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NERVOUS SHOCK AS A SUBJECT FOR DAMAGES.

In 1888 the Judicial Committee of the Privy Council decided on an appeal from an Australian Court in the case of *Victorian Railway Commissioners* v. *Coultas*, 13 App. Cas. 222, 58 L.T. 390, that damages arising from fright occasioned by the negligence of a defendant are not recoverable. The facts of that case were, that through the negligence of a railway company, the plaintiff had been invited to cross their railway where a train was approaching, and had very narrowly escaped being run down by a train of the defendants. The plaintiffs were husband and wife, and the wife was so terrified by the danger she was in, that she fainted and suffered a severe injury to her nervous system and was ill for a long time in consequence thereof. The Colonial Court held that the plaintiffs were entitled to recover damages in respect of the nervous injury thus occasioned, but the Judicial Committee reversed the decision, holding that such damages were too remote. This decision has been somewhat adversely criticized; it was, however, followed in Ontario by the Court of Appeal in *Henderson* v. *Canada Atlantic Ry.*, 25 A.R. 437, and also by a Divisional Court in *Geiger* v. *Grand Trunk Ry.*, 10 O.L.R. 511. In the latter case Clute, J., dissented and expressed the opinion that where there had been a physical injury the jury ought not to be asked to assess damages separately in respect of the physical injury, and of the nervous or mental injury, as was done in the *Henderson* case, a task which it would necessarily be difficult for any jury to perform with any degree of accuracy. In the more recent case of *Toms* v. *Toronto Ry.*, 22 O.L.R. 204, affirmed, 44 S.C.R. 268, the case of *Victorian Railway Commissioners* v. *Coultas*, *sup.*, was held not to be applicable where there was an actual physical injury, though slight, followed by, or occasioning serious nervous disorder, and the view expressed by Clute, J., as to the assessment

of damages in such cases was adopted. This case having been affirmed by the Supreme Court of Canada seems to reduce the effect of the *Coultas* case to somewhat narrow dimensions as far as Canadian Courts are concerned. Cases where actual bodily injury is sustained accompanied by, or occasioning, nervous disorders are in effect held to be excluded from its operation, because in such cases juries may be asked to assess damages not only for the bodily injury but also for any consequent nervous or mental injury; and according to this view of the decision, the *Coultas* case only applies where there is no physical injury, but only mental or nervous injury occasioned by fright or shock. But even reduced to such narrow limits the decision has failed to command assent in English Courts, which are at liberty to disregard the decision.

Reduced to its simplest terms, the question resolves itself into this: "Can it properly be said that the damages claimed for mental or nervous shock are, or are not, the necessary result of the defendant's negligence in any given case?" The unexpectedness of the result can hardly be said to be a proper criterion for answering that question; rarely can any injury be said to be the expected result of any act of negligence because it is always the unexpected which is happening; and the only ground for determining the question of damages is the actual state of facts which can properly be said to result from the negligence complained of.

It is impossible to say in respect of any act of negligence, that such and such results must be deemed to follow from it, and no others; because that is contrary to all experience. No one is competent to lay down any rule for determining in advance what will necessarily be the result of any act of negligence; its results may be manifold and altogether unanticipated; and the facts of each case are therefore unique, and the law in each case must in reason depend on its own particular facts. It cannot be said that because a severe fright may not affect the physical constitution of a man that therefore it cannot affect the more delicate organism of a woman. Such an act of negligence as was complained of in the *Coultas* case left the man who was in the vehicle unharmed, and as a matter of fact left the woman a nervous wreck; and

to say that, although for a shattered leg she might have recovered damages, yet for a shattered nervous system she is entitled to no redress, seems somewhat difficult to reconcile with sound reason. At all events, that seems to be the view to have been entertained by other Courts in regard to the principle of the *Coultas* case, even in its restricted application above referred to.

For instance, in *Wilkinson* v. *Downton* (1897), 2 Q.B. 57, 76 L.T. 493, the action was brought by husband and wife against the defendant for having falsely reported to the female plaintiff that her husband had been seriously injured, he knowing the statement to be untrue; in consequence of which the wife suffered great distress of mind, and became ill and her hair turned gray; and it was held by Wright, J., that the plaintiffs were entitled to recover, and judgment was given in their favour for £100, the learned Judge refusing to follow the *Coultas* case. That decision the learned Judge remarks was treated by the Court of Appeal in *Pugh* v. *London and Brighton & S.C. Ry.* (1896), 2 Q.B. 248, 74 L.T. 724, as open to question, and he also considered it to be inconsistent with the decision of the Court of Appeal in Ireland in *Bell* v. *Great Northern Ry.*, L. Rep. Ir. 26 C.L. 428, where that Court had expressly refused to follow it; Palles, C.B., in the latter case, refers to and follows an unreported Irish case of *Byrne* v. *Great Southern & Western Ry.*, where it was held by the Irish Court of Appeal that damages were recoverable for nervous disorder unaccompanied by any external injury to the body.

In *Ham* v. *Canadian Northern Ry. Co.*, 22 Man. R. 480, the plaintiff, while travelling on a street car with which one of the defendants' engines collided, was thrown with the car down an embankment. His physical injuries, so far as could be seen, were slight, but the mental shock he received was very serious, and acute neurasthenia and insomina followed and continued up to the time of trial, incapacitating him from doing any work, and causing him great suffering. The *Coultas* case was relied on by the defendant, but Prendergast, J., who tried the action, considered that it had no application because the expert evidence was to the effect that, although the visible wounds or injuries were insignificant in themselves, still the shock which caused the neurasthenic

condition was not only mental but also physical. He gave judgment therefore in favour of the plaintiff which was, on appeal, affirmed by the Court of Appeal.

In the Quebec case of *Montreal Street Ry.* v. *Walker*, 13 Que. K.B. 326, the jury found that a car of the defendants in which the plaintiff was travelling, through the negligence of the defendants, ran off the track, and the jury found that the plaintiff thereby sustained a nervous and physical shock, and judgment was given for the plaintiff for the damages assessed. On appeal the *Coultas* case was relied on by the defendants, but after referring to the criticism of that case in Pollock on Torts, 5th ed., p. 50-52, Blanchet, J., who gave the judgment of the Court, said: "In principle fear is not a cause of action for damages because ordinarily it produces no physical ill, but if such ill result from it, then there would be liability. This is the doctrine of our law whenever it is established that the fear or nervous shock has been the efficient cause of the damage proved by the victim."

The Court, therefore, in that case treated the *Coultas* case as merely affirming the principle that mere fear gives no ground of action, but the facts of the *Coultas* case shew that the decision in effect went a good deal further than that, for there the result of the fear caused physical suffering, and yet the plaintiff failed.

The most recent decision in the English Courts on the subject is that of *Janvier* v. *Sweeny*, 146 L.T. Jour. 382, which was somewhat similar in its facts to *Wilkinson* v. *Downton*, *supra*. According to the plaintiff's evidence, one of the defendants called on her and stated that he was an inspector from Scotland Yard, and represented the military authorities, and informed her that she was the woman they had been looking for, and that she had been in correspondence with a German spy. The jury found that the statement was made with the authority of the other defendant, and that the statement was calculated to cause physical injury though not maliciously made, and that the plaintiff suffered illness in consequence of the statement. Avory, J., following *Wilkinson* v. *Downton*, gave judgment for the plaintiff, and the Court of Appeal (Bankes and Duke, L.JJ., and Lawrence, J.) affirmed the judgment.

The fallacy underlying the *Coultas* case seems to consist in the unwarranted assumption that nervous and mental disorders are not physical. "Physical," according to the dictionary, is a term to signify something pertaining to the material part or structure of an organized being, as opposed to what is mental or moral: but how can it be said that the nervous system is not strictly a physical part of the human organism? Nerves are actual organisms as much as legs and arms, and for that matter so are brains. On what intelligible principle of law can it be said that if you negligently injure a man's leg you are liable in damages, but if you only destroy or injure his nerves you are not responsible? And even in the case of mental disorders resulting from negligence if they are due to a disorder of the brain brought about by the negligence complained of, why in reason should they not be equally a subject for compensation? The brain is surely as much a physical part of the body as a leg, and of the two, the more important. The difficulty is that while an injury to a leg can be seen an injury to the brain or nerves is frequently only manifested by its effects, and the nature of the injury is more or less a matter of conjecture; but any attempt to exclude such injuries from the category of physical injuries seems to be unfounded in reason. It has been remarked by a learned Judge: "That fright—where physical injury is directly produced by it—cannot be a ground of action merely because of the absence of any accompanying 'impact,' appears to me to be a contention both unreasonable and contrary to the weight of authority," *per* Kennedy, J., *Dulieu* v. *White* (1901), 2 K.B. 669, 85 L.T. 126; but that learned Judge goes on to say that it is necessary that the fright should have been occasioned by an act of negligence in regard to the person affrighted. It is not sufficient that the fright should have been occasioned by an act of negligence towards someone else, such as was the case in *Smith* v. *Johnson*, an unreported decision referred to by Kennedy, J., where a man was killed negligently in sight of the plaintiff, and the plaintiff became ill, not from the shock produced by fear of harm to himself, but from the shock of seeing another person killed.

POWERS.

In Farwell on Powers, 3rd ed., p. 56, the learned author writes in reference to the creation of powers: "It is submitted that the true principle is that a man may by any disposition, by which he himself is able to assure an estate or interest, legal or equitable, in property, confer upon another power to assure a like estate or interest to third persons." We are inclined to think that the proposition would be better stated in this way: "A man may confer upon another power to assure to himself, or some other person, any estate or interest in property which the donor of the power is himself entitled to convey."

But there is this limitation on the rights of the donor of a power, viz.:—"The author of a power may surround its execution with as many solemnities, and direct it to be carried out by such instruments, at such times, with the consent of or by such persons as he pleases, *provided that he does not transgress the rules of law or equity.*" Farwell on Powers, 3rd ed., p. 147. In other words, the donor of a power cannot alter the rules of law or equity which regulate the transmission of property. We may further observe that powers under wills and deeds are both distinguishable from a power to convey an estate under a letter of attorney. The estate raised by the execution of a power (whether it be created by deed or will) *takes effect as if limited* in the instrument creating the power. Sugden, p. 199.

We have been led to make these observations after perusing the recent case of *Re Spellman and Litovitz*, 44 O.L.R. 30.

