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SUPPLEMENTAL RELIEF.

The case of *Hoffman* v. *McCloy*, 38 O.L.R. 446, deals with a somewhat important question of practice which it leaves in a rather doubtful position because it is not very clear whether the case can be regarded as an authority on the question of jurisdiction which is the main point discussed in the case, having regard to the dissentient judgment of the learned Chief Justice of the Common Pleas on that question, notwithstanding the fact that he actually concurred in the result arrived at by the majority of the Court.

The point involved was comparatively simple and the difference of opinion was, we think, due to the fact that the majority of the Court approached the question from a Common law standpoint and the learned Chief Justice from an Equity one.

The facts were as follows: In 1915 the plaintiff brought the action against the defendant alleging an agreement between the plaintiff and defendant by which the plaintiff was to be entitled to receive part of the proceeds to be derived from the sale of a patent. The plaintiff's share being alleged to be one-fifth of the receipts until the defendant should have received $1,500, and then the remainder of the receipts. The plaintiff alleged a sale had been made under which the defendant had received $1,500 and was to receive a royalty of $1.50 for each machine manufactured. At the trial in May, 1915, the plaintiff recovered a judgment for $150, with costs on the County Court scale; and the Court made a declaration that he was entitled to 20 per cent. of all royalties thereafter received by the defendant from the purchasing company after that company should be recouped for the advance payment of $1,500.

In October, 1916, the plaintiff gave notice of motion for an order to take an account of the amount received by defendant by way of royalties since the judgment, and the late Chancellor made the order asked, reserving further directions and the question of costs until after the report.

It was this order which was the subject of appeal. The majority of the Court (Riddell, Kelly, and Masten, JJ.), allowed the appeal on the ground that there was no jurisdiction to make the order, and Meredith, C.J.C.P., held that there was jurisdiction to make the order, but, in the circumstances, the order should not have been made.

It is on this point of jurisdiction that the case has to be considered. The order appealed from was attempted to be supported under Rule 65, and *Meyers* v. *Hamilton Provident, Etc.*, 15 P.R. 39; this case the majority of the Court held ought not to be followed. Mr. Justice Riddell refers to *Witham* v. *Vane*, 1884, W.N. 98, where Pearson, J., in an action refused to make a supplemental order for an account in respect of breaches of the covenant subsequent to the judgment. Riddell, J., also thought the case was governed by what was decided in *Stewart* v. *Henderson*, 30 O.L.R. 447, where the Court set aside so much of the judgment appealed from as directed an inquiry as to moneys thereafter received by the defendant in respect of which the plaintiff would be entitled to a commission. Mr. Justice Masten, besides relying on this case, also bases his judgment on the ground that the moneys now claimed, not being due when the action was commenced, cannot be recovered in the present action. No doubt it is the strict rule of law, that only the rights of the plaintiff as they existed at the date the writ issued can be adjudicated. But although as a general proposition that may be said, is it not a rule that is subject to some exceptions even at law? For instance, in the common case of interest payable on a covenant, it is the ordinary practice to give judgment for interest which has become due after the issue of the writ, and before judgment, as well as in the case where it is allowed by way of damages subsequent to the date of the writ. But in equity, es-

pecially in cases of account against trustees, and other persons standing in a fiduciary position, the judgment always directs the account to be taken in such a way as to cover not only all receipts up to the date of the writ, but also all moneys received up to the taking of the account, and also of all prospective receipts until the winding-up of the trust. Indeed any other procedure might involve an endless series of actions. The action of *Witham* v. *Vane, supra,* though brought in the Chancery Division appears to have been in substance an action on a covenant, and probably on that ground was properly governed by Common law principles, which would not be applicable to other cases where an account is sought. The case of *Stewart* v. *Henderson, supra,* may also be said to have been a common law action and in like manner governed by common law principles. *Hoffman* v. *McCloy,* on the other hand, seems to have been of an equitable nature, the defendant apparently being trustee or agent or partner of the plaintiff and as such accountable to him for his proportion of the moneys received and to be received in respect of the sale of the patent; and what the plaintiff sought was a declaration of his right, and an account by the defendant as his trustee or agent, or partner.

The judgment of the Court at the trial of the action declared the plaintiff's rights, and awarded payment of the amount then actually in the defendant's hands belonging to the plaintiff, but omitted to direct an account of future receipts by the defendant for the plaintiff. The majority of the Divisional Court was of the opinion that the judgment could not properly have contained such a direction, although it is, we think, the common practice in the case of trustees, or agents or partners to order such accounts.

It is not very clear from the report in what position the defendant stood to the plaintiff. A patent for an invention had apparently been sold by the defendant and by virtue of some agreement between the plaintiff and defendant the latter was bound to account to the plaintiff for a certain proportion of the proceeds of the sale; but, in whatever position the defendant

may have been in regard to the plaintiff, it seems clearly to have been a fiduciary position of some sort, and, for aught that appears to the contrary, a direction for an account by the defendant of moneys received and to be received in his fiduciary character, would seem to have been a direction which might properly have been made by the original judgment in the action, if asked, and having been omitted in the judgment it seems a fitting subject for a supplementary order. It is to be observed that the order was made by the late Chancellor than whom no more expert equity practitioner was on the bench, and his jurisdiction to make it was affirmed by the learned Chief Justice of the Common Pleas, who was also an expert practitioner in the former Court of Chancery, and the order is found to be *ultra vires* by three Judges, none of whom, we believe, ever practised in equity.

The notion that an account in equity is limited to the receipts up to the date of the commencement of the proceedings is manifestly erroneous. In the last edition of Daniels Pr., p. 915, we read, speaking of the mode of taking accounts of agents, or personal representatives, or trustees: "The account should include any sums received or paid since the judgment, and if necessary a further account, or further accounts, should be brought in so as to bring down the account to the time the Master's certificate is made." Were the practice otherwise, as we have said, it would lead to an endless multiplication of actions.

It is a well-known practice in the Master's office to make interim reports, *i.e.*, reports up to a particular time, where the account is a continuing one; receivers, trustees and committees of lunatics, as is well known, are passing their accounts and paying over their balances from time to time, and in principle there is no reason why in an account against an agent he might not in like manner be required periodically to account without necessitating new action for each subsequent receipt by him.

We have referred to this subject because it is an instance of

the difficulty which inevitably arises where common law lawyers essay to administer equity procedure; other recent instances might be cited, but we forbear: the particular point of practice involved is important, and it is unfortunate that any doubt should have been cast on what we believe to be a well understood and beneficial procedure.

We may here point out that there are many instances in which the Court is accustomed to give supplemental relief without requiring a new action to be brought, *e.g.*, the appointment of a receiver after judgment by way of equitable execution; the removal of a trustee who, on the taking of his accounts, is found to be in default. Indeed, unless it did constantly exercise this jurisdiction to grant supplemental relief it is hard to say how the Court could effectively carry out the provisions of the Judicature Act, s. 16 (*b*), which provides that: "The Court in the exercise of the jurisdiction vested in it by this Act, in every cause or matter pending before it, shall have power to grant, and shall grant, either absolutely, or on such reasonable terms and conditions as it shall deem just, all such remedies as any of the parties may appear entitled to in respect of any, and every legal or equitable claim properly brought forward by them in such cause or matter, so that, as far as possible, all matters so in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

This provision of the Act the Divisional Court did not see fit to refer to although it appears to have a very plain and obvious bearing on the question before it.

*WAIVER.**

The subject of my address has been announced as "Waiver," but that is only my little joke, for there is no such thing as "waiver" —I mean as a distinct legal concept—and that is what I want to say.

About 12 years ago, after I had finished my work on Estoppel, I set myself to study Waiver, but very soon I ascertained that there was not enough "waiver" to write a book about. I first sketched what I had to do as follows:—

> Waiver is entangled with estoppel, election, and contract; and the first step towards separation will be taken when it is observed that it is principally in the law of insurance that waiver and estoppel become involved; in the law of landlord and tenant that waiver and election seem to blend; and in the law of contracts that waiver is confounded with agreement. Closely studying waiver in these three departments, comparing and contrasting it there, with estoppel, election, and contract, will enable us to see what there is in it that is special and peculiar to itself. And let our procedure be to assign to these three departments such cases as properly belong to them, and, examining the rest, see what we can make of them.

Proceeding on these lines, the result arrived at was that nearly all cases of supposed "waiver" could very easily be placed in one or other of the three departments above mentioned. Some had to be assigned to release (in one sense a part of contract), leaving only a few stragglers of negligible character. "Waiver" evidently was an empty category, and modification of the title of the book had become necessary.

REAL "WAIVER."—This general statement must be qualified by the admission that, in the older law, may be found one case of "waife" and one of "waive."

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* The following paper by John S. Ewart, K.C., of Ottawa was read by him at the Annual Meeting of the Ontario Bar Association held in Toronto in February last.

"Waife," translatable into "waiver," was when a pursued thief "waived" or threw away the stolen goods. And "waive" was an outlawed woman—

> left out or forsaken of the law, and not an outlaw as a man is; for women are not sworn in Lutes to the King nor to the law as men are, who therefore are within the law, whereas women are not, and for that cause they cannot be said outlawed, in so much as they never were within it. (*a*).

