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INTERNATIONAL LAW.

In his preface to the third edition of Halls' International Law, dated August 1, 1889, the author said: "It would be idle to pretend that Europe is not now in great likelihood moving towards a time at which the strength of international law will be too hardly tried. Probably in the next great war the questions which were accumulated during the last half century or more will be given their answers at once. Some hates, moreover, will crave for satisfaction, much envy and greed will be at work, but above all, and at the bottom of all, will be the hard sense of necessity. Whole nations will be in the field; the commerce of the world may be on the sea to win or lose; national existence will be at stake; men will be tempted to do everything to shorten hostilities and tend to a decisive issue. Conduct in the next great war will certainly be hard; it is very doubtful if it will be scrupulous, whether on the part of the belligerents or neutrals, and most likely the next war will be great. But there can be very little doubt that if the next war is unscrupulously waged it will also be followed by a reaction towards increased stringency of law. In a community, as in an individual, passionate excess is followed by a reaction of lassitude and to some extent of conscience . . . It is a matter of experience that times in which international law has been seriously disregarded have been followed by periods in which the European conscience has done penance by putting itself under stricter obligations than those which it before acknowledged. There is no reason to suppose that things will be otherwise in future. I look forward, therefore, with much misgiving to the manner in which the next great war will be waged, but with no misgiving at all as to the character of

the rules which will be acknowledged ten years after its termination by comparison with the rules now considered to exist."

This passage, in the light of recent events, may almost be considered prophetic. What the author considered to be the probable course of events has been surprisingly fulfilled. But it may occur to some people that it looks very much like a solemn farce for nations in times of peace, and when they are in a sane mind, agree to laws which shall govern their conduct in relation to other nations, and then when the time of stress comes for observing and carrying into action the laws they have thus agreed to, to treat them as if they were non-existent. Laws which persons are at liberty to disregard whenever it suits their convenience or supposed necessities are really no laws at all in any real or proper sense of the term. Laws which have a merely moral force and obligation, are for the individual who has no sense of moral obligation, no laws at all. Neither can any international law be worthy of the name of law unless in some way it can be enforced, and its infraction punished.

It would be hard, however, to adequately punish a whole nation for a breach of international law, indeed, it might be said to be impossible; but though the nation which offends cannot as a whole be punished, it would be quite within the verge of possibility to punish the individuals of the offending nation who are officially responsible for authorizing the violation of the law.

The individual, and the family, and the nation, have been brought under the dominion of laws, and it still remains to bring nations in their relations *inter se* under the like dominion.

Hitherto no attempt has ever been made to vindicate international law except by the arbitrament of the sword the wielder of which has assumed both the office of judge and executioner. That, however, is not the method of the law as understood by British people. Our municipal law is administered on an entirely different plan whether in its criminal or civil aspect. There must be a fair trial of the accused

before an impartial tribunal; there must be every opportunity for making a defence. The executive and judicial functions are not to be combined; and the like principles ought also to be applied for the punishment of violations of international law.

Mr. Hall seems to have regarded, and no doubt rightly regarded, international law as a sort of agreement between nations to observe certain rules of action, subject to an implied proviso, that if at any time the observance of such rules were thought to conflict with their interest they would not observe them. But, unless it can be lifted to a more exalted and binding status than this, it is, as we have suggested, only law in name, but not so in deed or fact.

It is, therefore, to be hoped that the conclusion of this war may see a distinct advance in the binding and obligatory character of international law; and this, it appears to us, can only be effected by in some signal manner bringing to justice those who have authorized its violation during the present war.

The murder of the subjects of a belligerent in violation of international law ought not to be condoned, even though perpetrated in time of war. The criminals guilty of such crimes, whoever they be, and even though sitting upon a throne, should be made to answer for the offence before some impartial tribunal, and if found guilty should be hanged like any other murderer, then international law would become a reality.

MECHANICS' LIENS AND THE REGISTRY ACT.

We have lately had occasion to comment adversely on some decisions of the Appellate Division which appeared to us to fail to interpret correctly the provisions of the Mechanics' Lien Act (R.S.O. c. 140).

Some of these decisions appear to us more like judicial repeals of provisions in the Act than interpretations of them. One of the most recent cases to which this objection may be

made is *Sterling Lumber Co.* v. *Jones*, 36 O.L.R. 153, which, however, merely purports to follow prior decisions without attempting to examine whether such decisions are well founded.