In that case, which was an application to the Court under the Vendors and Purchasers Act, an objection was made by the purchaser, that a certain mortgage incumbrance had not been properly discharged. The facts connected with it, were that it had been made in favour of several executors and that the certificate of discharge had been executed only by a majority of them. The learned Chief Justice who heard the application expressed himself as strongly of the opinion that a mortgage made to several executors or trustees of a will could not be validly discharged by some of them, unless some special power has been conferred upon some of them so to do; but he held that this special power had been

conferred in the case in hand; because, by the will of their testator, power was given to a majority of the executors to discharge any mortgage which they might take in the performance of the trusts of the will.

The case it must be borne in mind, therefore, was not the case of a mortgage made to the testator and devolving on the executors as part of his estate; but it was the case of a mortgage made to the executors themselves in the execution of their duties. The mortgaged property had, therefore, never been in the dominion of the testator, and he had never at any time any right of conveyance in respect of it. In these circumstances, therefore, the case would have been more informing if the learned Chief Justice had specially dealt with that aspect of the case. He refers to some observations of Mowat, V.-C., in *Ewart* v. *Gordon*, 13 Gr., at p. 57, where it is said: "If it is the will of a testator that any one or more of those he names should have authority, without the concurrence of the others, to sell his real estate, or receive the purchase money, it is within his power to say so," and the learned Chief Justice seems to rest his judgment on that dictum. This, however, it may be remarked, was the case of a power in reference to the testator's own property over which he had a dominion, and not in regard to property which becomes vested in his executors after his death, and over which the deceased never had dominion. Moreover, such a power as that in question in *Re Spellman and Litovitz* appears to "transgress the rules of law." By the taking of the mortgage there in question a joint estate became vested in the mortgagees at common law; that estate could only be effectually reconveyed according to the rules of law by all the mortgagees or the survivor or survivors of them, in case of the death of any, joining in the reconveyance or discharge.

The testator virtually sought to abrogate this rule of law, and to empower some to do, what the law requires all to join in doing: see *Matson* v. *Denis*, 10 Jur. N.S. 461.

The power, therefore, under which the executors assumed to discharge the mortgage in question appears to have been legally ineffectual for two reasons: (1) because it related to property over which the donor himself never had any dominion, and (2) because

it assumed to transgress a rule of law by empowering some of several joint tenants to convey the joint estate.

The provisions of the *Registry Act*, R.S.O. c. 124, ss. 62, 68, and the *Interpretation Act*, R.S.O. c. 1, s. 28 (*c*), seem really to have no application to the circumstances in question in *Re Spellman and Litovitz*, as they are directed to the case of personal representatives of a mortgagee discharging mortgages made to their deceased testator or intestate, and not to the case of mortgages made directly to the personal representatives themselves.

In this view of the matter, although the decision of Blake, V.-C., *In re Johnson*, 6 P.R. 225, may possibly still be good law, having regard to the *Interpretation Act*, s. 28 (*c*), the case of *In re Spellman* and *Litovitz* may, on the other hand, be open to question, and we should be inclined to counsel the profession to be wary about putting their faith in it.

Possibly it may be said that if the power in question was not effectual in law to enable some of the executors to reconvey the mortgaged land, so as to revest the legal estate, it might nevertheless have some effect in equity as authorizing some of the executors to receive and give acquittance for debts due to them all; and though the property in question was never vested in the testator, it was security for part of his estate.

ONTARIO BAR ASSOCIATION.

Address of Mr. Henry R. Rathbone, of Chicago, delivered at the last annual meeting.

The United States has seen great changes in its attitude towards the law. We started out as a young people with a great deal of spread-eagleism, as you know. Everything American was surely the best. We could point the way towards justice and the proper administration thereof to other nations, we felt quite sure. Now, I think the pendulum has rather swung to the other side. There is, perhaps, I might say, a tendency on the part of many American lawyers and citizens to rather depreciate the

administration of justice in the United States. The old spirit of cocksureness has surely gone. That was illustrated perhaps by the story of the little boy who was asked by his school teacher, "Willie, who was the first man?" "George Washington" was the reply. "Oh no, Willie; George Washington was not the first man; Adam was the first man." "Well, perhaps, if you are speaking of foreigners maybe he was."

But I can assure you with all sincerity there is great admiration on the part of the American Bar and American citizenship of British justice; and when some criminal is acquitted that the public thinks should have been convicted, very often indeed when it has taken a long period of time to secure a jury, or when something goes wrong in the administration of our justice, you hear the remark made on every hand "How much better they do it in the British Dominions. There this man would have been convicted; he would have been quickly brought to justice." Yet we must realize that each nation must be guided by its own peculiar conditions. As you know in our State of Illinois—of course this does not apply to the Federal Courts—our judiciary is elective. When I left Yale College I was firmly convinced that that was the wrong system. All our teachers had stoutly maintained that an appointive judiciary must be the best. I confess, however, speaking for ourselves alone, that I think the elective judiciary has worked rather well than otherwise. We have a certain responsibility to the people; we have produced some eminent jurists elected under that system. We have a majority of the Judges, I think I may fairly say, who give reasonable satisfaction, and only comparatively few who might be considered below par. Now, there are things that contribute to and help to bring about this situation, and one is the attitude of the Bar Association. If an elective judiciary were purely a partisan matter, as some would have it, no doubt it would stand at once condemned, but the Chicago Bar Association, and I think other Bar Associations, have been very strong on that subject. Wherever a judicial change is to take place we hold what is called a Bar primary. We send out to all the many members of that association a ticket made up of the names of those appearing on the Republican,

the Democratic, the Socialist, the Socialist Labour ticket, or whatever name it may be, whether it has any chance for election or not. Those names on that ticket are arranged in alphabetical order, with nothing to indicate their politics, or on what ticket they are to run; and the Bar Association then votes upon those names. This has contributed very largely to the success of many candidates. I can name many instances in which excellent Judges who have served the people perfectly and well would have been condemned, knifed at the polls, defeated by the party organization, but they have gone through and been elected because of the action of the Chicago Bar Association. This is due to the fact that their action, their verdict, is published far and wide in the press. Every one knows it, and even the men of limited education will say, "Well, the lawyers ought to know better than the rest of us; we will follow their lead." Then their action is taken up by the press of the city, which wields a tremendous influence upon the independent voter, and it is generally the case that the Judges elected are divided fairly equally between the great parties. The Socialist candidates seldom poll more than perhaps twenty votes at the Bar primary.

I was much interested in the address yesterday by your President, and it was interesting to me to see that some of the problems which you are meeting here are those with which we have been contending for years. There seems to be a tendency among us towards what might be called specialists. We have gone in some directions further than you have, in others not so far. Of course, you probably know we have specialists in the Courts. This is done in a rather peculiar way. What your President said yesterday about the establishment of Criminal Judges has called my attention to this fact. We have the Circuit and Superior Courts, regular Trial Courts, and in addition to those we have the Municipal Court created by special Act in 1896, with jurisdiction within the limits of the City of Chicago, with twenty-seven Judges. We have these Judges assigned from time to time to other special Courts. We have no Judges specially elected to the Criminal Court, but Judges are assigned from the Circuit and Superior Courts to the criminal branch, a period of one or two years. That might seem

the very opposite of specialization, and yet it often works along those lines, because those Judges who are specially qualified for work in the criminal Courts are practically always seated there. I have one Judge in mind who has probably been on the Bench at least for over fifteen years, constantly re-elected, and I do not believe he has sat for more than one month outside of the criminal branch. This happens because some Judge of the Circuit or Superior Court is assigned to the Criminal Court. He at once applies to this Judge, whose reputation as a criminal jurist is well known, and they exchange positions, and thus these men who are specially fitted to sit in that branch are enabled to do so. Another Court in which—if you will pardon me in saying so—I have always taken a special pride, is the Juvenile Court. You are perhaps aware that that originated in Chicago, and so excellent has been its work that I know that people from all over the civilized world have been constantly visiting that Court and watching its practical operation, and indeed the people of democracies are not so ungrateful, and the Judges who started, and one man especially who began with that Court, and another man who succeeded him, are practically impossible of defeat. No partisanship could relegate them from the Bench, I fully believe. Their work was so creditable and so excellent there that they are practically assured of a position on our Bench as long as they live.

In the Municipal Court we have specialized still further. We have, as you know, the Court of Domestic Relations. We have the Boys' Court. We have a Court even called the Speeders Court. One Judge sits there every day regularly assigned to pass upon violations of the automobile ordinances. The general opinion is that that has worked very well. Recently we have established another special branch, and that is a Judge who sits on nothing else but default divorce cases—a tremendous strain, a thankless job, but under our system and under our laws under which there are nine grounds of divorce admitted, this Judge has a tremendous task to perform, and one which is absolutely necessary to be met. To summarize, we have found that specialization in these different courts has worked well.

Now, we have not gone so far as England in the matter of

specialization among attorneys. From the very beginning I think it has always been the case in the United States that we have never observed the distinction between barrister and solicitor; but nevertheless those things find their own level, and gradually lawyers have become more and more specialists with us. You go into the Courts of Chicago where the greatest trial work is performed, and you will find there as a general thing a certain set of lawyers who are carrying ou' the trial work of the county. We have in Cook County perhaps 6,000 lawyers who are practising there, and a comparatively small number of those are doing the active trial work; some of them at least as much as English barristers do. They are practically in Court all the time. They try a tremendous number of cases every year. They are apt to be those who represent the great transportation companies, insurance companies, etc., and lawyers that often represent the plaintiffs in cases against them.