These are the only sorts of "waiver" or "waive" that I know of; and that is all that I am able to say about them.

DISTRIBUTION OF "WAIVER."—All else that is usually spoken of as "waiver" is, in my judgment, referable to one or other of the well-defined and well-understood departments of the law, Election, Estoppel, Contract, Release. "Waiver" is, in itself, not a department. No one has been able to give it satisfactory definition, or to assign to it explanatory principles. The word is used indefinitely as a cover for vague, uncertain thought.

In enunciating new doctrine of such apparently fundamental character, I cannot restrain a feeling of hesitation and doubt, but I take comfort and courage from varying features of the existing situation: (1) Nobody has yet thought that he knew enough about "waiver" to attempt its exposition in a book. (2) Although many Judges and text-writers have indicated views as to some of the elements of "waiver," there is not only no concensus of opinion, but there is the widest diversity and conflict. (3) Nobody appears to know whether "waiver" is unilateral or bilateral; whether it is the same as election, estoppel, contract, release, or some or one of them; and nobody seems to care.

DEFINITION OF "WAIVER."—The usual definition of "waiver" is "an intentional relinquishment of a known right," but no

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(*a*) Termes de Ley, ed. 1642, p. 285; quoted in Stroud's Jud. Dic. 2207. Waifs are *bona waviata*: Stephen's Com., 16th ed., vol. II, 653. And see *Foxley* v. *Annesley*, 1509, Cro. Eliz. 694; 5 Rep. 109, where the word is spelled *waved*.

case can be produced in which a right has been effectively relinquished save by contract, estoppel, or release. And "waiver" appears to be effective only because, being sufficiently loosely defined, it sometimes assumes the garb of one of these and sometimes that of another. "Waiver" is said to have close relations with election also, because, when you choose one thing, you are said to "waive" your right to the other—a right that you never had.

USEFULNESS OF THE WORD "WAIVER."—Notwithstanding what has been said, "waiver" is a serviceable word, and no sweeping condemnation of it is intended. But observe that it is used in three different ways:—

(1) It occurs frequently in general literature and conversation, and, there, its use is entirely unobjectionable. No one would think of disapproving Cowper's line, "She rather waives than will dispute her right." But if we are told that, as a matter of law, she had waived it, our informant might well be asked whether he meant that she had executed a release; and, if not, what had she done?

(2) Technical use of the word as descriptive of a legal situation is indefensible.

(3) Introduction of it into legal discussion, for any purposes, is misleading, and is subversive of general appreciation of correct principle. For lucidity, we must define our terms and use them accurately.

"WAIVER" AND SUCTION.—"Waiver" bears the same relation to scientific law as the word *suction* bears to physics. For although *suction* is a useful word in general conversation, it describes no natural force. And when a man tell you that something happened through suction, the word, although possibly conveying the intended idea, must be translated into atmospheric pressure, muscular action, or some other well-known force, before any argument can be based upon it. It is not itself a category. Neither is "waiver."

"WAIVER" AND ELECTION.—The substitution of "waiver" for election has produced very notable disaster in insurance

cases. According to current forms of pleading, an insurance company, when sued for a loss, defends itself by alleging: (1) the clause in the policy providing that the contract shall be void upon the happening of a certain event, and (2) the occurrence of the event; and the plaintiff replies "waiver" of the clause. But that is clearly wrong. The policy does not, upon breach of the conditions, become *ipso facto* void. It is voidable only at the election of the company, and therefore, for valid defence, there must be three allegations: (1) the clause in the policy providing that, upon the happening of a certain event, the company should have *a right to elect* to continue, or to terminate, the contract; (2) the occurrence of the event; and (3) that thereupon the company elected to terminate. Without this last allegation, the plea is obviously insufficient. If the policy read in the way it is construed, no one would think of omitting, from the insurer's defence, the allegation of the fact of election. And to such a plea, "waiver," as a reply is, of course, quite inapplicable.

That all appears to be very clear, but I venture to say that no one here has ever seen a defence with the three allegations in it. And the change from "waiver" to election is not a mere matter of the form of pleading. It extends to three more important results:—

(1) ONUS OF PROOF.—The onus of proof will be changed. Heretofore the burden of proving "waiver" lay heavily upon the insured. Now the insurer must prove election to cancel. For if there be no such election, the contract remains in force.

(2) PROOF OF AGENCY.—Heretofore the insurer had to prove the authority of the person who is alleged to have "waived" the condition. Many a righteous case has failed because of that requirement. Henceforth, the onus is on the company to establish that the official who is alleged to have made the election had authority sufficient for that purpose.

(3) SILENCE-STRATEGY.—Silence-strategy will be no longer available to the companies. At present some Courts say that

a breach of a condition is a forfeiture of the policy, and that a "waiver" of such forfeiture—

> cannot be inferred from mere silence. It (the company) is not obliged to do or say anything to make a forfeiture effectual. It may wait until claim is made under the policy, and then in denial thereof, or in defence of a suit commenced therefor, allege a forfeiture (*a*).

And these Courts are, at all events, consistent in thus holding. For if we assume that breach of a condition has, in reality, "forfeited," in the sense of terminated, the policy, there can be no reason why the company should send notification of any sort to the insured. He knows of the breach as well as the company does (and usually better), and he knows, too, that his contract is at an end. Then why tell him anything?

Other Courts are less consistent, but more nearly correct, when they declare that—

> If the company contemplated the forfeiture of the policy because of the non-payment of the premium, it should at once have so declared, plainly and unconditionally (*b*).

Such language (notwithstanding the misuse of the word "forfeiture") rightly assumes that the breach has no effect upon the policy, and that its termination is the result of the company's election. That being so, the necessity for a declaration by the company is obvious. If the breach ended the policy, then, as I have said, the company could have nothing to communicate to the assured, for he knew of the breach and of its legal effect.

(*a*) *Titus* v. *Glen Falls, etc.*, 1880, 81 N.Y. 419; 8 Abb. N.C. 315. Approved in *Cannon* v. *Home, etc.*, 1881, 53 Wis., 594; 11 N.W. 11. And see *Phœnix, etc.* v. *Stevenson*, 1879, 78 Ky. 161; 8 Ins. L.J. 927; *Smith* v. *St. Paul, etc.*, 1882, 3 Dak. 82; 13 N.W. 355; *Schimp* v. *Cedar Rapids, etc.*, 1888, 124 Ill. 357; 16 N.E. 229; *Queen, etc.* v. *Young*, 1888, 86 Ala. 431; 5 So. 116; *Armstrong* v. *Agricultural, etc.*, 1892, 130 N.Y. 564; 29 N.E. 991; *Petit* v. *German, etc.*, 1898, 98 Fed. 803; *Banholzer* v. *N.Y., etc.*, 1898, 74 Minn. 391, 77 N.W. 295; *Parker* v. *Bankers, etc.*, 1899, 86 Ill. App. 326; *Manhattan, etc.* v. *Savage's Adm'r*, 1901 23 Ky. 483, 63 S.W. 279.

(*b*) *U.S.* v. *Lesser*, 1899, 126 Ala. 585; 28 So. 646; *Pollock* v. *German, etc.* 1901, 127 Mich. 460, 86 N.W. 1; 17.

But if it be the election of the company that is the important factor, then the company *has* something to communicate, something of great importance to the assured, and something of which he can have no knowledge unless it is communicated to him by the company.

The effect, then, of the change from "waiver" to election is that silence-strategy will be as obsolete as flint-muskets, and that the law last quoted will be upheld, rather than that which supports the contrary view. If the company want to cancel the policy, it must so elect. It cannot have a live-policy for premium-catching and a dead one for loss-dodging (*a*).

FORFEITURE.—Misuse of the word "forfeiture" must share with "waiver" the blame for the general misconception. By breach of the condition, the assured is said to have forfeited his policy; and, in order to recover on it, he is required to shew that the forfeiture has been "waived." But the breach has not affected the policy in the very slightest. It has supplied merely an occasion for cancelling it. And as there has been no forfeiture, there can be no "waiver" of it.

Follow forfeiture and "waiver" a little further.

(1) Sometimes forfeiture of an estate ensues *ipso facto* upon the happening of an act—the estate terminates or reverts. That is what I call *real forfeiture*, and to it "waiver" can have no application. Restoration cannot be accomplished by "waiver."

(2) When a lessor or an insurance company has, upon the breach of some condition, a right to cancel an existing relationship, and exercises that right, you may, if you will, speak of the lease or policy as having been forfeited; but, if you do, I insist upon your supplying the word forfeiture with descriptive adjectives, and calling it a *completed elective forfeiture*, in order to distinguish it from real forfeiture. To that, too, "waiver" is inapplicable. Restoration cannot be accomplished by "waiver."

