —LOADING OF DIFFERENT CARGO FROM THAT AGREED—IMPLIED CONTRACT—QUANTUM MERUIT.

Steven v. *Bromley* (1919) 2 K.B. 722. In this case the charterers of a ship agreed to load her with a full cargo of steel billets at a specified freight—instead of doing so they loaded her in part with general merchandise for which the current freight was higher then the specified rate. The action was by the shipowners against the charterers for breach of contract. The defendants contended that the plaintiffs were only entitled to nominal damages beyond the amount of the chartered freight; but Bailhache, J., who tried the action, held that the facts implied an offer by the charterers to load general merchandise at the current rate of freight and acceptance by the plaintiffs of that offer; and therefore the plaintiffs were entitled to recover freight at the current rate

for the general merchandise loaded, and with this conclusion the Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.) agreed.

CONTRACT—SALE OF GOODS—DELIVERY "PREVENTED OR HINDERED" BY WAR—DIFFICULTY OF SHIPPING—FORCE MAJEURE —RIGHT OF SELLERS TO SUSPEND DELIVERY.

Dixon v. *Henderson* (1919) 2 K.B. 778. This was an action by buyers of goods to recover damages for breach of contract against the sellers in the following circumstances. The contract in question was made in 1911 for the sale of wood pulp to be delivered in quantities of 5,000 tons a year extending to 1917, but the contract was subject to a provision under the head of "Force Majeure," that delivery under the contract might be suspended pending any contingency beyond the control of the parties "which prevents or hinders . . . delivery . . . namely, Act of God, War," etc. The sellers made deliveries until the commencment of the war, when considerable difficulty arose in carrying out the contract. British ships were no longer available for the trade, although foreign shipping could be obtained at increased freights. Admiralty regulations lengthened the voyage, and there was liability to capture by the enemy, and danger of loss through mines or submarines, and delay through detention of Allied warships. Notwithstanding these facts on a case stated by arbitrators Bailhache, J., found, contrary to the opinion of the arbitrators, that the sellers were liable; but the Court of Appeal (Eady, M.R., Bankes, L.J., and Eve, J.) reversed his judgment, holding that the sellers, though not prevented, were "hindered" by reason of the war from carrying out their contract within the "Force Majeure" clause and were therefore entitled to suspend delivery as they had done.

PRIZE COURT—CONTRABAND—MISDESCRIPTION OF CARGO—FALSE PAPERS—VESSEL UNDER CHARTER—SHIPOWNERS' ABSENCE OF KNOWLEDGE.

The Ran (1919) P. 317. This was an action to condemn a vessel on the ground that she was carrying contraband and sailing with "false papers." She was under charter to an American firm and was carrying when captured a cargo including some aluminum and a small quantity of rubber which was manifested as "gum." The aluminum and rubber were seized and condemned as contraband destined for Germany. The vessel was a Norwegian vessel. It was not shewn that the master or the shipowners had any knowledge of the misdescription, or were

aware that any of the cargo had an enemy destination. In these circumstances Lord Sterndale, P.P.D., held that the vessel was not liable to condemnation.

ADMIRALTY—COLLISION—VESSELS ON CROSSING COURSES—GIVE-WAY VESSEL ACTING TOO LATE—"KEEP COURSE AND SPEED" RULE—REGULATIONS FOR PREVENTING COLLISIONS AT SEA, ARTS. 19, 21.

The Orduna (1919) P. 381. This was a case of collision. The *Orduna* and *Konakry* were approaching each other; the *Orduna* had the right of way. As the vessels neared those in charge of the *Orduna* wrongly assumed that the *Konakry* was going to cross, and starboarded the helm of the *Orduna* in order to give her more room. At about the same time the *Konakry* in order to give the *Orduna* the right of way ported her helm, the result being that the vessels came into collision. Hill, J., who tried the action, held that the *Konakry* was wholly to blame for not sooner porting her helm; but on appeal (Bankes and Scrutton, L.JJ., and Eve, J.) were of the opinion that it was the duty of the *Orduna* under the Regulations for Preventing Collisions at Sea, Arts. 19, 21, to have maintained her speed and course; and that both vessels were consequently at fault.—the *Orduna* for not keeping her speed and course, and the *Konakry* for keeping on so as to mislead those in charge of the *Orduna* to believe that she intended to cross the bows of the *Orduna*.