We are grappling, gentlemen, with two great problems in which we cannot truthfully say we have as yet met with success. But we are trying to solve them. The first one is uniformity of procedure. Of course, in Illinois, as you may know, we still cling to the old common law, largely modified by statute, and I for one cannot say that my faith in the common law has been in the least shaken; but when in 1896 we established the Municipal Court we started in with a totally different procedure. There, instead of the old forms of pleading, we had what we have considered the most simplified pleading possible; a man would simply state a fact or two in what is called the statement of claim, perhaps three or four lines of typewritten matter, and it stood as his pleading. The same with the defence. But that has been modified to a certain extent, because the Supreme Court of Illinois has recently held, and of course what the Supreme Court says is law on matters of pleading, even in the Municipal Court, the pleader on either side must state sufficient facts to make out a case or a defence. Now, we have other modes that are very decidedly different in the two Courts. In the State Court we still have the system of written instructions. The attorneys prepare in advance certain instructions; they must hand them up to the Trial Judge

before the arguments of counsel commence; the Judge by statute is then required to write on the margin of those instructions either "Given" or "Refused," or he may modify them. The "Given" ones are read to the jury, the "Refused" are put to one side; they are taken by the jury to the jury room and are part of the exhibits in the case. The Municipal Court has something entirely different, and that is a system of oral instructions. This we have come to feel is a mistake, that it is not the proper way to do, to have such totally different methods of procedure going on in the same community at the same time; so that only a few days before I left to come here there was a meeting of the judiciary of all Courts of the City of Chicago, and they agreed on a proposed bill of certain modifications and changes in the law. The first point and most essential of them all was to establish a uniform practice; and that will be presented undoubtedly to the State Legislature at an early moment, if it has not been done already; and when the judiciary and the lawyers are back of any movement of that kind it is usually safe to predict that the Legislature will follow their lead. So that I think we may look very soon to find in the great State of Illinois a simplified and uniform procedure.

But still another problem demands our attention, and we are very far from having solved it, and since arriving in Toronto I have inquired if you were troubled with the same thing—I am very pleased to know that you are not—and that is the old, old evil which Shakespeare enumerated through the lips of Hamlet, as one of the ills that flesh is heir to, the law's delay. There we have at least proved deficient. Not altogether in some respects; our Supreme Court, the highest tribunal sitting at Springfield, is fairly well up with its work; it has about four terms a year, and usually disposes of a case if not at the first, at any rate at the second term. But our Appeal Courts, the first appeal—there are four branches in Cook County of three Judges each, made up of the Judges of the Circuit and Superior Courts who are assigned to them—have been very steadily behind, but they are catching up to a certain extent. The work there, however, is very considerably delayed, of course depending on which Court it happens to be. But it is in our Trial Court, not so much in the matter of small

claims or wage claims, or those claims disposed of in the Municipal Court, or in criminal cases, there is not so much there; but in our regular Trial Courts we are sadly behind, and we find a situation which is demanding our attention. Judges have tried to remedy it of their own motion, but it is hard to hold the line exactly without going too much on one side or the other. For instance, the Judge may be altogether too strict. Different calendars are assigned to these Judges, and they take a certain pride, and there is a certain rivalry, in disposing of the cases, and keeping up with their work. Some Judges have gone to the extreme. I have known of a Judge having a list of one hundred cases, and he expected the people to be ready right away in those cases for trial; and if it should happen that the first case was ready for trial there would be no trouble, but if, for some reason or other, there were grounds for continuance, or the case should go off, there would be a run on the calendar which is almost as bad for lawyers as a run on the bank; and the Judge would go down the list, and if he was inclined to be severe he would dismiss the cases wholesale, which was of course a greater injustice to the people interested. On the other hand, it often happens that where there is a run on the calendar the Court cannot find any case to try during that day. He is practically, to use a common expression, put out of business that day; he has nothing to do. The first case goes off, and perhaps lawyers have relied on the first attorney or two being ready, and he at the last minute is disappointed, or perhaps he is called hurriedly into the trial of a case ahead of that one, and is actually engaged, which is ground for passing the case; and so we have a great deal of confusion. We are grappling with that problem and we hope to solve it.

[The speaker then referred at length to the work done by members of the Illinois Bar during the great war. This began by their valuable and energetic efforts to assist in suppressing and bringing to justice those engaged in the insidious and treasonable propaganda of the pro-German population. This was followed by an immense volume of work in connection with the war, most interesting, but which we have not space to refer to. Mr. Rathbone concluded as follows:]

In conclusion I only want to say this, we have in common a great bond, and that is the bond of Anglo Saxon free institutions. We realize now perhaps more than anything else when this world is threatened with the treachery of Bolshevism what those institutions mean. It is for us lawyers to do our duty, to play our part as men; it makes no difference whether it is in the United States or Canada, the principle is the same, this great inheritance of Anglo-Saxon liberty is ours, ours to preserve, ours to protect, ours to transmit unimpaired to future generations.

CHANGES IN ENGLAND IN LEGAL MATTERS.

THE MINISTRY OF JUSTICE AND JUDGES.

The turmoil and unrest that pervades everything these days has invaded the conservatism of matters pertaining to Bench and Bar in England. The question of an entirely new departure in the way of a Ministry of Justice is being discussed *pro* and *con*. One of the changes which might be the result of this new machinery would be in relation to judicial patronage. It is said that there is less danger of the evil of political influence in the appointment of Judges when the patronage is in the hands of the Lord Chancellor, and it is the prevailing thought that he, assisted by an advisory committee, should make all judicial appointments. It is a thousand pities that something of this kind is a practical impossibility in Canada. Realizing this, there are those who think that, after all, the other extreme, namely, the elective system prevailing in the United States, would be an improvement. In support of this is cited the argument in its favour of Mr. Rathbone in his address at the recent meeting of the Ontario Bar Association. The elective system is repugnant to our ideas, but the combination of political patronage and the inadequacy of salaries are potent factors in lowering the standard of days gone by.

LEGAL EDUCATION.

The treatment of legal education in the old country is in a transition stage, or rather, perhaps, is likely to arrive there shortly.

One authority on the subject says that "it is nothing less than a scandal that no national school of law exists in England." The difficulty seems to be mainly in the way of vested interests. We are told that on one hand there is the Council of Legal Education, on the other the Law Society's scheme of education in London, whilst in addition there are the faculties of law at the universities. They have perhaps something to learn from this country in the way of systematic legal education.

FUSION OF BARRISTERS AND SOLICITORS.

Strong exception is taken in legal journals to a proposal warmly advocated by others for a fusion of the two branches of the profession, which is the rule here. It is claimed that it would help nobody and be detrimental to the public.

THE ADMISSION OF WOMEN.

A change of thought has come to English lawyers since the war as to the admission of women to the ranks of the legal profession. They have proved themselves so brave and helpful and so equal to the sterner sex in many avocations which they had not taken up before, that the determined hostility of the profession in the past is breaking down, and prejudice disappearing.

The time may soon arrive when the door will be open alike to men and women in the old country. While this may come as one of the many unlooked-for results of the war, nothing has happened which would do anything more than give them the right to shew their capacity in this new line of business. Women lawyers are no new thing in this country, but very few women have taken advantage of the open door here, nor have any of them gained any particular distinction in our ranks. The fact is that, speaking generally, women have their own sphere of usefulness, quite different from that of the male sex, and nobly and devotedly most of them fill it; but whilst we men respect and admire many qualities in them which we cannot attain unto, we have a feeling that when they enter the turbid, and too often in these days the malodorous arena of legal practice, they seem to have in a measure "fallen from their high estate," and for this reason we are sorry to see them there. In the last number of the *Journal*

of Comparative Legislation, Mr. Justice Riddell collects statistics as to the number of women in the profession in various countries, and summarises what he has found, so far as Ontario is concerned, as follows:—"The admission of women to the practice of law has had in Ontario no effect upon the Bar or the Courts; the public and all concerned regard it with indifference; while no one would think of going back to the times of exclusion, no one would make it a matter of more than passing comment that a woman lawyer was engaged in the conduct of legal business. It has prevented any feeling of injustice, sex oppression, or sex partiality—it has made the career open to the talents. Otherwise it has no conspicuous merits and no faults."

LEGISLATIVE INTERFERENCE WITH TESTAMENTARY DISPOSITIONS.

Under the civil law a testator has not the right to dispose of the whole of his property without regard to the claims of his family. Thus, by s. 913 of the Code Napoléon an owner cannot, either by gift *inter vivos* or by will, dispose of more than half his property if he leaves one child, a third if he leaves two children, a fourth if he leaves three or more. In Scottish law we have the children's legitim and the widow's *jus relictæ*. Dower in ordinary English law is the only right that at all corresponds to these rights under the civil law—unless we add curtesy.

Both dower and curtesy have been legislated out of existence in many of the oversea dominions where English law prevails, but there is at present a movement in the opposite direction, and in more than one part of the dominions statutes of a novel kind have been enacted since the beginning of the present century for the purpose of curbing the uncontrolled right of a testator to leave his family inadequately provided for. The principle of the civil law has been adopted, and a right to some share in the property of a deceased person, notwithstanding any testamentary disposition of that property, has been conferred on his widow and children. This right, however, is not, as it is under the civil law, a legal right properly so called according to the nomenclature of

English jurisprudence, except that it is conferred by statute, and possibly all statutory rights should be classed as legal in one sense. The statutory right conferred on the testator's family has all the characteristics of what English lawyers would generally call an equitable right, inasmuch as it consists in the right to apply to the court—and, where common law and equity are not administered concurrently, to the court in its equity jurisdiction—for suitable provision to be made out of the estate of the testator in the hands of his representatives.

The home of the legislation referred to is New Zealand, and apparently as yet similar statutes have only been enacted in Victoria and New South Wales. It would not be surprising if enactments on the lines of these statutes were to find favour in other parts of the Empire, even in the United Kingdom itself—except, of course, Scotland, where they are not necessary. The movement in favour of the creation of a Public Trustee originated in New Zealand, with the result that the Public Trustee is now an established institution here.

The first New Zealand Act on the subject was passed in 1900. Victoria followed in 1906, and New South Wales in 1916. The enactments now in force in New Zealand are contained in ss. 32-36 of the Family Protection Act 1908 (No. 60), those in force in Victoria in ss. 108-117 of the Administration of Probate Act, 1915 (N. 2611), and the New South Wales enactment consists of ss. 1-12 of the Testator's Family Maintenance and Guardianship of Infants Act, 1916 (No. 41). The New Zealand and New South Wales provisions are substantially dentical; those of Victoria differ slightly.

The scheme of the statutes is as follows: If a testator leaves his widow and children insufficiently provided for, the court may be applied to and may order a suitable provision to be made out of the testator's assets. In New South Wales and New Zealand, though not in Victoria, the Act applies to the case of a woman leaving her husband insufficiently provided for. The provision ordered by the court may, in New Zealand and New South Wales, take the form of either a "lump sum" or periodical payments. In Victoria nothing is said in the statute itself about a lump sum,

and it has been held that periodical payments only can be ordered. (*Re Mailes*, 1908, V.L.R. 269; *Re Bennett*, 1909, V.L.R. 205): In New Zealand and New South Wales the provision ordered by the court is inalienable without the leave of the court; in Victoria the court may, but need not, impose a restraint on alienation (*Re Mailes, sup.*).