(3) From cases in which there is a right to elect to cancel, but in which no election has been made, I plead for the extrusion

(*a*) *Mulchmoor* v. *New Zealand, etc.*, 1901, 64 Pac. 814; 39 Or. 342; *Phœnix, etc.* v. *Lansing*, 1884, 15 Neb. 497.

of the word forfeiture. It is absolutely inapplicable and most mischievously misleading. If you insist upon using the word, put it in the phrase *potential elective forfeiture*, and shew that you at least know what you mean.

WAIVER AND ELECTION.—"Waiver" sometimes produces confusion by pretending to be the reverse of election. For example, Mr. Bishop opens a chapter in his book on Contracts with the words:—

> The law, in all its departments, is constantly presenting to the choice of people its different paths, so that a person who has elected one has waived another. The doctrines of election and waiver, therefore, belong together (*a*).

If you had a choice between a horse and a mule, and you chose the horse, you would not say that you "waived" the mule. For you did not. You had an election between two animals, and, electing to take one, you could do nothing with reference to the other—not even waive it.

You do not "waive" a right to appeal by acting upon the judgment—as is often said (*b*). You elect whether to accept the judgment, or to appeal from it. If you chose to appeal, would you say that you had "waived" your acceptance of the judgment? It is customary to declare that, where goods are tortiously taken and sold, the owner may "waive" the tort and sustain an action in assumpsit for money had and received; but nobody would think of saying that the owner might "waive" his action in assumpsit and bring an action in trespass. The owner had a right to elect; he makes his election; he gives up—he "waives" nothing.

"WAIVER" AND CONTRACT.—Having, as I hope, helped to separate election from "waiver," let me try to disentangle contract from the same evil association.

(*a*) Ed. 1907, p. 326. And see *Warren* v. *Crane*, 1883, 15 N.W. 465; 50 Mich. 300; *United Firemen's, etc.* v. *Thomas*, 1897, 82 Fed. 406; 27 C.C.A. 42; *Supreme Lodge, etc.* v. *Quinn*, 1901, 29 So. 826; 78 Miss. 525; *Gable* v. *U.S. Life*, 1901, 111 Fed. 19; 49 C.C.A. 216

(*b*) *Videan* v. *Westover*, 1897, 29 Ont. R. 6, note.

Nobody would imagine that one party to a contract could "waive" it. Even if performance of all its stipulations rested upon one party, the contract could not be "waived" by the other party—unless, of course, you choose to substitute the word "waived" for released. But, nevertheless, almost everybody appears to think that performance of some of the stipulations of a contract may be "waived" by the party for whose benefit they were inserted. All the stipulations cannot be "waived," but some of them may. That will not do. The defence to an action for non-performance of some term in a contract may be:—

1. Cancellation of the clause by subsequent agreement.
2. Release from performance.
3. Estoppel to require performance.
4. Accord and satisfaction, or acceptance of substituted performance.

And the idea seems to be that there is, also, the defence of "waiver." If so, what are its elements? Will "waiver" be established by proof of the emission of a few words by the waiverer (is that the correct term?)—words which do not amount to contract or release, and words which are not followed by any consequential action? No case known to me so declares. Every well-decided case of modification of contract by "waiver" can be put upon better ground.

Suggestion to the contrary may be found in cases in which some minor incident of the contract has been omitted—cannot performance of a trifling detail be "waived"? When A says to B, "You need not print the labels in red unless you like," he means one of two things—either (1), "If you do not, I shall not pay you," or (2), "I shall pay you all the same." And if he means the second of these, you may, if you wish to speak colloquially, say that A "waived" the colour of the ink; but you ought to say, that by a new contract the old one had been modified.

The obscuring, and sometimes vitiating, effects of the introduction of "waiver" into the law of contracts is often very obvious. I shall content myself with two instances.

What is meant by the words sometimes used by the endorsers of notes, "presentment and protest waived," we all know quite well. But their use is unfortunate, for it obscures just appreciation of the fact that there are two kinds of contracts which an endorser may make—one that he will pay if the maker do not, and the other that he will pay if the maker do not and if presentment and protest be made. The words "presentment and protest waived" are intended to indicate that the first of these contracts is the one intended, and they manifest that fact by saying that the holder of the note need not do that which would be necessary if the contract were of the kind that it is not. That is stupid and leads to misapprehension.

Confusion rather than misapprehension has been the result of the interjection of the word "waiver" into a section of the English Sale of Goods Act (*a*).

> "Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated."

That extraordinary bungle was caused by the insertion of the word "waive" in the clause as drafted by Mr. Chalmers. The intention was to declare that a purchaser should have the option of insisting upon a condition as a condition, or of treating it as a warranty—for example, as applied to the sale of a horse with a condition of pedigree, that the purchaser might adhere to the condition and return the horse, or keep the horse and sue, as upon a warranty of pedigree. The statute, on the other hand, provides that the purchaser may either "waive" the condition—that is, I suppose, keep the horse, or treat the condition as a warranty, and in that case also keep the horse.

"WAIVER" AND ESTOPPEL.—Estoppel appears to me to have no relation to anything which might be called "waiver," but in the United States they are treated as almost interchangeable

(*a*) 56, 57 Vic., c. 71, s. 11.

terms. The Courts, the digests, and the textwriters all confound them. We are told over and over again that "The terms *waiver* and *estoppel* are ordinarily used both by the Courts and textwriters as synonymous in the law of insurance" (*a*).

In Cyc., vol. 40, p. 255, may be found the following:—

> While "waiver" belongs to the family of estoppel, and the doctrine of "estoppel" lies at the foundation of the law of waiver, they are nevertheless distinguishable terms. It is difficult to make an distinction between "waiver" and "estoppel" which will give to each a clear significance and scope, separate from and independent of the other, as they are frequently used in the cases as convertible terms, especially as applied to the law of contracts and in the avoidance of forfeitures.

For my part, I should say that the very clear distinction between the two things is, that one of them exists as clear, well-defined doctrine, and that the other does not exist at all—save when masquerading as one of the four subjects I have mentioned.

UNILATERAL AND BILATERAL CHARACTERISTICS.—It is, of course, quite impossible that "waiver" can be election, estoppel, contract, and release. If it were identical with any one of them, it would, for that very reason, have little resemblance to any of the others. And it cannot be the same as any one of them.

Commencing with "waiver," we may say that (if it is anything), it is (it certainly used to be) of unliteral character. The possessor of some property throws it away. The effect may be that someone else is benefitted, but "waiver" has no relation to benefits. A watch is thrown away, and some functionary or finder is so much the richer (if the true owner do not intervene). But the "waiver" is complete, although the watch be never found, although it be flung into the ocean.

Election is "waiver's" nearest neighbour, for it, too, is unilateral. But, in election, the act has a legal effect upon the re-

(*a*) Vance on Ins., 1904, p. 343. To the same effect is Richards on Ins., p. 158.

lationship between two persons, or upon the legal right of some party. "Waiver" has no such effect. "Waiver" implies that you have something, and that you are throwing it away. Election, upon the other hand, implies that you have a right to get one of two things, or to occupy one of two positions, by choosing between them.

Release comes next in order; but it is bilateral, inasmuch as it requires concurring acceptance by someone else.

Estoppel is also bilateral, and depends, not merely upon the concurrence of the estoppel-asserter, but upon his consequential action.

Contract is the furthest removed from "waiver" and unilateralism, for it connotes the equal action of the two interested parties.

"Waiver" cannot be all, or like all, of these. If it be identical with any one of them, let us say so, and we shall understand that we have two names for one thing. And if it be not identical with any one, let us so declare, and ascertain, if we can, whether it has any separate and independent existence.

I have found no case of so-called "waiver," and the book which I am now passing through the press is therefore entitled not "Waiver," but "Waiver distributed among the departments, Election, Estoppel, Contract, and Release."

Ottawa. JOHN S. EWART.

NOTES FROM THE ENGLISH INNS OF COURT.

THE COURTS IN WAR TIME.

The legal columns in the daily press and the pages of the law reports might lead one to suppose that even now, towards the end of three years of war, "business as usual" is a maxim of the law. But this is not so. A very large number of the common law cases recently determined have arisen in consequence of the war; while the time of the Chancery Courts, alas! is to some extent occupied with administration suits brought about by the death of our gallant soldiers at the front.

Again, the war has caused new Acts of Parliament to be passed. Hastily drafted, as, in the nature of things, many of them must have been, they are not always easy to construe, and much judicial time has been spent upon them. Finally, new jurisdictions—of which no one ever conceived before the war—have sprung into existence. The decisions of the "Tribunals"—that is to say of those local bodies who decide whether a man shall or shall not be called up for service—may, to some extent, be reviewed in the High Court, as may also the decisions of those who pass judgment on the conduct of munition workers.

Extra-judicial Duties.

Wholly apart from the functions which they continue to perform in the calm atmosphere of the Bench, His Majesty's Judges are doing much extra-judicial work connected directly or indirectly with the war. There are many tribunals now in existence, of which the public know little or nothing, which are doing work, the value of which will be only appreciated when peace is declared. In work of this kind many of the Judges are actively engaged.

The Lawyers and National Service.