The question involved is, the status of a mechanic's lien during that period which may intervene between the commencing of the work, or the furnishing of materials, and the period limited by the Act for registering the lien, or a certificate of *lis pendens* in an action to enforce the lien, and whether or not during that period it can be cut out by an alienation by the owner to a *bonâ fide* purchaser for value without actual notice of the lien. The Appellate Division decided that the lien may be defeated by the alienation of the property subject to the lien to a *bonâ fide* purchaser for value without notice.

A perusal of the Mechanics' Lien Act appears to disclose a solicitous intention to protect as far as possible mechanics and labourers from being deprived of the fruit of their labours by any subsequent transfer of the property which is the subject of the lien, but when its language, which seems plain and specific, comes to be submitted to judicial scrutiny, it is held to fall short of effecting its apparent intention.

In the first place, a mechanic or labourer doing work or furnishing materials is, from the commencement of the work, or the furnishing of the materials, declared by the Act entitled to a lien on the interest of the owner in the land on which the work is done or materials furnished, and the Act, sec. 2 (*d*), defines the "owner," to include any person or body corporate or politic, including a municipal corporation and a railway company having any estate or interest in the land upon or in respect of which the work or service is done, or materials are placed or furnished at whose request and

(i) upon whose credit, or
(ii) on whose behalf, or
(iii) with whose priority and consent, or
(iv) for whose direct benefit

work or service is performed, or materials are placed or furnished, and *all* persons claiming under him or them *whose rights are acquired after* the work or service in respect of which the

lier. is claimed is *commenced* on the materials furnished have been *commenced* to be furnished.

Having regard to this definition of "owner" we might fairly conclude that the Legislature exhausted its ingenuity in order to secure the lienholder the benefit of his statutory lien as against all alienees or representatives of the person who orders, or for whose benefit, or with whose privilege or consent, the work is done or materials are furnished. But, although the Legislature says "all persons claiming under him," "all" is interpreted to mean "some," but by what process, we confess we are utterly unable to understand. To make assurance doubly sure the Legislature seems to provide that except as therein expressly provided to the contrary liens are not to be defeated by the registration of transfers from the owner of land subject to the lien, for it expressly declares that, except as therein otherwise provided, the Registry Act shall not apply to any lien arising under the Act: S. 21.

If the Registry Act does not "apply to the lien," neither can the Act apply to any transfer from the owner of the land subject to the lien which would enable the transferee to defeat the lien, by reason of anything contained in the Registry Act: this seems an obvious proposition, but when the Court comes to consider this section they find it to mean exactly the opposite of what it says in express terms, and, so far from not applying, it is held that the Registry Act does apply, and may be invoked by purchasers acquiring an interest from the owner after the commencement of the work or furnishing the materials for which a lien has arisen, as against the lien, and so as to defeat it.

It cannot be pretended by the Courts that the Mechanics' Lien Act does in fact provide that the Registry Act shall apply in favour of a purchaser of an interest in the land on which a lien has arisen as against a lienholder, yet, nevertheless, although the Mechanics' Lien Act expressly says the Registry Act shall not apply to liens unless otherwise provided by the Act, yet the Courts have said that it shall, and have in fact assumed to apply it, and thereby denied the rights of lien-

holders as against subsequent grantees of the land subject to their liens. This looks to us very like an usurpation of legislative functions.

The principle on which the Act is plainly based is that as between lienholders and subsequent grantees their rights are to be determined independently of the Registry Act, and that the rule of equity *qui prior est in tempore potior est in jure* must prevail. This may, in the opinion of some, constitute a hardship on purchasers and mortgagees, but if it really does so, it is for the Legislature and not for the Courts to remove it.