The discretion of the court is left unfettered—the provision is to be such "as the court thinks fit"—in New Zealand and New South Wales. In Victoria a widow is not to receive more than £1,000 a year, nor more than her income would have been had her husband died intestate. There is here very obviously a wide field for the creation of case law in the approved English fashion in order to determine the proper limits of the judicial discretion conferred by the statutes. Already some twenty cases (chiefly on the New Zealand statutes) have been decided by the courts upon the subject. As might perhaps have been expected, the statutes have been relied on, and the courts asked to make provision under them, in a considerable number of cases where a second marriage had taken place and the children of the first marriage left out in the cold. In more than one case Judges have referred to the statutes as casting upon the court a duty of extreme difficulty, and unedifying family quarrels have sometimes been brought to light. The latter kind of case is illustrated by one in New South Wales—*Re Harris* (1918, 18 State Rep. 303). Some general principles have, however, been laid down, and these (as formulated in a New Zealand case), have been approved by the Privy Council: (*Allardice* v. *Allardice*, 106 L.T. Rep. 225; (1911) A.C. 730).

In this case the testator died worth £20,000. He left a family by a first wife unprovided for, among them three married daughters. The New Zealand Courts ordered £60 a year for life to be paid to one daughter and £40 a year for life to each of the other two. It was laid down by the New Zealand Court of Appeal that the court was not empowered to make a new will for a testator, but could only provide for proper maintenance and support of "widow, husband, or children" where adequate provision had not been made by the testator, and that the standard for the court to be

guided by was (as to widow and children) the position in which they had been maintained in the past. The judgment to this effect was approved by the Judicial Committee, and it was observed in the course of the committee's judgment, that "the matters of fact so carefully analysed" in the courts below were "essentially questions for the discretion of the local courts."

It may be questioned whether this experiment in legislation will prove quite successful in its present shape unless some more clearly defined rule for the exercise of judicial discretion is set in the statutes themselves. The more satisfactory plan would seem to be to boldly adopt both the principle and the method of the civil law and secure definitely to a widow her *jus relictæ* and to children their legitim as in Scotland.

The statutes above referred to leave one loophole which no doubt will sooner or later be taken advantage of. They apply only to testators. In the event of intestacy no application can be made to the court, so that if the intestate had denuded himself in his lifetime of all his property, as by gifts or voluntary settlements, a widow or child in whose favour no such gift or settlement had been made would be unable to secure an adequate provision out of the husband's or father's property.—*Law Times.*

MOTOR-CARS AND DISTRESS FOR RENT.

Is a motor-car in a garage, where it is ordinarily housed, liable to be distrained for rent by the landlord of the premises? This question does not seem to have been yet formally decided by the courts in England. A car standing in a garage merely for exhibition would not be exempt from distress: (*Simms Manufacturing Company* v. *Whitehead* (1909) W.N. 95.) Whether a motor-car standing in the garage where it is usually kept ready for the owner's use can be seized by the landlord as goods on the demised premises liable to distress depends on whether it comes within the second class of the "five sorts of things which at common law were not distrainable," viz., "Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ": (*Simpson* v. *Hartopp,*

1743, Willes, 512; 1 Sm. L.C.). This being the principle, the nearest analogy to be found among the actual decisions of the courts seems to be the case of horses and carriages kept on a livery-stable keeper's premises.

Now, there are two reported cases in the English courts, one in the King's Bench and one in the Common Pleas, in which it was decided, in the first that a carriage, in the second that a horse, is not exempt from distress as being within the second of the "five sorts" enumerated by Lord Chief Justice Willes in his classical judgment in *Simpson* v. *Hartopp*. The case as to the carriage is *Francis* v. *Wyatt* (1765, 1 W. Bl. 483, 485), in which Lord Mansfield presided, and it was held that the carriage was distrainable "upon the ground of its being part of the profits of the premises, which distinguishes it from the case of goods sent to be manufactured." This was followed by the Court of Common Pleas in *Parsons* v. *Gingell* (1847, 4 C.B. 545), where the horse only was seized, but *Francis* v. *Wyatt* was treated as a binding authority on the question of horses and carriages at livery, and it was held that the horse was distrainable as having been sent to the stables to be kept there, and not merely fed and groomed.

In the year 1865 it was held by the Court of Common Pleas that goods deposited as a pledge with a pawnbroker could not be distrained by the pawnbroker's landlord: (*Swire* v. *Leach*, 11 L.T. Rep. 680; 18 C.B.N.S. 479.) Chief Justice Erle said there was no difference between the case of a pawnbroker and that of a wharfinger, factor, or warehouse keeper; he also observed that "many Judges have attempted to lay down a rule which should embrace all the exemptions, but no very well-defined principle is to be found in any of the cases." A few years afterwards the Court of Queen's Bench had to decide whether household furniture stored in a warehouse was distrainable for rent due by the warehouseman, and it was held to be exempt, on the ground that the principle applicable to a pawnbroker's business applied, and *Swire* v. *Leach* (*sup.*) was followed: (*Miles* v. *Furber*, 27 L.T. Rep., 756; L. Rep., 8 Q.B. 77.) But some observations were made on the case of horses and carriages at livery and the decision in *Parsons* v. *Gingell* that these were not exempt from distress.

Sir James Cockburn, after saying that the principle of a pawnbroker's business and the decision in *Swire* v. *Leach* applied exactly in the case before the court, observed: "I am inclined to think that the case of a horse and carriage at livery must be taken as trenching upon this principle; at all events, if the two cases in the Court of Common Pleas are not reconcilable, I prefer to abide by the later case, *Swire* v. *Leach.*" Mr. Justice Mellor also, after referring to the exemption from distress in general of "goods received in the course of a particular trade to be dealt with in accordance with that trade by a tenant of premises," said: "There are cases somewhat to the contrary, such as that of a horse and carriage at livery." Thus, the case of horses and carriages at livery was treated as an exception that had been recognised, and the Court of Queen's Bench did not, though disapproving of the exception, purport to overrule the decisions under which these were held to be distrainable.

If the cases of *Francis* v. *Wyatt* (*sup.*) and *Parsons* v. *Gingell* (*sup.*) are to be regarded as still law with respect to horses and carriages, the courts in England, when called upon to decide whether motor-cars in a garage are distrainable or not, will be confronted with the alternatives of following the principle, so often enunciated by Lord Kenyon, of *stare decisis*, or treating a motor-car as essentially different from a carriage in a livery stable, and so not within the exception sanctioned by *Parsons* v. *Gingell.* Should *Francis* v. *Wyatt* and *Parsons* v. *Gingell* be held to be no longer good law, the difficulty, of course, disappears, and, in the event of horses and carriages not being distrainable, there can hardly be any doubt that motor-cars would equally be held exempt.

The question has recently arisen in an Australian case, and the Supreme Court of New South Wales has formally decided that a motor-car standing in a garage is not distrainable: (*Mackenzie* v. *Shrimpton*, 1918, 18 State Reports, 311.) The court proceeded on the view that the decision in *Miles* v. *Furber* (*sup.*) is "quite irreconcilable with" *Parsons* v. *Gingell* (*sup.*), and the "reasons given in *Miles* v. *Furber* are much more satisfactory than those in *Parsons* v. *Gingell.*" The case of a motor-car is aptly brought within the second of the "five sorts" of exemptions in *Simpson* v. *Hartopp* by the following concluding words of one of the New South

Wales judgments: "The keeping of the garage was in the nature of a public trade, and . . . the car in question was delivered to the keeper of the garage as exercising and carrying on a public trade, to be managed by him in the way of his trade, and as such was privileged from distress." This Australian decision is a valuable contribution to the case law on motor-cars, even if the English courts of first instance feel bound by the decisions of 1765 and 1847 to class motor-cars with horses and carriages as still liable to distress.—*Law Times.*

JUDGES AND WRITTEN OPINIONS.

The following observations from the *Central Law Journal* may be perused with profit:—

"Much complaint has been made of recent years concerning the undue length of the written opinion, and yet in the demand for brevity there is a hidden danger. A much greater danger lies in the demand that only in exceptional cases shall opinions be written at all. Much of the delay and expense of the law, insofar as appellate courts are concerned, is no doubt due to the written opinion. Yet on the carefully prepared opinion depends not only the orderly growth of the law, but its unswerving righteousness. The written opinion, indeed, is the result of the desire for a government by law and not by men, and for a government by principle and reason and not by prejudice and passion. This fact even practising lawyers often fail to recognize. The digest-making law book writer realizes it but little and the general public not at all. The public knows nothing of the duties and responsibilities of the appellate court judge. It believes him to be possessed of Solomon-like opportunities and expects him, like Solomon, to decide cases off the bat and with regard merely to his momentary conception of their particular equity. It has no realization of the fact that each appellate court decision becomes a precedent and the guiding rule for those of other similar controversies; that the body of our law always has been, and, unless we radically change our governmental system, always will be judge rather than legislature made; that the lawsuit is the exception and not the rule; and that, as a rule, it is only the cases of doubt that are appealed; that one appellate court case rightly decided and carefully and thoughtfully expressed furnishes a rule of a public and business conduct which if observed will prevent numerous other controversies. The thoughtless observer and the ordinary judicial critic, indeed, desire a government by men when, as a matter of fact, our whole legal structure and the permanence of democracy demands and depends upon a government by law."

REVIEW OF CURRENT ENGLISH CASES.

INSURANCE (MARINE)—POLICY ON CARGO—"WARRANTED FREE FROM ALL CONSEQUENCES OF HOSTILITIES"—DAMAGE CAUSED BY INFERNAL MACHINE PLACED IN SHIP'S HOLD BY GERMAN—EVIDENCE OF AGENCY FOR GERMAN GOVERNMENT—LIABILITY OF INSURER.