If the Judges are doing their share of that war work which has become the common lot of all classes of the community, what shall be said of the legal profession? Thousands of lawyers are at the front, while of those that remain behind a very large number are helping their country in one way or another. "Jobs" which can only be filled by lawyers are exceedingly numerous. Each of the tribunals above referred to has a Military Representative whose functions can only be performed by a lawyer. Again the compulsory acquisition of property by the Government involves the settlement of claims by lawyers on legal principles. The introduction of universal military service, too, was only carried after a promise by the Government to make provision for the civil liabilities of those called up for service. The determination of the amount to be paid is left to Commissioners

—who are lawyers. And of these there are about 120 working locally up and down the country.

Finality on Questions of Fact.

Vexed questions sometimes arise in this country concerning appeals from County Courts. It is one of the characteristics of these tribunals that the decision of the Judge on a mere question of fact is final. No Kadi under a palm tree was ever more absolute than he who presides in an English poor man's Court! Time was when his jurisdiction was very small—limited to deciding points involving £20 and no more. In those days the fact that there was no appeal from a decision on fact was not important.

Recent statutes, however, have made such changes that now a judgment of an inferior Court which involves up to as much as £100 may be absolutely binding if it is founded on fact, whereas a judgment of "one of His Majesty's Superior Courts of Record" can be reviewed on fact as well as on law. The rule that there is no appeal on fact applies to cases under the Workmen's Compensation Act; and if the County Court Judge is to have the last word in dispensing very large amounts annually in compensation it is of the utmost importance that he shall decide according to law.

Control of Inferior Courts.

This finality has often been criticised. One frequently hears a member of the Court of Appeal: "I do not say that I should have come to the same conclusion as the County Court Judge, but I am bound by his ruling on the facts." It is thus that we often hear of "County Court Justice" as administered in England. Where, however, the Court of Appeal finds that a County Court Judge is trying to arrogate to himself the right to be final on law as well as on fact, he will admonish him. In a recent case a County Court Judge considered an application by the widow of a workman who had met with an accident. The defence was that the necessary statutory claim had not been made in time—that is within six months of the accident. The learned Judge found as a fact that the notice had been given,

and the Court of Appeal (by a majority) approved him. In giving judgment Lord Justice Warrington, who with the Master of the Rolls was for upholding the decision said: "The difficulty is caused by the want of precision in the terms in which the Judge has expressed his opinion, occasioned, I have no doubt, by the view expressed by him that the point was a purely technical matter of no real interest to anybody and had no business bearing on the case. I venture to deprecate the dealing with such cases in this way. The Act renders the making of a claim a condition of the maintenance of proceedings for recovery of compensation. This is inserted as a protection to the employer. It is a formality, no doubt, but the employer is entitled to have it complied with, and the Judge ought to deal with the question whether this has been done or not with the same seriousness and care as any other part of the case." But notwithstanding this, he was of opinion that the appeal should be dismissed.

LORD JUSTICE SCRUTTON'S VIEW.

That this was not the first occasion on which this Judge had incurred the censure of the Court of Appeal appears from the judgment of Lord Justice Scrutton, who, in giving his dissenting judgment, said: "We have had to note with regret this sittings a written judgment of this same County Court Judge in which he has stated that he is not bound to look at or be guided by any authorities at all. And I desire very respectfully but firmly to express my complete agreement with the rebuke, not the less pointed for the moderation with which it is expressed, addressed to him by Bankes, L.J., in *Burvill* v. *Vickers* (1916), K.B. 180, at p. 188." In *Burvill* v. *Vickers* it appears that the same learned Judge in deciding a very similar point—namely as to whether employers had been prejudiced by the lack of notice, said: "To deprive the widow and the children of a man who has died serving his country by making munitions of war is unpatriotic, and it would be against public policy to allow it to be done." Lord Justice Bankes in that case said that: "It is time that the Judge's views as to his position as arbitrator under

the Act should receive consideration in the interests of the very person whom he is desirous of helping, because awards founded upon such reasons must necessarily lead to some extent and in some cases to the applicants being unable to support an award which has been given in their favour." It rather looks that in the interval between November 3, 1915 (when *Burvill* v. *Vickers* was decided), and December 15, 1916, the learned Judge had not had time to reconsider his opinion.

Recent War Legislation.

Nearly all the statutes now appearing if they do not relate directly to the war have been placed upon the book because of the war. On April 5, the Army Annual Act, 1917, received the Royal assent. This measure which has been used for generations to secure the annual assembly of Parliament has now assumed a form which would have startled us not a little three years ago. The preamble says: "And whereas it is adjudged necessary by His Majesty and this present Parliament that a body of forces should be continued for the safety of the United Kingdom and the defence of the possessions of His Majesty's Crown and that the whole number of such forces should consist of 5,000,000 including those employed at the depots in the United Kingdom of Great Britain and Ireland for the training of recruits for service at home and abroad but exclusive of the numbers actually serving within His Majesty's Indian possessions," and so forth. How long would the then Prime Minister have remained in office had he introduced this measure as a Bill, in April 1914?

Grand Juries Suspended.

The Grand Juries (Suspension) Act which received the Royal assent on March 28 is another remarkable Act. It makes an irresistible appeal to an English lawyer, affecting, as it does, one of the pillars of our legal institutions. Although it is expressed to remain in force during the continuance of the present war and for a period of six months thereafter, the general opinion is that the Grand Jury, as such, is a thing of the past. As was natural, the measure has been the subject of much criticism

in the press. For the benefit of Canadian readers a few words upon the origin and functions of this institution may not be out of place.

Origin of the Grand Jury.

Many laymen and some lawyers have a vague notion that the Grand Jury system was established by *Magna Charta*. In his work on the Great Charter, however, Mr. McKechnie says: "One persistent error, universally adopted for many centuries, and even now hard to dispel, is that the Great Charter granted or guaranteed trial by jury." The error has no doubt arisen from a misreading of ch. 40 which provides that: "No freeman shall be arrested, or detained in prison, or deprived of his freehold or outlawed or banished, or in any way molested, and we will not set forth against him nor send against him unless by the lawful judgment of his peers and by the law of the land." Of this celebrated pronouncement Creasy said, in his English Constitution (p. 151 n.): "The ultimate effect of this chapter was to give and to guarantee full protection for person and property to every human being that breathes English air."

The True Origin of the Grand Jury.

Mr. McKechnie in the work above mentioned writes: "It was . . . Henry II. who laid the foundation of the modern jury system . . . In reorganizing machinery for the suppression and punishment of crime by the Assizes of Clarendon and Northampton, he established the general principle that criminal trials should (in normal cases) begin with formal indictment of the accused by a representative body of neighbours sworn to speak the truth. This was merely a systematic enforcement of one of the many forms of *inquisition* already in use; from that date onwards the practice so established has been followed in England. Criminal prosecution cannot be begun on mere suspicion or irresponsible complaints. The jury of accusation (or presentment) may be said to have been instituted in 1166, and has continued in use ever since, passing by an unbroken course of development into the Grand Jury of the present day."

From 1166 down to the year of grace 1917 it has been a recognized principle unaffected even by statute, that no man shall even be put on his trial for any grave offence unless there is a *primâ facie* case against him. Of the question whether there is such a *primâ facie* case the Grand Jurors have been the sole judges. At each assize or Court of Quarter Sessions they have been summoned to attend to present indictments, and scarcely a Session goes by without one or more bills being ignored by the Grand Jury.

The exigencies of the war, however, have brought about a change. In future (to use the language of s. 1 (2) of the new Act) :—

In any case where a person has been committed for trial, or where the consent or direction in writing of a Judge of the High Court or of the Attorney-General or Solicitor-General for the presentment of an indictment against any person has been given, but in no other case, an indictment against that person may be presented in the appropriate Court without having been found by a Grand Jury, but in other respects as heretofore.

It is thus that in a few lines of cold print an institution hallowed through the centuries has been swept away. It will be for a Judge of the High Court or one of the Law Officers of the Crown to exercise the function of the Grand Jury.

The Object Gained.

There can be no doubt that this reform will save an immense amount of time at assizes and other criminal Courts. The stately ceremony of charging the Grand Jury will no longer occupy the Judge's time; while the whilom Grand Juries who are generally busy men will not be called upon to waste the greater part of a day. The writer has heard but few objections to this reform. In time of peace the voice of controversy would have been uplifted. We should have read much of "a bulwark of British Liberty," of "a barrier between the Crown (represented by the Public Prosecutor) and the British Public." But the

noise of battle has hushed the critics who have one and all come to the conclusion that at any rate for the duration of the war the function of the Grand Jury may be safely entrusted to His Majesty's Judges and Law Officers.

W. VALENTINE BALL.

Temple, 28-4-1917.

DEFENCE OF THE REALM.