But not only have the Courts repealed the provisions of the Mechanics' Lien Act above referred to, but they have further read into the Registry Act provisions which are not to be found therein. The Registry Act purports to regulate the priority of instruments dealing with land; it does not purport to, nor does it in fact, relate to, or deal with interests which are not created by "instruments." Let us glance at the sections which deal with the subject and which are supposed to give purchasers from an owner priority over existing mechanics' liens, and it will be found that none of them properly construed afford any ground whatever for saying that the registration of a transfer from the owner without actual notice will cut out an existing mechanics' lien." S. 71. (1). After the grant from the owner of land, and letters patent issued therefor, every *instrument* affecting the land or any part thereof shall be adjudged fraudulent and void against any *subsequent purchaser* or mortgagee for valuable consideration without actual notice, unless such *instrument* is registered before the registration of the *instrument* under which subsequent purchaser or mortgagee claims."

(Sub-sec. (2) has no bearing on the question now under consideration.) "S. 72. Priority of registration shall prevail unless before the prior registration there has been actual notice of the *prior instrument* by the person claiming under the prior registration."

It must be noted that both s. 71 (1) and s. 72 refer to *prior instruments*, and that a mechanic's lien which arises by virtue

of doing work and furnishing materials is the creature of the statute and does not arise, nor is it created by any "instrument" as that word is defined by the Registry Act, sec. 2 (*d*).

"S. 73. No equitable lien charge or interest affecting land shall be valid as against a registered instrument executed by the same person, his heirs or assigns; and tacking shall not be allowed in any case to prevail against the provisions of this Act."

This section obviously has no application because a mechanic's lien is a legal statutory lien and not in any sense an "equitable lien."

It has been assumed, perhaps without sufficient consideration, that a mechanic's lien is in some way created by an "instrument," whereas, as we have said, it is created by the operation of a statute on a certain state of facts, viz., the doing of work or furnishing materials for, or with the privity or consent of some person having an interest in the land on which such work is done, or materials furnished. It exists without any registration of the claim during the progress of the work or the furnishing of the materials and for thirty days after the last work is done or materials furnished and need not be and often is not evidenced by any instrument whatever.

It will then expire if the claim of lien is not registered. Registration of the claim of lien is required, not to create the lien, but to continue its existence. If registered in due time as prescribed by the Mechanics' Lien Act its prior unregistered life is not destroyed as if it had never existed, but it is simply prolonged and extended into a registered state of existence. If the registration is by a certificate of *lis pendens* it can only then be put an end to by a judicial sentence. If, on the other hand, the registration be merely of the claim, it will expire by effluxion of time unless an action be brought and a certificate of *lis pendens* registered within the prescribed time. The apparent intention of the Mechanics' Lien Act therefore is that a lien shall attach without registration, and cannot be defeated by any sale or transfer of the interest of the person whose interest is bound by the lien, but if that interest is sold or

transferred in any way during the existence of the lien the vendor or transferee must take *cum onere*. It is apparently assumed that a person buying land or advancing money on the security of land which is subject to a lien will go upon the land and make all necessary inquiries to satisfy himself whether or not there are any liens affecting the same. But the decisions of the Courts have certainly not given that effect to the Act but quite the reverse, and have thrown upon the lienholder the duty of notifying all persons dealing with the land of the existence of his lien by the immediate registration of his claim to a lien as soon as he begins to work or furnish materials, although the Act explicitly provides that his lien shall exist without any such registration both as against the person whose interest is primarily bound and all persons claiming under him.

"In the recent case of *Charters* v. *McCracken*, 36 O.L.R. 260, the learned Chief Justice of the Common Pleas remarks: 'The interpretation clauses of the Registry Act (sect. 2) do not provide expressly that the word 'instrument' shall include mechanics' liens; but do provide (clause (c) that it shall include 'every other instrument whereby land may be transferred, disposed of, charged, incumbered, or affected in any wise;' and sec. 21 of the Mechanics' and Wage Earners' Lien Act provides that 'where a claim is so registered the person entitled to the lien shall be declared a purchaser *pro tanto* and within the provisions of the Registry Act and the Land Titles Act, but except as herein otherwise provided those Acts shall not apply to any lien arising under this Act. 'So registered' means registered under the provisions of the Mechanics' and Wage Earners' Lien Act.

"The effect of the two enactments seems to be in such a case as this, that if the lienholder delays registration of his lien he does so at the risk of being cut out under the provisions of the Registry Act."

How the learned Chief Justice arrives at this conclusion he does not explain, and we confess we are at a loss to understand.