LANDLORD AND TENANT—LEASE FOR ONE YEAR AND PART OF ANOTHER—OVERHOLDING—IMPLIED TENANCY FROM YEAR TO YEAR—DATE OF COMMENCEMENT—NOTICE TO QUIT.

Croft v. *Blay* (1919) 2 Ch. 343. This case deals with a simple point in the law of landlord and tenant, viz., where a tenancy is created for a year and a part of a year and the tenant holds over after the expiration of the lease, from what period is the new implied tenancy to be deemed to commence? Cole on Ejectment and many text books on landlord and tenant stated the law to be, that the implied tenancy was to be presumed to commence on the anniversary of the commencement of the original term. Astbury, J., came to he conclusion that this was erroneous, and that the the new implied tenancy began at the expiration of the original tenancy—and with this conclusion the Court of Appeal (Warrington and Duke, L.JJ. and Eve, J.) also agreed, and a notice to quit given on the assumption that the implied tenancy so began, was upheld. It will be prudent for practitioners to take a note of this case as it upsets the statements to be found in so many text books.

SETTLEMENT—TRUST TO PAY ANNUITY OUT OF DIVIDENDS—DEDUCTION BY A COMPANY OF INCOME TAX—WHETHER PROPORTION OF INCOME TAX SO DEDUCTED CHARGEABLE TO ANNUITANT.

In re Cain, Cain v. *Cain* (1919) 2 Ch. 364. By a settlement in question in this case the trustees were authorised out of income to be received from the settled property, which consisted of shares in a limited company, an annuity of £2,000 to the settlor's widow, and the trustees were directed to accumulate the surplus income for the benefit of the settlor's children. The company deducted income tax in respect of all dividends paid to the trustees. On this application the trustees sought the opinion of the Court as to whether or not they should deduct from the annuity payable to the widow the proportion of the income tax applicable thereto. The Vice-Chancellor of Lancaster held that the annuity was properly subject to the deduction for income tax, and the Court of Appeal (Warrington and Duke, L.JJ., and Eve, J.) affirmed his decision.

POWER—APPOINTMENT—OBJECTS OF POWER—"MY PEOPLE"—APPOINTMENT TO THE DAUGHTER OF DONOR'S ILLEGITIMATE SISTER.

In re Keighley, Keighley v. *Keighley* (1919) 2 Ch. 388. In this case the question to be decided was whether there had been a valid exercise of a power of appointment. The donee of a general power of appointment bequeathed all she died possessed of to her husband for his life at his death "to be willed to my people as he knows I should wish it." By his will in accordance with his wife's wish expressed to him during her lifetime he gave all the property in which he had a life interest under his late wife's will to the child of an illegitimate daughter of his wife's mother. This illegitimate daughter had always been regarded as one of the family. The question was raised whether she could come within the designation of "my people." It was contended that this expression implied legitimate relationship. Peterson, J., however, thought the word had a much wider meaning and could properly include others than relations by blood or marriage, and he upheld the appointment.

Correspondence

THE ONTARIO TEMPERANCE ACT—IS IT IN FORCE.

To the Editor CANADA LAW JOURNAL.

DEAR SIR:—The Ontario Temperance Act, which came into effect on the 16th day of September, 1916, provides that on the first Monday in the month of June, 1919, there should be a vote of the electors of the Province of Ontario on the following question: "Are you in favour of the repeal of The Ontario Temperance Act?" and this was not done.

In 1919 an Act was passed, to be cited as, "The Temperance Referendum Act, 1919," providing that 4 questions should be submitted to the electors, and the said questions were duly submitted in the month of November, and by means of a trick ballot the Province remained "Dry."

The Legislature of the Province of Ontario had no legal existence in 1919. It was elected in 1914, and under section 85 of the British North America Act came to an end in 1918. This section provides that "Every Legislative Assembly of Ontario . . . shall continue for 4 years from the day of the return of the Writs for Choosing the same . . and no longer."

Therefore in 1918 the Ontario Legislature came to a legal end, and could not by any act of its own continue its own existence, and "The Temperance Referendum Act, 1919" is not valid because the Legislative Assembly in 1919 was legally defunct in pursuance of the B.N.A. Act, and had no right to pass it, or any other Act.