By a majority of four to one, the House of Lords have held, affirming the Court of Appeal and the Divisional Court, that reg. 14B made under the statutory powers of the Defence of the Realm is not *ultra vires*. This regulation provides for the interhment of any person, in view of his hostile origin or associations, where it is necessary for securing public safety or defence of the realm, and it is quite clear that, taking the ordinary meaning of the words of the statute under which it was made, it was certainly *intra vires*. Under this power a naturalized British subject had been interned, and in the case in question (*Rex* v. *Halliday; Ex parte Zadig*) the old hackneyed arguments about the suspension of the writ of *habeas corpus* and the interference with the rights of British subjects were again put forward, we are glad to say, without success. As the Lord Chancellor pointed out, the measure was not punitive, but precautionary, and both statute and regulations were passed and made at a time of supreme national danger which still exists.

No reasonable-minded citizen will be impressed by the suggestion that regulations might be made involving the most extreme consequences, even the punishment of death, without trial. These regulations are made by His Majesty in Council, to whom the duty has been intrusted by Parliament, and there can be no grounds whatever for the suggestion that such powers will be exercised otherwise than reasonably. The regulation in question affords a good example, for the executive have provided an advisory committee, which includes two eminent Judges of the High Court, one from the Chancery and the other from the King's

Bench Division, and before whom the person suspected may appear, to assist the Secretary of State in arriving at a conclusion.

Before leaving this subject there is one other matter to which we must refer. Five Judges of the King's Bench, three Lords Justices, and the Lord Chancellor, Lord Dunedin, Lord Atkinson, and Lord Wrenbury have held the regulation *intra vires*. The sole dissenting Judge was Lord Shaw, and his judgment, which can only be characterised as an extraordinary tirade on the subject of what he calls British liberty, one can hardly believe was delivered by a member of the highest tribunal of the Empire. Two shore extracts—we quote from the *Times* report—are sufficient:—

"Under this the Government became a Committee of Public Safety. But its powers as such were far more arbitrary than those of the most famous Committee of Public Safety known to history."

And again:—

"The analogy was with a practice, more silent, more sinister—with the *lettres de cachet* of Louis Quatorze. No trial: proscription. The victim might be 'regulated'—not in his course of conduct or of action, not as to what he should do or avoid doing. He might be regulated to prison or to the scaffold."

Observations, certainly neither judicial nor accurate, and to which another description might well be well applied.—*Law Times.*

REPRISALS AND THEIR LIMITS.

There has been an interesting correspondence in the columns of the *Times* on the legitimacy of the recent air-raid reprisals at Freiburg. Amongst those who have taken part in it, in addition to Sir Edward Clarke, whose first letter we printed last week, are Professor Dicey, Professor Holland, Sir Herbert Stephen, and "Jurist." Several of these letters we print elsewhere. The general result of the correspondence is to base the opposition to such reprisals on grounds of morality and honour, and not upon any prohibition recognized by international law. In other words, they are immoral and dishonourable, though

they may be legal. The same higher tone is taken in a letter from Mr. Steed, which we print elsewhere, and on this we have nothing to add. But inasmuch as we said, in first criticising the occurrence, that such reprisals were forbidden by international law, we are naturally interested in Professor Holland's statement that they are not. "Objections," he writes, "might, of course, be made to them as unlikely to produce their hoped-for effect, or as repugnant to our feelings of humanity or honour. They are not illegal." Well, that depends on what we are entitled to treat as international law. The Hague Conventions are silent as to reprisals, and it may be admitted that there is no express authoritative declaration on the subject. That reprisals are, speaking generally, permissible is clear enough. Our Order in Council of March, 1915, for instance, by which the Blockade of Germany was set up, was stated to be by way of reprisal. But the objections to such procedure are so great that "belligerents are universally considered to be bound not to resort to reprisals except under the pressure of absolute necessity, and then not by way of revenge, but only in cases and to the extent by which an enemy may be deterred from a repetition of his offence:" Hall's International Law, 6th ed., p. 411. The question, indeed, is not as to the lawfulness of reprisals in general—that is, the meeting of one violation of the laws of war by another—but as to the limits which must be placed on them; and when we said that the air raid at Freiburg was forbidden by international law, we meant that it exceeded the limits which may now be regarded as recognized by international lawyers. These limits are founded on the gradual amelioration which has taken place—except with the Germans in the Franco-Prussian War and the present war—in the barbarities of war, and on the rule laid down by the Institute of International Law at Oxford, in 1881, that reprisals must in every case respect the laws of humanity and morality (*Annuaire de L'Institut de Droit International*, 5th year, p. 174). Air raids on undefended towns, which the aviators know will have as their natural—and therefore intended—result the deaths of women and children, exceed the limits, and in that sense are unlawful.—*Solicitors' Journal*

LAWYERS IN PUBLIC OFFICE.

In several recent instances the lay press has shewn satisfaction over an alleged modern tendency to prefer business men to lawyers for elective and appointive office, and predicted that more efficient administration of public affairs will result. The sponsors of this view apparently picture the typical lawyer as wholly engrossed in browbeating witnesses and drawing up documents full of involved verbiage. As a matter of fact the lawyer is the highest type of business expert. His most lucrative practice is found in solving by the aid of his broader viewpoint and better trained mind the problems which threaten his clients. The amount of business acumen necessary to advise the parties to a single corporate reorganization would suffice to run a grocery store for a year. Another element also is often lost sight of. A man engaged in commercial business is trained to the single idea of personal profit—a perfectly honourable and legitimate idea but none the less quite foreign to the highest ideals of public service. The lawyer, on the other hand, is trained to service: his most strenuous endeavours are habitually directed to maintain the rights and interests of another. A code of ethics rigidly enforced by the Courts teaches him that when his personal interest opposes that of his client he must act with an eye single to the benefit of the latter. Coming into public office it is a natural and easy transition of thought to regard the public as his client, and an application to the relation of officer and public of the fidelity and zeal which is habitual between the attorney and client would produce a public service well nigh ideal. It would be a public misfortune if the services of men trained in the legal profession were not utilized to the fullest possible extent by the public, but it is a misfortune which the discriminating electors of the country will assuredly avert notwithstanding the occasional descendants of Jack Cade who now edit newspapers.—*Law Notes.*

REVIEW OF CURRENT ENGLISH CASES.

BANKER—DUTY TO ADVISE CUSTOMERS AS TO INVESTMENT—AUTHORITY OF BANK MANAGER—LIABILITY OF BANK—PAROL REPRESENTATION—STATUTE OF FRAUDS AMENDMENT ACT 1828 (9 GEO. IV. C. 14), S. 6—(R.S.O. C. 102, S. 8).

Banbury v. *Bank of Montreal* (1917) 1 K.B. 409. This was an action by the customer of a bank to recover damages for loss sustained by the plaintiff owing to his having relied on the advice of one of the defendant's managers in making certain investments. The facts of the case were that the plaintiff came from England to Canada in 1911 and stayed at Montreal with the general manager of the defendant bank, who gave him letters of introduction to branch managers and asking them to give plaintiff advice and assistance if he desired it. In 1912 he again visited Canada and went to Vernon, B.C., where he called upon the manager of the branch of the defendant bank at that place, upon whose advice he invested £25,000 upon a mortgage to secure a loan to a Canadian company, a customer and debtor of the bank. The advice alleged to have been given by the manager consisted of oral representations as to the credit of the company and the merits of the investment, and it was admitted that the advice was honestly given. The company failed to pay either principal or interest. It was admitted that the bank did not, and, according to the law of Canada, could not advise as to investments, and it was admitted that the branch manager had no general authority so to do. The action was tried by Darling, J., with a jury. The jury found that the branch manager had authority to advise the plaintiff as to his investment, and that he did advise him that the proposed investment would be a safe one; and that the plaintiff relied on the advice and invested his money, and they assessed the damages of the plaintiff at £25,000 for which amount Darling, J., gave judgment. The Court of Appeal (Lord Cozens-Hardy, M.R., and Warrington, and Scrutton, L.JJ.), however, found that the findings of the jury were unwarranted by the evidence, and that the alleged representation, even if made, could not give rise to an action, not being in writing as required by 9 Geo. IV. c. 14, s. 6; (see R.S.O. c. 102, s. 8).

TRESSPASS—OCCUPIERS OF ADJOINING FARMS, HELD UNDER SAME LANDLORD—AGREEMENT WITH LANDLORD TO KEEP FENCES IN REPAIR—ANIMAL STRAYING FROM ADJOINING FARM ON TO LAND OF TENANT LIABLE TO LANDLORD TO KEEP UP FENCE—OWNER OF STRAYING ANIMAL—LIABILITY.

Holgate v. *Bleazard* (1917) 1 K.B. 443, was an action of trespass for injury to plaintiff's colt by an animal straying from the defendant's farm on to the plaintiff's land. The plaintiff and defendant were tenants of adjoining farms under the same landlord, and each had covenanted with the landlord to keep the fences on his farm in good repair. The plaintiff had neglected to keep his fence in repair, and an animal from the defendant's farm had strayed through the defective fence on to the plaintiff's land and injured his colt, and the question was whether, notwithstanding his neglect to keep his fence in repair, he was entitled to recover damages against the defendant. The Judge of the County Court who tried the action dismissed it, but a Divisional Court (Ridley, and Avory, JJ.), held that on the principle laid down in *Fletcher* v. *Rylands* (1866), L.R. 1 Ex. 265; L.R. 3 H.L. 330, the defendant was liable, and that the plaintiff's neglect to keep his fence in repair was no defence. Their lordships held that there was a clear distinction between the case of a person bound by statute to keep a fence in repair, and that of a person whose obligation so to do rests on a covenant or agreement with some third party.