The Mechanics' and Wage Earners' Lien Act, as we have already pointed out, distinctly and explicitly provides that a mechanic's lien shall arise by doing work and without any registration of the claim of lien and that the Registry Act shall not apply to such liens except as therein otherwise provided; and the only express provision it makes to the contrary is that the lien shall cease to be operative unless registered within a certain specified time. How the lien becomes an "instrument" in the meantime the learned Chief Justice does not explain. Perhaps for the very obvious reason that it is inexplicable.

The reasoning of Mr. Justice Lennox in the same case appears to be equally inconclusive. He says: "The deed to Lucas was registered weeks before the registration of the plaintiff's claim for lien. I need not quote the provisions of the Act; but a careful reading of the provisions of the Mechanics' and Wage Earners' Lien Act, and the Registry Act, satisfies me that Lucas obtained priority over the plaintiff by priority of registration. This need not have been, of course. The plaintiff's claim *arose* long before this. He could have registered before Lucas, but did not do so. It is not in my opinion a question of when the claim arises, but the relative dates of registration that determines priority. The statute puts the means of protecting himself within the reach of a lien holder or supply man but the plaintiff did not avail himself to the full measure of its provisions." All of this is based on the false assumption that the lien before registration is an "instrument" and that the Registry Act applies to such instrument.

The vital question for determining priority in such a case is the very one that the learned Judge dismisses as immaterial, viz., *when* the respective claims arose, for the maxim of law *qui prior est in tempore potior est in jure* is the really governing principle.

From the passages we have quoted from the judgments delivered in *Charters* v. *McCracken* it would seem as if the learned Judges were of the opinion that the registration of the claim of a mechanic's lien in some way created the lien; but

that is an apparent fallacy; the registration is merely a notification to the public of the fact of the existence of the lien, the registration cannot in any way be said to create or give rise to the lien, any more than the registration of a certificate of *lis pendens* creates or gives right to a cause of action, or any interest in the land in question in the suit. It is a mere notice that a claim exists and is the subject of litigation.

But, after all, is it not reasonably clear that when s. 21 of the Mechanics' and Wage Earners' Lien Act declares that the Registry Act, except as the M.L.A. Act otherwise provides, shall not apply to mechanics' liens, it was not making any law but merely declaring an obvious fact? Suppose that the provision did not exist, how could the Registry Act be said to apply to mechanics' liens? The Registry Act is designed, as we have shewn, to meet the case of competing "instruments," or registered instruments competing with unregistered equitable claims. It contains no provisions whatever that we are able to find giving registered instruments any priority over prior legal statutory liens. To read the statute as if it contained such provisions is really to legislate, not judicially to interpret the statute as it stands.

We do not despair of seeing both the Mechanics' Lien and Wage Earners' Act and the Registry Act so far as mechanics' liens are concerned interpreted by the Courts according to their plain and obvious meaning.

NOTES FROM THE ENGLISH INNS OF COURT.

The question whether a company in which practically all the shareholders are enemy subjects can bring actions under the King's Courts has been discussed, but by no means satisfactorily answered, in the *Continental Tyre and Rubber Co. Ltd.* v. *Daimler Co. Ltd.*, which has by this time found its way into all the Law Reports. This is one of those cases in which an issue which is of absorbing interest to the public and the commercial world, has become confused in a welter of legal procedure and conflicting judicial opinion.

An action was commenced in October, 1914, by what is called a specially endorsed writ, to recover the sum of £5,605. The writ was issued by the company's solicitor on the instructions of the secretary. Under this procedure, the plaintiffs are entitled to obtain summary judgment unless the defendants can shew that, *primâ facie*, they have a right to defend The defendants asked for leave to defend on the grounds (1) that the company was in fact an alien company with whom it was illegal, without a license from the Crown, to hold any commercial intercourse, which included the payment of money for a trade debt; and (2) that the secretary had no authority either to instruct the company's solicitors to issue the writ in the action or to give a receipt for the money when recovered.

It will be seen that the Court was not bound to decide whether the plaintiff company was entitled to sue; a decision that the secretary had no authority, or that the defendant had a *primâ facie* right to defend, would suffice. The Court might refrain from settling the main and most interesting question. In the House of Lords, all the Lords were of opinion that the secretary had no authority *virtute officii* to commence actions on behalf of his company, and that, on the facts, he had no authority from the directors. That was quite enough to decide the case. The majority of the Court of Appeal and five members of the House of Lords were of opinion that it was a case which ought to be investigated, and not one for summary judgment. It remained for two very distinguished lawyers to pronounce certain *obiter dicta* to the effect that the plaintiff company as an illegal association ought not to be allowed to sue.