Atlantic Mutual Insurance Co. v. *King* (1919) 1 K.B. 307. This was an action on a policy of re-insurance on a cargo carried on a ship from Bahia to New York. It contained a clause: "Warranted free from all consequences of hostilities or warlike operations whether before or after the declaration of war." A German subject surreptitiously placed an infernal machine in the hold of the vessel which exploded and set the ship on fire and burnt part of the cargo. The question Bailhache, J., had to decide was, whether this was a consequence "of hostilities or warlike operations," or was to be attributed merely to the wrongful act of an irresponsible individual? It was proved that by order of the Naval General Staff of Germany to the naval attachés, that they were required to mobilise all destruction agents in ports where munitions were being loaded on ships going to England, France, Canada, or the United States of North America, and to hire persons for arranging explosions on board ships bound for enemy countries; and that funds for hiring and bribing persons would be placed at their disposal by the Secret Service Division of the Naval Staff. The learned Judge came to the conclusion that, although the German did not appear to have received an iron cross, or other express ratification of his act, he was nevertheless the agent of the German Government. He therefore came to the conclusion that the explosion was the result of "warlike operations," and therefore that the loss was not covered by the policy.

FIRE—LIABILITY FOR DAMAGE TO ADJOINING PREMISES—"ACCIDENTAL FIRE"—NEGLIGENCE IN NOT CHECKING SPREAD OF FIRE—FIRES PREVENTION ACT, 1774 (14 GEO. III., c. 78), s. 86—(R.S.O. c. 118).

Musgrave v. *Pandelis* (1919) 1 K.B. 314. This was an action to recover damages caused by a fire spreading from the defendant's premises. The defence was that the fire "accidentally began" on the defendant's premises and that therefore under the Fires Prevention Act, 1774 (see R.S.O. c. 118) the defendant was not liable. The facts were that the plaintiff was possessed of furnished rooms situate over a garage occupied by the defendant and in which he

kept a motor-car. The defendant's servant was engaged in cleaning the car and for that purpose it was necessary to move it, and as he could not move it himself, he started the engine, when, from some unexplained cause, the petrol in the carburettor caught fire. If the servant had at once turned off the tap of the pipe leading to the petrol tank, the small quantity of petrol in the carburettor would have speedily burnt itself out, and no damage would have been done to the plaintiff. He neglected to do this and the petrol in the tank caught fire, and the fire spread to the body of the car and the garage with the plaintiff's rooms over it, with their contents were destroyed. Lush, J., who tried the action, found as a fact that the fire which broke out in the carburettor was accidental, in the sense that it was not the result of a wilful act, or of negligence, but he found that the defendant's servant was guilty of negligence in omitting to turn off the tap promptly, and he held that in these circumstances the defendant was not protected by the statute, because, even assuming that the fire which began in the carburettor caused the damage, it was not "accidental" within the meaning of the statute, because a person using a dangerous thing like a petrol engine, the carburettor of which is not unlikely to get on fire when the engine is started, cannot be heard to say that the fire was "accidental" within the statute, even though he was not guilty of negligence. Because the rule is that he must keep such a thing under control at his peril. And, secondly, because a fire "begins" within the meaning of the statute only when the flames get out of control; and, therefore, the "fire" in this case began when the body of the car caught fire, and in that sense the efficient cause of it was not the initial fire in the carburettor, but the negligence of the servant in not turning off the tap, and therefore it was not the "fire" which burnt the plaintiff's property which "accidentally" began.

PRIZE COURT—CONTRABAND—INNOCENT SHIPPERS—ULTIMATE ENEMY DESTINATION.

The Noordam (1919) P. 57. This was a prize case. The goods in question were absolute contraband shipped from New York to Amsterdam. The nominal consignees were the Netherlands Oversea Trust Co., who had an agreement with the British Government to prevent as far as they could any of the cargoes consigned to them from reaching enemy countries. In this case they were acting for a Dutch firm of De Vries. This firm was engaged in shipping goods received by it to Germany, which fact they endeavoured to conceal from an English accountant who was appointed to examine their books by falsifying and fabricating their accounts. When the goods were seized the buyers refused to pay, and in the present proceedings the consignors were the

claimants. In these circumstances the Court (Lord Sterndale, P.P.D.) held that it was immaterial that the claimants were innocent of any intention to ship the goods to an enemy country—that the doctrine of "continuous voyage" applied, and that in this case notwithstanding the agreement of the Netherlands Oversea Trust Co., the Court was justified in assuming that the ultimate destination of the goods was intended to be an enemy country if the buyers could succeed in evading the restrictions that the company imposed. The goods were therefore condemned.

MORTGAGE — LEASEHOLD — FIXTURES — MORTGAGE OF LEASEHOLD WITH FIXTURES ATTACHED—SALE BY MORTGAGEE—SEVERANCE OF FIXTURES.

In re Rogerstone Brick & Stone Co., Southall v. *Westcomb* (1919) 1 Ch. 110. In this case a company had issued debentures secured by a floating charge on all of its assets, subject to a proviso that the company should not create any mortgage to have priority thereto. Any debenture holder was empowered to appoint a receiver with power to make arrangements in the debenture holders' interests. The company requiring money, the debenture holders agreed to the creation of a mortgage on the leasehold premises of the company to have priority over the charge. Accordingly, the leasehold premises with fixtures attached were assigned by way of mortgage for the residue of the term. The business of the compar not succeeding the mortgagee, who was also a debenture hold appointed a receiver for the debenture holders, who eventually closed down the works, and an arrangement was thereafter made between the mortgagee, who was a solicitor, and the receiver for the latter to offer the loose and fixed plant together for sale, the proceeds of the former to go to the debenture holders, and of the latter to the mortgagee. The action was brought by a debenture holder who claimed that the whole of the proceeds should go to the debenture holders in priority to the mortgagee. Younger, J., who tried the action, dismissed the action, holding that the company's interest in the fixtures as mortgagor continued only so long as it had an interest in the term, and ceased on a sale by the mortgagee; that the right which the mortgage carried to remove the fixtures did not render it obnoxious to the Bills of Sales Act so as to make it void for non-registration thereunder; that the receiver was under no obligation to insist that the removal of the fixtures by the mortgagee should be delayed until the end of the term; and, lastly, that the arrangement come to between the receiver and the mortgagee was beneficial to the debenture holders, and that the mortgagee had gained no undue advantage; and the Court of Appeal (Eady, M.R., Duke, L.J., and Eve, J.) affirmed his decision. It may be observed that the case seems to some extent to have turned on the fact that the mortgage was by

assignment of the lease which carried the fixtures, and that the result might possibly have been different if the mortgage had been by way of sub-lease. The plaintiff relied on the case of *Re Yates*, 38 Ch. D. 112, where it was laid down that a mortgagee of premises on which there are trade fixtures, has no right to sever them and sell them separately from the property to which they are affixed, and it was argued that if he does sever them they immediately revert to the mortgagor. But Eady, M.R., as to that said that the mortgagee had the right to the fixtures, and if he improperly severed them to the prejudice of the mortgagor he might be answerable for the damage so occasioned, but that was all.

MARRIAGE—DECEASED WIFE'S NIECE—VALIDITY—DECEASED WIFE'S SISTER MARRIAGE ACT 1907 (7 EDW. VII. c. 47)—(R.S.C., c. 105, s. 2).

In re Phillips, Charter v. *Ferguson* (1919) 1 Ch. 128. This was a summary application by originating summons on behalf of the administrator of an estate, to have it determined whether the marriage of a man to his deceased wife's niece is valid. It was admitted that the marriage with an aunt or uncle's wife was expressly prohibited, and that the Ecclesiastical Courts held that marriage with a wife's niece was prohibited by parity of reason; but it was claimed that as the statute of 1907 had removed the prohibition of marriage with a deceased wife's sister, it had impliedly removed the prohibition of marriage with a deceased wife's niece, who was one degree further off. Astbury, J., who heard the application, refused to give effect to this argument, and held that the marriage was within the prohibited degrees and therefore under the Marriage Act, 1835 (5-6 W. IV. c. 54) absolutely null and void. This is another instance of the necessity for a uniform marriage law for the whole Empire. Here we have a marriage declared unlawful in England, and a Canadian statute, R.S.C., c. 105, declaring that in Canada such a marriage is not invalid. And it also manifests the unsatisfactory character of the tinkering method of legislation. A marriage with a deceased wife's sister is made legal, and a marriage with a deceased husband's brother remains illegal, although by parity of reason both stand on the same footing. Then we have a marriage with a deceased wife's niece, though invalid in England, declared to be valid in Canada, but marriage with a deceased husband's nephew still remains unlawful, though both, by parity of reason, are on the same footing. How far the Parliament of Canada has authority to alter the Imperial legislation on this subject, even as far as Canada is concerned, in view of the Colonial Laws Validity Act, remains still to be decided.

ACCUMULATIONS—GENERAL RESIDUARY BEQUEST—ACCUMULATIONS BEYOND 21 YEARS—ACCUMULATIONS ACT, 1800 (39-40 GEO. III., c. 98)—(R.S.O., c. 110, s. 2).

In re Garside, Wragg v. *Garside* (1919) 1 Ch. 132. In this case a testator had devised certain real estate to his trustees on trust to apply a competent part of the income for the maintenance of his son Abraham, and, subject to certain provisions for the children of Abraham in case he had any, which he did not—he directed the estate to be held subject to the uses of his residuary estate, and he directed that his residuary estate should be applied in payment of debts and funeral expenses and legacies and certain annuities until his youngest child attained 21 and to accumulate the surplus income, and on his youngest child attaining 21 he devised and bequeathed his residuary estate to his son Frederick for life, and after his death to his children. Abraham died in 1918, and during his life part of the income of the estate first mentioned was applied for his maintenance and the surplus accumulated. The testator died in 1893, and the youngest son attained 21 in 1896. The accumulations at Abraham's death amounted to £12,000, and the question was who was entitled thereto. Astbury, J., who heard the application, held that the accumulations for a period of 21 years after the testator's death formed part of the capital of the residuary estate; but that the subsequent accumulations being subject to the Accumulations Act (39-40 Geo. III., c. 98) (R.S.O., c. 110, s. 2) were income and belonged to the tenant for life.

WILL—CONSTRUCTION—GIFT TO THREE AND TO THE "SURVIVORS OR SURVIVOR."

Powell v. *Hellicar* (1919) 1 Ch. 138. A nice little problem of construction was presented to Younger, J., in this case. A testatrix who died in 1858 gave her residuary estate to trustees upon trust for her nephew Charles and her two nieces Catharine and Mary for their respective lives only, and after their respective deaths then in trust for their respective children who should attain 21 or die under that age leaving issue, such last mentioned child or children taking *per stirpes* and not *per capita* and in case either of the nephew or nieces should die without leaving a child or children then the share of each of them so dying "shall from time to time go to the survivors or survivor in like manner as hereinbefore provided in regard to their original share or shares," and, subject to the trusts thereinbefore declared, the testatrix gave her residuary estate to one Hassell who predeceased the testatrix.