POLICY OF INSURANCE — GOODS CONSIGNED ABROAD ON TERMS "SALE OR RETURN"—OUTBREAK OF WAR WITH COUNTRY OF CONSIGNEE—INABILITY OF CONSIGNEE TO DEAL WITH GOODS—LOSS UNDER POLICY.

Moore v. *Evans* (1917) 1 K.B. 458. This was an appeal from the judgment of Rowlatt, J. (1916) 1 K.B. 479 (noted ante vol. 52, p. 217). The action was brought on an insurance policy on goods as for a total loss. The goods in question had, before the war, been consigned to a person in Germany on terms of sale or return. The goods were insured against any loss whatever. In the ordinary course of business, goods consigned on the above terms remain with the consignee for a limited period to give him an opportunity of selling them. By reason of the outbreak of the war it became impossible for the plaintiff to recover possession of the goods. There was no evidence that

they had been seized, or specifically interfered with by the German authorities, or that they had not remained in the possession of the consignees. Part of them had been placed by the consignees, with the consent of the plaintiff, in the custody of a bank for safe keeping, and there was no evidence that the remainder were not still in the possession of the consignees. The Court of Appeal (Eady, and Bankes, L.JJ.), held that the policy was on goods, and not on an adventure, and that the evidence did not establish a loss under the policy, and the judgment of Rowlatt, J., was therefore reversed.

PRINCIPAL AND AGENT—REMUNERATION—COMMISSION ON NET ANNUAL PROFITS—EXCESS PROFITS DUTY.

Thomas v. *Hamlyn* (1917) 1 K.B. 527. This was an action by the plaintiff as manager of defendant's business to recover his remuneration therefor, which it was agreed should be fifteen per cent. of the net annual profits thereof, and the sole question at issue was whether in estimating such profits the defendants were entitled first to deduct from the profits the excess profits tax imposed by statute. Rowlatt, J., who tried the action, held that the defendants were not entitled to make the deduction claimed.

PRINCIPAL AND AGENT—DAMAGE OCCASIONED BY UNTRUE STATEMENT OF AGENT TO PRINCIPAL—MEASURE OF DAMAGES.

Johnston v. *Braham* (1917) 1 K.B. 586. This was an appeal from the judgment of a Divisional Court (1916) 2 K.B. 529 (noted ante vol. 52, p. 432). The action was brought by a principal against her agent for damages occasioned by the plaintiff being induced to enter into a contract with third parties by the false representations of the agent. The Court of Appeal (Eady, Bankes, and Scrutton, L.JJ.), held that there was evidence on which the Judge at the trial could properly award the plaintiff the sum of £20 for her loss of time in addition to the actual outlay incurred by her, and dismissed the appeal.

MASTER AND SERVANT—RAILWAY COMPANY—LIABILITY FOR ACTS OF SERVANT—IMPLIED AUTHORITY—SLANDER—ARREST OF PASSENGER.

Ormiston v. *Great Western Ry.* (1917) 1 K.B. 598. The plaintiff was the holder of a first-class season ticket entitling

him to travel between certain stations on the defendant's railway. Upon the plaintiff's arrival at a station for which his ticket was available, after he had passed the ticket barrier and shewn his ticket to a ticket collector, but before he had reached the exit from the station, a porter in the defendant's employment took him by the arm and, in the presence of other persons, accused him of travelling first-class on a third-class ticket. The plaintiff brought the action for slander and assault and false imprisonment. The action was tried by Rowlatt, J., and was dismissed on the grounds that the offence of travelling without a proper ticket not being punishable by imprisonment, the claim for slander could not be maintained, no special damage being shewn; and further, that as the defendants had no power to arrest the plaintiff for the offence with which he was charged by the porter, they could not be taken to have impliedly authorized the porter to arrest him. The action therefore failed.

LANDLORD AND TENANT—LEASE—COVENANT BY LESSEE TO REPAIR BEING ALLOWED ALL NECESSARY MATERIALS THEREFOR—CONSTRUCTION.

Westacott v. *Hahn* (1917) 1 K.B. 665. In this case the construction of a covenant by a lessee to repair was in question. The covenant was somewhat unusual in its terms, providing, that the lessee would "from time to time during the said term at his own cost (being allowed all necessary materials for this purpose (to be previously approved in writing by the lessor) and carting such material free of cost a distance not exceeding five miles from the farm) when, and so often as, need shall require, well and substantially repair and maintain the farmhouses, etc., to the said premises belonging." The question discussed was whether the stipulation as to the allowance of all necessary materials raised an implied covenant on the part of the lessor to furnish them. The lessor had made no demand for the making of the repairs required, and it was held by the Divisional Court (Lord Reading, C.J., and Ridley, and Coleridge, JJ.), that the words in question did not create any implied covenant on the part of the lessor to supply the materials, but merely had the effect of making the lessee's covenant conditional on their being supplied.

HIRE-PURCHASE AGREEMENT — CONTRACT BY HIRER TO KEEP HIRED CHATTEL IN REPAIR—CHATTEL SENT TO REPAIRER—LIEN OF REPAIRER ON CHATTEL AS AGAINST OWNER FOR COST OF REPAIRS.

Green v. *All Motors* (1917) 1 K.B. 625. In this case the plaintiff let a motor car to a person on a hire-purchase agreement, the hirer agreeing to keep the car in repair. The car needed repair and was sent by the hirer to the defendants for repair. After the car was sent to the defendants for repair and before the contract for repairs was made, default was made in the payment of an instalment under the hire-purchase agreement. The plaintiff did not terminate the agreement until after the repairs were commenced, when he demanded the car from the defendants, but did not tender the amount then due for the cost of the repairs. The defendants refused to deliver up the car, and subsequently completed the repairs, for the cost of which they claimed a lien on the car as against the plaintiff who brought the action to recover possession. Lush, J., who tried the action held that, in the circumstances, the defendants were entitled to the lien claimed, and his judgment was affirmed by the Court of Appeal (Eady, Bankes, and Scrutton, L.JJ.).

HUSBAND AND WIFE—MIXED MARRIAGE—ENGLISH MARRIAGE OF MAHOMEDAN DOMICILED IN INDIA WITH CHRISTIAN WOMAN—DISSOLUTION OF MARRIAGE—"WRITING OF DIVORCEMENT."

The King v. *Superintendent Registrar, Etc.* (1917) 1 K.B. 634. This was an application for a mandamus to the registrar of marriages to compel him to issue a marriage license to the applicant. It appeared that the applicant, a Mahomedan domiciled in India, had in March, 1913, married a Christian woman in England, she had in 1913 deserted him, and had since refused to live with him. He had instituted proceedings in India and obtained a decree for the restitution of conjugal rights, which she refused to obey, and she had subsequently instituted proceedings in England for a divorce on the ground of cruelty, which proceedings were dismissed for want of prosecution. The applicant thereupon assumed to divorce his wife according to the rites of the Mahomedan religion, which divorce he claimed was effectual and entitled him to marry again in England. In order to ascertain his position the applicant had instituted proceedings in the Probate and Divorce Division for a decree declaring

his marriage had been dissolved, and alternatively for a dissolution of the marriage on the ground of the alleged misconduct of his wife. The suit had been dismissed on the ground that the applicant was not domiciled in England; but Deane, J., intimated that he considered the marriage had been dissolved, and there being no subsisting marriage the Court could not pronounce the decree asked. The applicant then applied to the registrar for a marriage license which was refused. The Divisional Court (Lord Reading, C.J., and Darling, and Bray, JJ.), dismissed the application, holding that there had been no legal dissolution of the marriage of 1913, and that though the wife was suubject to the law of her husband's domicile, she was not subject to the law of his religion, and therefore the pretended divorce was inoperative, and with this conclusion the Court of Appeal (Eady, and Bankes, L.JJ., and Lawrence, J.), agreed. Their lordships point out that although according to Mahomedan law the applicant might dissolve a Mahomedan marriage, there was nothing to shew that by that law he could dissolve a Christian marriage.

ADMINISTRATION DE BONIS NON—WILL—CONSTRUCTION.

Re Griffiths, Morgan v. *Stephens* (1917) P. 59. This was an application for the grant of letters of administration *de bonis non* of the estate of William Griffiths, in the following circumstances. The testator by his will gave all his property to his wife "during her widowhood" and after her death to the child or children, "Issue of our marriage." Should the widow marry the property was to devolve on "the offspring of our marriage:" and if the issue of the marriage should die, then, on the remarriage of the wife, the testator directed the property was to go over to "the legal next of kin and heirs descendants of my family." There was no appointment of an executor. The widow did not marry again. There was only one child of the marriage, and he predeceased the widow. The widow died in 1915 leaving a will which was proved by the executrices named therein —who also took out letters of administration to the estate of the deceased child of the testator, and they now opposed the application of one of the next of kin of William Griffiths for letters of administration *de bonis non* of his estate. Low, J., held that the child of the testator did not take a vested interest, but only an interest contingent on his surviving the remarriage or death

of his mother, and therefore the applicant was entitled to the grant in preference to the representatives of the deceased child and widow.