The vote of the electors, plebiscite or referendum, whatever you like to call it, was not held in June, 1919, but in November, in pursuance of an Act which was passed by a Legislative Assembly in 1919 having become defunct in 1918.

The Ontario Temperance Act was to remain in force for 3 years from 1916, and was illegally kept in force in 1919 by an illegal Act of the Legislature and a trick ballot.

Yours truly, E. J. B.

[The foregoing letter is based on the assumption that the Legislative Assembly has not under its power to amend the Constitution of the Province (see B.N.A. Act, s. 92, 1), the right or the power to amend it in regard to the duration of the Legislative Assembly. This is an assumption in the absence of authority which we are not prepared to admit. We do not agree with the writer that the ballot to which he refers can be rightly called a "trick ballot." It is true the vote was not asked on the question in the original Act, but the Legislature had power to alter the question.—*Ed.* C. L. J.]

Obituary.

COL. ARCHIBALD HENRY MACDONALD, K.C.

Col. Macdonald, the County Crown Attorney of the County of Wellington, Ontario, passed off the scene on Feb. 13th, ult. He was the eldest son of the late A. M. Macdonald, County Court Judge of the County of Wellington, and was born in Cobourg, July 15, 1884. He was educated at the Guelph Grammar School, and studied law in the office of Kingsmill and Guthrie. He was called to the Bar in 1870; Q.C. in 1889.

In 1913 Col Macdonald was appointed County Crown Attorney and Clerk of the Peace. This position he held till his death. He was President of the Wellington Law Association for many years, and a Bencher of the Upper Canada Law Society.

Col. Macdonald was an outstanding figure in military matters in the district in which he lived. In 1870, after serving in the Wellington Rifles, he was gazetted to the Guelph Garrison Artillery. In 1881 he was the Commanding Officer of the Wellington Field Battery, and in 1900 was given the honorary rank of full Colonel. He was also interested in civic matters, being Alderman and subsequently Mayor of the City of Guelph.

Col. Macdonald was a man of outstanding ability and energy, a highly esteemed citizen and personally popular. His loss will be deeply felt in the city of Guelph and the surrounding country.

T. C. ROBINETTE, K.C.

The Bar of Ontario has lost one of its leading lawyers, in the person of the late Thomas Cowper Robinette, who died on the 14th day of March at his residence in the city of Toronto.

Mr. Robinette was born at Cooksville, Ontario, July 28th, 1861. He was educated at the Strathroy Collegiate, subsequently in 1884 taking his degree of B.A. at the University of Toronto. His course there was of a high order. He won the Governor-General's gold medal, and the silver medal in modern languages. He was called to the Bar of Ontario in 1887, and became a K.C. in 1902. Nine years later being elected a Bencher of the Law Society of Upper Canada.

Mr. Robinette's talents were devoted largely to counsel work in criminal cases, and his reputation in that branch of the law was very high. He was retained mainly for the defence in most

of the important murder cases which came up for trial during the time he was in practice. It has been said that the tendency of those practising at the criminal Courts is to blunt the higher ideals of those practising who devote their attention to criminal cases. The reverse was the case with Mr. Robinette. As was said by a learned Judge before whom he often appeared, one of his characteristics was that he never put a client in the witness box if he felt that he was not going to tell the truth, and the same learned Judge characterized him as being one of the ablest lawyers in Canada, with a wonderful mastery of his cases, and one in whom Judges had the utmost confidence.

Flotsam and Jetsam.

The Vagrant Act occasionally catches some queer fish. A man was recently arrested in London on a charge of begging on Victoria Street. The constable who arrested him found in his pockets 47 £1 notes, 98 10s notes, besides silver and coppers, as also a P.O. Savings Bank book, showing £143 to his credit. This same mendicant had previously been fined £5 for begging in some other part of the city. For the last offence he was fined £30, which shows that London policemen keep their eyes open, and that London J. P.'s do not fully appreciate enterprise and thrift. Other profiteers in a somewhat similar line of business in this country have received high honours for their success in a larger field of operations. These latter have not been made to disgorge their illgotten gains, much to the disgust of those whose small savings they have complacently pocketed.