The nephew Charles died in 1882 without issue; Mary died in 1900, leaving three children who attained 21. Catharine died in 1917, a spinster. The question therefore arose who was entitled to Catharine's share; and this depended on the meaning to be placed on the words "survivors or survivor." The children of Mary claimed to be entitled to her original share as also the ⅓ which had devolved on Catharine on the death of Charles, notwithstanding that their mother had not survived Catharine. Their claim was contested by the next of kin (the report does not say of whom), probably of the testatrix, and of Catharine. The learned Judge held that, having regard to the context, the words "survivors or survivor" ought not to be construed literally but rather as meaning "other," as to construe them literally would have the effect of defeating the intention of the testatrix, the children of Mary were therefore held entitled to the fund.

GIFT OF CHATTELS INTER VIVOS—CHATTELS IN THE ACTUAL POSSESSION OF INTENDED DONEE—PAROL GIFT BY DONOR—DONEE APPOINTED EXECUTOR—CONFIRMATION BY WILL.

In re Stoneham; *Stoneham* v. *Stoneham* (1919) 1 Ch. 149. In this case a testator had two residences, one at Brighton and the other at a place called Beredens. At the latter place he had a quantity of old oak furniture, arms and armour. In February, 1910, the plaintiff with the consent of the testator went with his family to reside at Beredens, where he was visited from time to time by the testator, who generally resided at Brighton. The plaintiff alleged that in 1913 the testator when on a visit to Beredens verbally gave him the old oak furniture, arms and armour. He subsequently made his will in 1914, which, after confirming the gift he had made to the plaintiff "of the furniture and effects in his possession at Beredens," gave "all his furniture and effects . . . or such of them or parts thereof as he might not have given away to his executors" upon certain trusts and appointed the plaintiff one of his executors. The question at issue was whether in the circumstances there had been a complete gift of the chattels above referred to to the plaintiff. Lawrence, J., held that there had, and that the parol gift of the chattels in the actual possession of the donee needed no further act of delivery to complete the gift; and that the same principle applied though the gifts were in the donee's possession as bailee at the time of the gift.

COMPANY—QUORUM OF DIRECTORS—INTERESTED DIRECTOR—ONE TRANSACTION, TWO RESOLUTIONS—RESOLUTION REDUCING QUORUM.

In re North Eastern Insurance Co. (1919) 1 Ch. 198. This was a summary application in a winding-up proceeding to determine whether or not certain debentures, issued by the company in liquidation, were validly issued. By the Articles of Association of the company, no director was to be disqualified from contracting with the company, but no director interested in any such contract should be entitled to vote respecting the contract. The articles also provided that the directors might determine the quorum necessary for the transaction of business. Two of the directors, Young and Dobbie, made certain advances to the company, and at a board meeting, after referring to these advances having been made in consideration of debentures being issued as thereafter mentioned, a resolution was passed authorizing the issue of a debenture for £351 to Young who did not act or vote in relation to this resolution; and a second resolution was passed authorizing the issue of a debenture for £950 to Dobbie who did not act or vote in relation to this resolution. These debentures were issued accordingly, and were made equally a floating charge on the company's property, and authorized the holder to appoint a receiver, the moneys to be received to be applied *pari passu* on both debentures. Lawrence, J., held that the issue of the two debentures was one transaction in which both Young and Dobbie were equally interested, and that the resolutions were void for want of a disinterested quorum. At another board meeting at which all the directors were present except Dobbie, a resolution was passed for the issue of a debenture to Dobbie for £2,000 as security for all moneys due to Dobbie and Young not exceeding that sum. It did not clearly appear whether or not Young took any part in relation to this resolution, but evidence was offered that at the same meeting a previous resolution had been passed that the quorum of directors should be reduced to two. Lawrence, J., held that these resolutions were also invalid for want of a disinterested quorum; and that, even assuming the resolution for the reduction of the quorum had been passed, it was invalid because it was not passed in the interest of the company, but solely to enable Young and Dobbie to obtain an interest in the company's property. He says: "In my opinion the vote of the interested director in favour of a resolution to alter the quorum for such a purpose, really comes to the same thing as a vote by him in favour of the resolution conferring the interest on himself."

Reports and Notes of Cases.

Province of Manitoba.

COURT OF APPEAL.

Perdue, C.J.M., Cameron, Haggart and Fullerton, JJ.A., and Curran, J.] [45 D.L.R.

REIMER v. ROSEN.

Contract—Sale of land—Breach—Penalty or liquidated damages—Construction.

The question whether a sum mentioned in an agreement to be paid for a breach is to be treated as a penalty or as liquidated and ascertained damages is a question of law to be decided by the court upon a consideration of the whole instrument.

Leach, K.C., and *Sutton*, for plaintiff; *Andrews*, K.C., and *Burbidge*, K.C.

ANNOTATION ON ABOVE CASE FROM 45 D.L.R.

Penalties and Liquidated Damages in Contracts.

In cases where there is added to the contract a clause for the payment of a sum of money in the event of non-performance, the question arises whether the contract will be satisfied by its payment, or whether it will not. In the former case, equity will not interfere; in the latter it may.

The question always is, What is the contract? Is it that one certain act shall be done, with a sum annexed, whether by way of penalty or damages, to secure the performance of this very act? or is it that one of two things shall be done at the election of the party who has to perform the contract, namely, the performance of the act or the payment of the sum of money? If the former, the fact of the penal or other like sum being annexed will not prevent the court's enforcing performance of the very act, and thus carrying into execution the intention of the parties: *Howard* v. *Hopkyns* (1742), 2 Atk. 371, 26 E.R. 624; *French* v. *Macale* (1842), 2 Dr. & War. 269; *Roper* v. *Bartholomew* (1823), 12 Pri. 797, 147 E.R. 880. If the latter, the contract is satisfied by the payment of a sum of money, and there is no ground for proceeding against the party having the election to compel the performance of the other alternative.

Contracts of the kind now under discussion may be divisible into three classes:—

(i.) Where the sum mentioned is strictly a penalty—a sum named by way of securing the performance of the contract, as the penalty in a bond:

(ii.) Where the sum named is to be paid as liquidated damages for a breach of the contract:

(iii.) Where the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done.

Where the stipulated payment comes under either of the two first-mentioned heads, the court will enforce the contract, if in other respects it can and ought to be enforced, just in the same way as a contract not to do a particular act, with a penalty added to secure its performance or a sum named as liquidated damages, may be specifically enforced by means of an injunction against breaking it. On the other hand, where the contract comes under the third head, it is satisfied by the payment of the money, and there is no ground for the court to compel the specific performance of the other alternative of the contract. "There are," said Lord Bramwell, in *Legh* v. *Lillie* (1860), 6 H. & N. 165, 171, 158 E.R. 69; "three classes of covenants; first, covenants not to do particular acts, with a penalty for doing them, which are within the 8 & 9 Wm. III., c. 11: secondly, covenants not to do an act, with liquidated damages to be paid if the act is done, which are not within the statute: and thirdly, covenants that acts shall not be done unless subject to a certain payment." It will be convenient to consider the three classes of cases separately.

A penalty (strictly so called) attached to the breach of the contract will not prevent it from being specifically enforced.

"The general rule of equity," said Lord St. Leonards, in *French* v. *Macale*, 2 Dr. & War. 274-5, "is that if a thing be agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done. If a man, for instance, agree to settle an estate and execute his bond for £600. as a security for the performance of his contract, he will not be allowed to pay the forfeit of his bond and avoid his agreement, but he will be compelled to settle the estate in specific performance of his agreement. (The case referred to seems to be *Chilliner* v. *Chilliner* (1754), 2 Ves. Sen. 528, 28 E.R. 337.) So if a man covenant to abstain from doing a certain act, and agree that if he do it he will pay a sum of money; it would seem that he would be compelled to abstain from doing that act, and, just as in the converse case, he cannot elect to break his engagement by paying for his violation of the contract."

Thus, where two persons entered into articles for the sale of an estate, with a proviso that, if either side should break the contract, he should pay £100 to the other, and the defendant, by his answer, insisted that it was the intention of both parties that, upon either paying £100, the contract should be absolutely void, Lord Hardwicke nevertheless decreed specific performance of the contract to sell. *Howard* v. *Hopkyns*, 2 Atk. 371. In another case, the condition recited a contract for a settlement comprising a sum of money and also real estate: the penalty was double this sum of money, but had no relation to the real estate: the court granted specific performance of the contract embodied in the condition. *Prebble* v. *Boghurst* (1818), 1 Swans. 309, 36 E.R. 402. And where a father, in consideration of his daughters giving up a part of their interest in the property, agreed to make up their incomes arising out of it to £200 a year, and entered into a bond for the payment of such sum as

might be needful for that purpose, and the bond recited the contract, the court took this as evidence of the contract, and accordingly granted relief on the foot of it beyond the bond, *Jeudwine* v. *Agate* (1829), 3 Sim. 129, 57 E.R. 948; and in a case which went to the House of Lords, a contract (contained in the condition of a bond) to give certain property by will or otherwise, was held not to be satisfied by the penalty, but was specifically performed: *Logan* v. *Wienholt* (1883), 7 Bli. N.S. 1, 5 E.R. 674. See also *Butler* v. *Powis* (1845), 2 Coll. 156, 63 E.R. 679; *National Provincial Bank of England* v. *Marshall* (1888), 40 Ch. D. 112.

So, again, a contract not to carry on a particular kind of business within certain limits expressed in the condition to a bond can be enforced by injunction: *Clarkson* v. *Edge* (1863), 33 Beav. 227, 55 E.R. 354; *Gravely* v. *Barnard* (1874), L.R. 18 Eq. 518; *cf. William Robinson & Co.* v. *Heuer*, [1898] 2 Ch. 451, at 458.