MERGER — INTENTION — EVIDENCE — SUBSEQUENT DEALINGS WITH PROPERTY.

In re Fletcher, Reading v. *Fletcher* (1917) 1 Ch. 339. This was an appeal from the decision of Astbury, J. (1917), 1 Ch. 147 (noted ante p. 182), and the Court of Appeal (Lord Cozens-Hardy, M.R., Warrington, L.J., and Lawrence, J.), have reversed his decision. The case really turns on a point of evidence, the Court below being of the opinion that evidence of an intention against merger must be concurrent with the transaction which would operate as a merger but for such opposite intention, therefore that a subsequent dealing with the property on the basis of there being no merger, was not sufficient to prevent a merger. The Court of Appeal on the other hand held that the intention not to create a merger may be established by the subsequent dealings with the property. In this case it may be remembered that a leasehold term, and the reversion, became vested in the same person, and nine months subsequently the term was assigned by the transferee as a still subsisting term, and it was held that this was sufficient evidence of the intention not to create a merger.

VENDOR AND PURCHASER—OPEN CONTRACT TO PURCHASE LAND—SPECIFIC PERFORMANCE—INQUIRY AS TO TITLE—NOTICE TO PURCHASER OF INCURABLE DEFECTS PRIOR TO CONTRACT—EVIDENCE.

Alderdale Estate Co. v. *McGrory* (1917) 1 Ch. 414. This was an action for specific performance, in which judgment had been pronounced for specific performance in case a good title could be made by the plaintiffs, and a reference as to title was directed. On the reference the defendant objected (1) that there was a public right of way across the land; (2) that there was a public sewer under it, and (3) that the vendors had no title to the subjacent minerals. The plaintiffs offered evidence to prove that the defendant, prior to the contract, had actual knowledge of all these defects. The Vice-Chancellor of Lancaster held that such evidence was inadmissible, but the Court of Appeal (Lord Cozens-Hardy, M.R., Warrington, L.J., and Lawrence, J.), held that it was.

WILL—ADMINISTRATION — ANNUITY CHARGED ON REAL AND PERSONAL ESTATE—EXPRESS TRUST — ARREARS OF ANNUITY—ACKNOWLEDGMENT IN WRITING—REAL PROPERTY LIMITATION ACT, 1833 (3-4 WM. IV. c. 27), ss. 1. 25. 40, 42—REAL PROPERTY LIMITATION ACT 1874 (37-38 VICT. c. 57), ss. 8, 10—(R.S.O. c. 75, ss. 18. 24. 25. 47 (2) (*b*).

In re Turner, Klaftenberger v. *Groombridge* (1917) 1 Ch. 422. This was an action to recover arrears of annuity charged by a will on the real and personal estate of the testator. The plaintiff claimed to recover the whole amount due, which exceeded six years' arrears, on the ground that it was payable by the defendants as trustees under an express trust, but Neville, J., held that, under the Statutes of Limitations, no more than six years' arrears were recoverable either as against the real or personal estate.

ONTARIO — SEPARATE SCHOOLS—ENGLISH—FRENCH SCHOOLS—RESTRICTION OF USE OF FRENCH—B.N.A. ACT, 1867 (30-31 VICT. c. 3) s. 93 (1)—PROVINCIAL LEGISLATURE.

Trustees of R.C. Separate Schools v. *Mackell* (1917) A.C. 62. The question at issue in this case was whether the Provincial Legislature of Ontario had power under the B.N.A. Act, 1867, s. 93 (1), to restrict the use of French as a language of instruction in Roman Catholic Separate Schools. The Judicial Committee of the Privy Council (Lord Buckmaster, L.C., and Lords Haldane, Atkinson, Shaw, and Parmoor) held that it had, and the validity of Regulation 17 was upheld.

ONTARIO — SEPARATE SCHOOLS—TRUSTEES—ACT SUPERSEDING TRUSTEES—INVALIDITY—5 GEO. V., c. 45, ONT.—B.N.A. ACT, 1867, s. 93 (1).

Trustees of R.C. Separate Schools v. *Ottawa* (1917) A.C. 76. The question in this case was whether the Provincial Legislature of Ontario had power under the B.N.A. Act, s. 93 (1), to pass a statute (5 Geo. V., c. 45 Ont.) purporting to supersede the school trustees of Roman Catholic Schools who refused to carry out a regulation of the Department of Education restricting the use of French as a language of instruction in such schools. The validity of the regulation was in litigation, and there being no reason to believe that, when determined, as it was in the preceding case, the decision would not be accepted and obeyed, and it

appearing that the Act in question was too wide in its scope, in that it purported to enable the Government of the Province permanently to withdraw from the trustees power to control the schools under their care, the Judicial Committee of the Privy Council (Lord Buckmaster, L.C., and Lords Haldane, Atkinson, Shaw, and Parmoor) declared the Act in question to be *ultra vires*.

These two cases are palmary instances of the value of the appeal to His Majesty in Council, where questions of this kind, involving a good deal of feeling, can be adjudicated in the calm atmosphere of a Court absolutely free from all local prejudices and prepossessions.

Their lordships absolutely disclaim the idea that the trustees cannot, by due process of law, be compelled to discharge their duties according to law.

ONTARIO—TORONTO ELECTRIC LIGHT CO.—MUNICIPALITY OF TORONTO—LETTERS PATENT—RIGHT TO ERECT POLES—FRANCHISE—45 VICT. c. 19, s. 2 ONT.

Toronto Electric Light Co. v. *Toronto* (1917) A.C. 84. The appellant company was incorporated by letters patent issued under R.S.O. 1877, c. 150, and 45 Vict. c. 19 (Ont.). It was empowered to conduct electricity by any means through, under, or along, the streets of the municipalities named in the patent, but only upon, and subject to, such agreement in respect thereof as should be made between the company and the municipalities respectively. The company erected poles in the streets of the city of Toronto for the purpose of their business, which had been suffered to remain without objection by the city for sometime, but which the city had recently ordered the company to remove, and in default had proceeded to remove some of the poles. The action was brought to restrain the city from so doing. Middleton, J., granted an injunction as prayed, and his decision was reversed by the Appellate Division, 33 O.L.R. 267. The Judicial Committee of the Privy Council (Lords Haldane, Atkinson, Shaw, and Parmoor) now affirm judgment of the Appellate Division, holding, that mere acquiescence on the part of the city was not sufficient to satisfy the requirements of the statute, which required a formal agreement to be made; and secondly, that the city had an absolute right to prohibit the company from constructing any works through, under, or along the streets of the city, and not merely a right to regulate by agreement the manner in which the work should be carried out.

Reports and Notes of Cases.

Province of Saskatchewan.

SUPREME COURT.

ANDERSON v. CANADIAN NORTHERN R. Co.

Elwood, J.] [33 D.L.R. 418.

Railways — Injury to animals at large — Owner's negligence — Wilful act or omission.

It is a wilful act within the meaning of sec. 294(1) of the Railway Act, 1906, to turn animals at large upon a highway within half a mile of an intersection at rail level despite a provincial Act permitting animals to run at large, and if the animals so at large get from the highway to railway property and are killed or injured there, the railway company is not liable.

[*Koch* v. *G.T.P. Branch Lines* (Sask. 1917), 32 D.L.R. 393 (annotated) considered; see also annotation following.]

G. E. Taylor, K.C., for plaintiffs. *J. N. Fish*, K.C., for defendant.

ANNOTATION ON ABOVE CASE IN D.L.R.

ANIMALS STRAYING ON RAILWAY.

In the above case the animals were turned out by the owner, to graze with other stock, where they would, upon unenclosed land; they got upon a highway, and thence upon the railway, at an intersection at rail level, where the cattle guards had been removed.

A provincial Act says that "it shall be lawful to allow animals to run at large." The only question of law really raised by these facts is this, is the intentional act of the owner in turning his cattle at large a "wilful" act, within the meaning of sec. 294(4) of the Railway Act, R.S.C. 1906, in view of the fact that it is legalized by the provincial Act, so far as such an Act can legalize it? Elwood, J., said: "The mere fact that there is a (provincial) statute permitting them to be at large cannot affect the owner's position and responsibility with respect to the railway company. It (the owner's act) is none the less intentional (that is, wilful) that it is permitted.

Elwood, J., seemed to see some significance in the word "permitted" where it occurs in sec. 294(1) "No horse, etc., shall be permitted to be at large." In face of that word he thought a provincial Act could not grant permission,

but manifestly, provincial power, if it existed under the B.N.A. Act 1867, could not be limited by any such prohibition. "Permitted" is mere surplusage in sec. 294(1) which should be read as if it ran: No horse, etc., shall be at large.