The difference between penalty and liquidated damages is, as regards the common law remedy, most material. For, according to common law, if the sum named is not a penalty, but the agreed amount of liquidated damages, the contract is satisfied either by its performance or the payment of the money: *Anon.*, (1737), Hard. 390, 95 E.R. 252; *Lowe* v. *Peers* (1768), 4 Burr. 2225, 98 E.R. 160; *Hurst* v. *Hurst*, 4 Ex. 571; *Legh* v. *Lillie*, 6 H. & N. 165; *Mercer* v. *Irving* (1858), El. Bl. & E. 563, 120 E.R. 619; *Atkyns* v. *Kinnier* (1850), 4 Ex. 776, 154 E.R. 1429. As to the distinction between penalty and liquidated damages, see also *Elphinstone* v. *Monkland*, 11 App. Cas. 332, 346-348; *Clydebank* v. *Castaneda*, [1905] A.C. 6, 15; *Public Works Commissioner* v. *Hills*, [1906] A.C. 368, 375; *Wallis* v. *Smith*, 21 Ch. D. 243, 249, 258; *Pye* v. *British Automobile Commercial Syndicate*, [1906] 1 K.B. 425; *Diestal* v. *Stevenson*, [1906] 2 K.B. 345, 350; and *General Billposting Co.* v. *Atkinson*, [1908] 1 Ch. 537, at 544. But as regards the equitable remedy the distinction is unimportant: for the fact that the sum named is the amount agreed to be paid as liquidated damages is, equally with a penalty strictly so called, ineffectual to prevent the court from enforcing the contract in specie: *City of London* v. *Pugh* (1727), 4 Bro. P.C. 395, 2 E.R. 268; *French* v. *Macale*, 2 Dr. & War 269; *Coles* v. *Sims* (1854), 5 De G. M. & G. 1, 43 E.R. 768; *Carden* v. *Butler* (1832), Hayes & J. 112; *Bird* v. *Lake* (1863), 1 H. & M. 111, 71 E.R. 49; *cf. Bray* v. *Fogarty* (1870), Ir. R. 4 Eq. 544.

The simplest illustration of this is the ordinary case of a stipulation on the sale of real estate that if the purchaser fail to comply with the condition he shall forfeit the deposit, and the vendor shall be at liberty to resell and recover as and for liquidated damages the deficiency on such resale and the expenses. "A purchaser," said Lord Eldon in *Crutchley* v. *Jerningham* (1817), 2 Mer. 502, at 506, 35 E.R. 1032, "has no right to say that he will put an end to the agreement, forfeiting his deposit." *Cf. Long* v. *Bowring* (1864), 33 Beav. 585, 55 E.R. 496. Such a condition has never been held to give the purchaser the option of refusing to perform his contract if he choose to pay the penalty, nor to stand in the way of specific performance of the contract.

In *French* v. *Macale*, 2 Dr. & War. 269, Lord St. Leonards fully discussed the law as to compelling the performance of contracts of the kind under discussion. In that case there was a covenant in a farming lease "not

to burn or bate the demised premises or any part thereof under the penalty of £10 per acre to be recovered as the reserved yearly rent for every acre so burned." His Lordship appears to have considered this increased rent as in the nature of liquidated damages and not a penalty, but nevertheless he granted an injunction against the burning, saying after a careful review of the authorities that in every case of this nature the question is one of construction, and that the court will always interfere unless there is evidence of an intention that the act is to be permitted to be done on payment of the increased rent.

In one case a deed was executed dissolving a partnership between H. and L., and containing a recital that it had been agreed that the deed should contain a covenant by L. not to carry on the trade within one mile from the old place of business "without paying to H., as or by way of stated or liquidated damages," a sum named. In a subsequent part of the deed there was an absolute covenant not to carry on the trade within that limit, followed by a proviso that if L. should act contrary to or in infringement of that agreement he would immediately thereupon pay to H. the sum of £1,500 by way of liquidated damages. Notwithstanding the recital and the form used, it was held that L. was not entitled to break the covenant on paying the £1,500, and an injunction was granted: *Bird* v. *Lake*, 1 H. & M. 111.

The same view was put forward, though perhaps in slightly different language, by the Lords Justices in *Coles* v. *Sims*, 5 De G. M. & G. 1. That was a case in which there were mutual covenants between a vendor of part of his land and the purchaser of that part as to building on the sold and unsold parts, with a stipulation for payment of liquidated damages in case of breach of covenant. On an application for an interim injunction (which was granted), Knight Bruce, L.J., said (5 De G. M. & G. 1, at 9): "If I were now deciding the cause, I should probably come to the conclusion that in a case where a covenant is protected (if I may use the expression) by a provision for liquidated damages, it must be in the judicial discretion of the court, according to the contents of the whole instrument and the nature and circumstances of the particular instance, whether to hold itself bound or not bound upon the ground of it to refuse an injunction if otherwise proper to be granted: and that in the present case, the circumstances are such as to render it right for the court to grant an injunction." Turner, L.J., p. 10, added: "The question in such cases, as I conceive, is, whether the clause is inserted by way of penalty or whether it amounts to a stipulation for liberty to do a certain act on the payment of a certain sum."

Where the contract to do or not to do the act is distinct from the obligation to pay a sum of money, it seems that either the contract or the obligation may be sued on.

"Where a person," said Lord Romilly, M.R., in *Fox* v. *Scard* (1863), 33 Beav., 327, at p. 328, 55 E.R. 394, "enters into an agreement not to do a particular act and gives his bond to another to secure it, the latter has a right at law and equity, and can obtain relief in either, but not in both courts."

It is clear that the fact that the contract may be comprised in a bond does not of itself import any election to pay the money and refuse to do the

act: *Hobson* v. *Trevor* (1723), 2 P. Wms. 191, 24 E.R. 695; *Chilliner* v. *Chilliner*, 2 Ves. Sen. 528; *Clarkson* v. *Edge*, 33 Beav. 227. "The form of marriage articles by bond does not import election": *Roper* v. *Bartholomew*, 12 Pri. 797.

In the third class of contracts, which may be distinguished as alternative contracts, the intention is that a thing shall be done or a sum of money paid at the election of the person bound to do or pay.

In these cases the contract is as fully performed by the payment of the money as by the doing of the act, and therefore where the money is paid or tendered there is no ground for interference by way of specific performance or injunction.

The question to which of the three foregoing classes of contracts any particular one belongs is of course a question of construction. In considering it "the court must, in all cases, look for their guide to the primary intention of the parties, as it may be gathered from the instrument upon the effect of which they are to decide, and for that purpose to ascertain the precise nature and object of the obligation": *Roper* v. *Bartholomew*, 12 Pri. 797, at 821. Consequently each case depends on its own circumstances, but it may be noticed that "a court of equity is in general anxious to treat the penalty as being merely a mode of securing the due performance of the act contracted to be done, and not as a sum of money really intended to be paid": *Per* Lord Cranworth in *Ranger* v. *Great Western R. Co.* (1854), 5 H.L. Cas. 94, 10 E.R. 824; *Astley* v. *Weldon*, 2 Bos. & Pul. 346; and that, "on the other hand, it is certainly open to parties who are entering into contracts to stipulate that on failure to perform what has been agreed to be done, a fixed sum shall be paid by way of compensation": *Ranger* v. *Great Western R. Co.*, 5 H.L. Cas. 94.

On this question it is by no means conclusive that the contract may be alternative in its form, for nevertheless the court may clearly see that it is essentially a contract to do one of the alternatives: so that where there was a contract to renew a certain lease, with an addition of three years to the original term, or to answer the want thereof in damages, the court decreed specific performance of the lease, the second alternative only expressing what the law would imply: *Finch* v. *Earl of Salisbury*, Finch, 212.

The largeness or smallness of the sum named is no reason for considering it a mere penalty, unless that be the apparent intention: *Roy* v. *Duke of Beaufort* (1741), 2 Atk. 190, 26 E.R. 519; *Astley* v. *Weldon*, 2 Bos. & Pul. 346; *French* v. *Macale*, 2 Dr. & War. 269. But see *Burne* v. *Madden* (1835), Ll. & G. *t.* Plunk. 493; but where the amount of the penalty is small, as compared with the value of the subject of the contract, it has been considered a reason for treating the sum reserved as a mere penalty, and not in the nature of an alternative contract: *Chilliner* v. *Chilliner*, 2 Ves. Sen. 528.

In a case where a man, being very uncertain what estate he should derive from his father, entered into a bond in £5,000, on the marriage of his daughter, to settle one-third of such property, and the contract so to settle was recited in the condition of the bond, it was specifically performed in full, and not up to £5,000 only: *Hobson* v. *Trevor*, 2 P. Wms. 191. "Such agreement," said Lord Macclesfield, 2 P. Wms., at p. 192 (6th ed.), "was not to be the weaker but the stronger for the penalty."

The fact that the benefit of the contract would result to one person or

flow in one channel, and the benefit of the sum, if paid, in another, is a strong circumstance against considering the contract alternative in its nature: thus where, on a marriage, the husband's father gave a bond for the payment of £600 to the wife's father, his executors or administrators, in the penalty of £1,200 if he did not convey certain lands for the benefit of the husband and wife and their issue, Lord Hardwicke held that the obligor was not at liberty to pay the £600, or settle the lands, at his election, but compelled the specific performance of the contract to settle—partly on the ground that the £600 would not have gone to the benefit of the husband and wife and their issue, but of the wife's father and his representatives, and partly that the lands to be settled were worth much more than £600: *Chilliner* v. *Chilliner*, 2 Ves. Sen. 528; *Roper* v. *Bartholomew*, 12 Pri. 797.

Where the sum reserved is single, and the act stipulated for or against is in its nature continuing or recurring, as, for instance, particular modes of cultivating a farm, the sum will be considered as a security and not an alternative: *French* v. *Macale*, 2 Dr. & War. 269; and see *Roper* v. *Bartholomew*, 12 Pri. 797.

On the other hand, where the sum or sums made payable vary in frequency of payment or amount according to the thing to be done or abstained from, the courts have, in many cases, found that the payment is an alternative.

In *Woodward* v. *Gyles* (1690), 2 Vern. 119, 23 E.R. 686, a covenant by the defendant not to plough meadow land, and if he did, to pay so much an acre, was held not to be a fit case for an injunction restraining the ploughing: but the exact form of the covenant does not appear. "If," said Lord St. Leonards, *French* v. *Macale*, 2 Dr. & War. 284, "as in *Woodward* v. *Gyles*, 2 Vern. 119, and *Rolfe* v. *Peterson*, 2 Bro. P. C. 436, there is evidence of intention that the party is to be at liberty to do the act if he choose to pay the increased rent, of course the court cannot interfere, because this court never interferes against the express contract of the parties."

In *Rolfe* v. *Peterson*, *Ibid.*, the question was whether the payment was a penalty and so came within the doctrine of equitable relief against penalties: but of it Lord Loughborough said, in *Hardy* v. *Martin* (1783), 1 Cox, 26: "That was a case of a demise of land to a lessee to do with the land *as he thought proper:* but if he used it one way he was to pay one rent and if another way another rent." Similarly, a covenant in a farm lease not to do certain things "under an increased rent of," etc., was held to give the tenant the right to do the act on paying the increased rent: *Legh* v. *Lillie*, 6 H. & N. 165; and see *Hurst* v. *Hurst* (1849), 4 Ex. 571, 154 E.R. 1341; *Gerrard* v. *O'Reilly* (1843), 3 Dr. & War. 414; and a contract to renew perpetually "under a penalty of £70" was held alternative: *Magrane* v. *Archbold* (1813), 1 Dow, 107, 3 E.R. 639.

But where, in addition to the increased rent, there is a stipulation that the act provided against shall be a forfeiture of the covenanter's interest, the sum is held to be a security only and not an alternative: and consequently the court would restrain the doing of the act: *Barret* v. *Blagrave* (1800), 5 Ves. 555, 31 E.R. 735, as explained by Lord St. Leonards in *French* v. *Macale*, 2 Dr. & War. 278-9; and, of course, the usual form of lease giving the lessor

the right to re-enter and avoid the lease on breach of covenant offers no impediment to the enforcement of the covenants specifically: *Dyke* v. *Taylor* (1861), 3 De G. F. & J. 467, 45 E.R. 959.

Where the contract would be unreasonable unless it gives an option to the person stipulating to pay the sum, this will be a strong circumstance for treating the contract as alternative. So where a lady, administratrix of her husband, covenanted, under a penalty of £70, to renew a sub-lease as often as she obtained a renewal of the head-lease, and it appeared that the fines on the head-lease were raised on renewal, according to the then value of the property, so as to render her covenant unreasonable except upon the construction of its giving her an option, the House of Lords treated the contract as alternative: *Magrane* v. *Archbold*, 1 Dow, 107.

In the case of *Re Dagenham Dock Co.; Ex parte Hulse* (1873), L.R. 8 Ch. 1022, a company incorporated by Act of Parliament for making a dock, agreed with a land owner to purchase a piece of land for £4,000, of which £2,000 was to be paid at once, and the remaining £2,000 on a future day named in the agreement, with a provision that if the whole of the £2,000 and interest was not paid off by that day, in which respect time was to be of the essence of the contract, the vendors might repossess the land as of their former estate without any obligation to repay any part of the purchase-money.

The court held that this stipulation was in the nature of a penalty from which the company was entitled to be relieved on payment of the balance of the purchase-money, with interest,

In *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.*, [1915] A.C. 79, the appellants, who were manufacturers of motor tyres, covers and tubes, supplied these goods to the respondents, who were dealers, under an agreement whereby the respondents, in consideration of certain trade discounts, bound themselves not to tamper with the marks on the goods, not to sell or offer the goods to any private customers or to any co-operative society at less than the appellants' current list prices, not to supply to persons whose supplies the appellants had decided to suspend, not to exhibit or export without the consent of the appellants, and to pay the sum of £5 by way of liquidated damages for every tyre, cover, or tube sold or offered in breach of the agreement.

The respondents sold a tyre cover to a co-operative society below the current list price. In an action for breach of contract, it was proved that substantially the whole of the appellants' business in these articles was done through the trade; that in order to prevent underselling the appellants insisted upon all their trade customers signing agreements of this nature, and that the probable effect of underselling by any particular trade customer was to force their other trade customers to deal elsewhere. The Court of Appeal had held that this £5 agreed to be paid was a penalty: The House of Lords reversed this, holding it to be liquidated damages. The list of cases and authorities are carefully reviewed in this case.

Among the Canadian cases may be noted *Fisken* v. *Wride*, 7 Grant's Ch. 598.

Upon a contract for sale of an estate subject to a mortgage, it was stipulated that the vendor should execute a bond to save harmless and indemnify

the purchaser against the encumbrance, and a sum of £500 by way of liquidated damages for non-performance by either was to be paid to the other. The court held that this did not enable either party to repudiate the contract upon paying to the other £500, and in a suit by the vendor a reference as to title was directed, but without the usual declarations that the plaintiff was entitled to specific performance, reserving a right on the hearing on further directions to refuse specific performance in the event of the vendor's failing to effect, or endeavouring to effect an arrangement with the mortgagee, which the vendor alleged he could make. It was also held that the fact of the vendor being a partner in a mercantile firm who since the execution of the contract had made a composition with their creditors was not such an objection as could prevail against the claim to specific performance.

Kilmer v. *B. C. Orchard Lands Co.*, 10 D.L.R. 172, [1913] A.C. 319, was an appeal to the Privy Council from the British Columbia Court of Appeal. (2 D.L.R. 306.)

The question on the appeal arose out of a claim by the respondent company—an unpaid vendor of a tract of undeveloped land in British Columbia—to enforce a condition of forfeiture contained in the agreement for sale. By the terms of the agreement, the purchase-money was to be paid together with interest, by specific instalments at certain specified dates. Time was declared to be of the essence of the agreement. In default of punctual payment at an appointed date of the instalment of purchase-money and the interest then payable or any part thereof, the agreement was to be null and void and all payments made under the agreement were to be absolutely forfeited to the vendor; and the vendor was to be at liberty to sell the property immediately. The first instalment of $2,000 was duly paid on the execution of the agreement. The second instalment of $5,000 with interest as provided by the agreement was not paid on the day fixed for payment. The Privy Council held that the case was entirely within the ruling in the *Dagenham Dock* case (*supra*) and that the court should relieve against the strict letter of the contract, the arrears having been paid into court in the vendor's action brought shortly after the default for the enforcement of the forfeiture, particularly as the strict wording of the agreement would involve the right to confiscate sums of money increasing from time to time as the agreement approached completion, in case of default occurring upon subsequent instalments.

Massey v. *Walker* (1913), 11 D.L.R. 278, was a decision of the Court of King's Bench, Manitoba. The facts were as follows: The plaintiffs purchased from the defendant under an agreement of sale, the lands and premises therein described for the sum of $2,700 and made a payment of $100, being the first cash payment referred to in the said agreement, and entered into possession of the lands. The plaintiffs made default in payment of the principal and interest falling due under said agreement and by reason of the non-observance of the covenants, etc., the whole of the moneys secured by the agreement became due and payable. The court distinguished this case from *B. C. Orchards* v. *Kilmer*, 10 D.L.R. 172, in that in this case there was an express stipulation between the parties, providing and agreeing to a means by which the agreement might be put an end to. There was not an auto-

matic conclusion resulting from default, but the result of a deliberate agreement by which the mode of cancellation was arrived at. Notices of default were served according to the terms of the agreement in September, 1912, and the plaintiffs after receipt of such notices had made no move towards making their default or satisfactorily explaining their delay or asserting their right to redeem until the following March. The court held that the defendant was entitled to a declaration that the agreement had been cancelled.

Papineau v. *Guertin*, 15 D.L.R. 513, was decided by the Quebec Court of King's Bench in 1913. In this case a proprietor while he had a building in course of erection entered into a distinct contract with the builders to have work done, the doing of which caused the completion of the work originally contracted for to be delayed. The court held that he must be taken to have abandoned his right to enforce a purely penal covenant in the contract upon which he relied. The court, while realizing that the principles to be applied in the decision of the action differed from those which would be applied in English law, referred to *Public Works Commissioners* v. *Hills*, [1906] A.C. 368, and *Kilmer* v. *B. C. Orchards*, 10 D.L.R. 172.

Obituary

JOHN WINCHESTER, K.C., JUDGE OF THE COUNTY COURT OF THE COUNTY OF YORK, ONTARIO.

Judge Winchester died at his residence in Toronto, on the 8th inst., after an illness of a few months. His health had suffered from many years of hard work and assiduous attention to his arduous duties as a County Judge.

Mr. Winchester was born at Elgin, Scotland, August 27th, 1849. He came to Canada in early youth and was educated in Toronto, choosing the law as his life work, and was called to the Bar of Toronto in 1871. He served as a school trustee and alderman of the City of Toronto, and held other municipal offices. In 1882 he was appointed Registrar of the Queen's Bench Division of the High Court; and subsequently became Master in Chambers, on the death of his eminent predecessor, Mr. R. G. Dalton, Q.C., Four years later he was called inside the Bar.

Upon the death of Judge McDougall he was, in April, 1903, appointed Senior Judge of the County Court of the County of York. In this capacity he was called upon to hold a number of investigations, many of them of much interest in municipal circles.

Judge Winchester devoted himself without stint of labour and attention to the multifarious duties which pertain to the position of a County Judge. A good lawyer, of large experience of men and things, he gave great satisfaction to the public and the profession.

Bench and Bar

Law Society of Manitoba.

We are requested to make the following announcement as to persons selected to serve as Benchers of the Society for the next term of three years:—"The following persons resident and practising in the Eastern Judicial District of Manitoba, namely, Sir J. A. M. Aikins, K.C., G. W. Allan, K.C., E. Anderson, K.C., A. J. Andrews, K.C., I. Campbell, K.C., J. B. Coyne, K.C., R. W. Craig, K.C., A. E. Hoskin, K.C., W. R. Mulock, K.C., I. Pitblado, K.C., H. A. Robson, K.C., S. J. Rothwell, K.C., W. J. Tupper, K.C., C. P. Wilson, K.C., were elected as Benchers for the said term; E. A. McPherson, K.C., resident and practising in the Central Judicial District of Manitoba, was elected as a Bencher for the said term; S. E. Clement and H. E. Henderson, K.C., both resident and practising in the Western Judicial District of Manitoba, were elected as Benchers for the said term; A. W. Bowen, resident and practising in the Southern Judicial District of Manitoba, was elected as a Bencher for the said term; H. F. Maulson, K.C., resident and practising in the Northern Judicial District of Manitoba, was elected as a Bencher for the said term; and F. E. Simpson, resident and practising in the Dauphin Judicial District of Manitoba, was also elected a Bencher for the said term."

ERRATUM.

P. 129, 2nd line, for "a" read "no."