The offence is not in permitting, but in being at large; it is not the owner who is at fault, by permitting, but the animal in being at large.

In arriving at this conclusion, Elwood, J., considered himself at liberty to disregard certain opinions upon this point expressed by the Saskatchewan Court of Appeal in *Early* v. *C.N.R. Co.*, 21 D.L.R. 413, and *Koch* v. *G.T.P. Branch Lines Co.*, 32 D.L.R. 393, upon the ground that those opinions were not necessary to the findings in the cases, and, therefore, were *obiter*. It is true that in the *Koch* case it was found as a fact that the owner had not been guilty of negligence, and therefore was entitled to damages, but it is also true that a by-law permitting animals to be at large was proven, and relied on, and that the Court based its judgment on this point as well as on the other. The opinion, therefore, cannot properly be considered as *obiter*, and the decision of Elwood, J., must be attributed to the very strong conviction he evidently felt that the Court of Appeal was wrong. Those who have read the annotation in 32 D.L.R., at p. 397, will notice that this is the opinion there expressed.

The remarks made by Elwood, J., himself in relation to injuries to animals which get upon a railway through a defective railway fence are clearly *obiter*, as the point was not in issue before him. They are based upon what appears to us a misapprehension of a remark made by Boyd, C., in *McLeod* v. *C.N.R. Co.*, 18 O.L.R., at 624, and are apparently intended to suggest a ground upon which *Greenlaw* v. *C.N.R. Co.*, 12 D.L.R. 402, could have been decided, but was not; a suggestion made, apparently, in order that the grounds given by the Manitoba Court of Appeal for its decision might also be treated by Elwood, J., as *obiter*, because he did not agree with them. In that case, the animals which were running at large got upon the railway from unenclosed lands, not by using a highway, but through a defective railway fence; but a municipal by-law permitted cattle to run at large, and the Manitoba Court held that because of the by-law the intentional act of the owner in turning his cattle at large was not "wilful," within the meaning of the Railway Act. Elwood, J., now comments that these animals were not "at large" within the meaning of sec. 294(4), and this rather amazing conclusion he deduces from the remark made by Boyd, C., that "cattle on the lands of the owners are not at large, but at home." So also, says Elwood, J., are cattle of other persons permitted by an owner to be on his land, or cattle there "by virtue of a statute or municipal by-law." In passing, it may be remarked that while it is possible that the rights of an owner of land against an adjoining railway may be attributed to the owner's licensee, it is difficult to conceive how they could be attributed to a trespasser who had no other defence than that a municipal by-law said that his cattle might run at large. It may also be pointed out that if the cattle in *Greenlaw* case were not "at large" within the meaning of sec. 294(4), their owner had no remedy under that section, and as the land was unenclosed, the railway was not bound to fence it (sec. 254), so that the railway would not be liable under sec. 427. The Manitoba Court saw this difficulty, and avoided it by finding that the municipal by-law had the effect of making an intentional

action of the owner neither negligent nor wilful. The plaintiff was given damages under sec. 294(4), which could not have been done if the animals were not "at large."

But a perusal of *McLeod* v. *C.N.R. Co.* (*supra*), will shew that the remark of Boyd, C., has been torn from its setting, and does not, in fact, warrant the deductions Elwood, J., has drawn from it. In that case the animals had got upon the railway from an enclosed field, through a gap in the railway fence, and all that Boyd, C., meant was this, "animals on the (enclosed) lands of the owner are not at large, and therefore sec. 294 does not apply." The defendant company was found liable because it had not kept in good repair the fence it was bound to keep up between the enclosed land and the railway track. In other words, *McLeod* v. *C.N.R. Co.* was decided on the meaning of the words "at large," the *Greenlaw* case on the meaning of the words "negligence or wilful act or omission."

To say of unenclosed land that the owner whose cattle got from it to the railway could recover for injury to them if they got there "through a defect in the railway fence" is to leave out of sight the fact that unless the land is both enclosed and settled or improved (sec. 254(4)), the company is not bound to fence, and consequently is not liable under sec. 427(2).

"At large," in the Railway Act, manifestly means "not enclosed or under physical restraint," for sec. 294(1) speaks of animals at large upon a highway in charge of a competent person, shewing that the mere fact of a caretaker being with them, while a defence, does not alter the fact that they are at large. Sub-sec. 4 speaks of animals at large, whether upon the highway or not, and as the words "at large" should be given the same meaning in all parts of the section, they can only mean in sub-sec. 4, as in sub-sec. 2, "Animals not enclosed or under physical restraint." Sec. 254 provides that the railway company shall fence where the track runs through fenced land which is settled or improved, and sec. 427 renders the company liable in damages resulting from failure to so fence. For injury to animals not at large, sec. 294 provides no remedy; that is to say, for animals under physical restraint, or upon enclosed land, which not being either improved or settled, the company was not bound to fence, and mere inclosure is not improvement within the meaning of sec. 254. For damages to such animals, an action for negligence on common law grounds would probably lie; for animals at large, sec. 294 is a code, and sub-sec. 4 makes the company liable without proof of negligence on its part, for animals killed on its property, but allows it to be a good defence that the animals got at large through the negligence or wilful act of the owner. Thus the Railway Act is seen to have three principles as to animals: (1) If not at large, liability is dependent upon negligence; (2) If at large upon a highway, without competent oversight, the company is not liable; if with such oversight, liability as in the former case is a question of negligence; (3) If at large anywhere, and injured upon railway property, the company is liable unless it can prove that the animals got at large by the negligence or wilful act of the owner. At large or not at large is a question of fact, and negligence or wilful act or omission are also questions of fact. If the law is not satisfactory, parliament, not the Courts, should do the necessary legislation.

Bench and Bar

CANADIAN BAR ASSOCIATION.

ANNUAL MEETING.

The third annual meeting of this Association will be held in the City of Winnipeg on the 29th, 30th, and 31st days of August next. The Executive are making arrangements to facilitate transportation, preparing of programme of proceedings, etc. The annual address will be delivered by the Hon. Hampton L. Carson of Philadelphia. Other leaders of the Bar from the United States will also be present.

Committees are also working on the following important subjects: Judicial appointments: Judges as arbitrators and commissioners: Uniform legal procedure: Marriage and divorce: Agency commissions: Delays in the administration of justice and in the publication of statutes: Uniform statutes are in course of preparation for company law, insurance, conditional sales, bulk sales and the enforcement of foreign judgments, while succession duties and insolvency are also receiving attention. As upholding the honour and dignity of the profession, legal education and professional ethics are also under consideration.

Whilst we are glad to know that the Association is dealing with these matters in view of amendments, we would again seek to emphasize the crying need there is for making an advance in the direction indicated by section 94 of the British North America Act; and as far as possible to include the Province of Quebec. There should be complete and absolute uniformity in the subjects above referred to as also in the law affecting devolution of estates and intestacy: Limitation of actions: Assignments and preferences and other branches of mercantile law. If Canada is ever to be a homogeneous nation, uniformity of laws and procedure must exist. The tendency at present is for the various Provinces to drift apart in this regard rather than to get together. This is all wrong, and none can be more helpful in discussing this most difficult subject than the legal profession. Those who look for a full development of the resources of this country and the requirements of the trade and business of the Dominion along national lines are beginning to think seriously of this matter. The time of action is not appropriate at this moment, but it must come in due course, and the sooner the better.

The *Canada Gazette* of June 16th announces that the Hon. Sir Ezekiel McLeod, Chief Justice of the Supreme Court of New Brunswick, and the Hon. Louis Tellier, a retired Judge of the Superior Court of the Province of Quebec, have been appointed Commissioners to review, consider and report upon the evidence taken before the Hon. Mr. Justice Galt, of Manitoba, a Commissioner appointed by the Lieutenant-Governor of Manitoba to investigate and report upon certain matters of concern to the Government of Manitoba. It is much to be regretted that it is thought to be necessary to use our judges to investigate and report on matters which are connected with alleged scandals in which party politics figure largely. It is degrading to the Bench and not satisfying so far as the public is concerned and never will be. Let judges attend to their proper duties and let politicians settle their squabbles without dragging in the Bench.

Flotsam and Jetsam.

A triumph of commercialism over sentiment was exhibited in the United States in the case of *Pollock* v. *Symon*, Fed. 1005. A swain became engaged to a young lady and presented her with an engagement ring of considerable value, and shortly afterwards went into bankruptcy. It was held that, notwithstanding the custom of betrothed persons in regard to such matters, a man must be just before he is generous, and cannot be generous with money which really belongs to his creditors, even for the purpose of retaining the affection of his lady-love. The ring being, therefore, part of the bankrupt's estate, the lady was told that if she desired to retain it she would have to pay its value to her lover's creditors.

It may be interesting to some members of the profession to know that the total amount of fees paid to counsel on the celebrated prosecution of the seven bishops was only £240 16s. 0d., and that the largest fee paid to any counsel on that occasion was £20. What would the present generation of lawyers think of such fees in such a case?