In the Court of Appeal, Lord Justice Buckley (as he then was), differing on this point from all his learned brethren, held that in the circumstances the company was an alien enemy, and could not sue in the King's Courts.

No less an authority than Lord Halsbury took the same view in the House of Lords. But the net result of the whole litigation is that the case "went off" on a mere side issue, and the main question is still undecided. At the same time the opinion

of Lord Parker in the House of Lords contains a number of propositions of law which are worthy of the closest study and of the great tribunal of which he is a member.

"Hammering" on the Stock Exchange.

The case of *In re Halstead* (32 T.L.R. 718) which was decided on July 28 by Mr. Justice Horridge, the Bankruptcy Judge, is likely to cause a considerable flutter on the London Stock Exchange. Everyone knows what is meant (in a popular sense) by a man being "hammered" on the Exchange, but it has fallen to Horridge, J., to point out the legal consequences of being declared a defaulter. A man is elected a member of the Exchange and re-elected annually. As a member he is bound by the rules. One of the rules provides that when he is unable to meet his liabilities he shall be publicly declared a defaulter. When in difficulties he makes a written request for this declaration to the secretary. Subsequently the declaration is publicly announced in the Exchange by the porter who has first arrested attention by striking his desk with a hammer. When a member is hammered his assets become vested in an officer known as the Official Assignee, who distributes them amongst the Stock Exchange creditors. Before the decision in the case above mentioned, it was well recognised that if bankruptcy supervened within three months of the fall of the hammer, the assignment to the Official Assignee was void as against the trustee in bankruptcy. It is unnecessary for present purpose to elaborate the well known principle of English bankruptcy law which makes such an assignment invalid.

The legal consequences of being "Hammered."

In the case of *re Halstead* bankruptcy supervened outside the three months, and the Official Assignee claimed the assets. But the trustee in bankruptcy disputed his title. He attacked it on two grounds. In the first place he said: "This division of a man's assets for the purpose of his Stock Exchange creditors *only* is contrary to the spirit of the bankruptcy law which

prevents there being a *cessio bonorum* in favour of one class of creditors to the exclusion of others." Mr. Justice Horridge ruled against that contention. The second contention was founded upon a very recent Act of Parliament relating to deeds of arrangement. A deed of arrangement, if it is to be valid must be registered. Prior to 1913, a deed of arrangement required to be registered if made for the benefit of *creditors generally;* but in that year an Act was passed making it necessary to register a deed in favour of *three or more* creditors. It was boldly contended on behalf of Halstead's trustee that Halstead's re-election as a member of the Exchange, the rules, and the letter requesting that he be declared a defaulter, taken together, amounted to a deed of arrangement which was void for want of registration. And this contention was accepted by the learned Judge, who, by a stroke of the judicial pen, appears to have upset one of the well established usages of the Stock Exchange. The case will probably be heard of in higher courts.

"A LENGTHY SUIT"—*Continued.*

The "lengthy suit" to which reference was made in the July number is still (August 25) proceeding. Towards the end of the summer term leading counsel for the plaintiffs, who have already spoken "in reply" for a fortnight, intimates that the case was getting on his nerves. Mr. Justice Eve granted an adjournment, and by deciding to resume the hearing on August 17, violated the sanctity of the Long Vacation. That counsel was done up, appeared from the fact that he had a violent quarrel with his opponent. Nor has the adjournment enabled them to adjust their differences, because they resumed the dispute only yesterday, each threatening to report the other to the Benchers of his Inn. The learned Judge, wisely deciding to take no side in the matter, adjourned for lunch at the critical moment.

THE JURISDICTION OF THE BENCHERS.

It is before the Benchers of his Inn that any member of the Bar guilty of unseemly conduct, in court or out of it, must be arraigned. Fortunately, the Benchers are seldom called

upon to exercise their jurisdiction, but cases do, unhappily, arise.

The last case, within the memory of the writer, when the Benchers had to intervene because of a dispute between counsel in court occurred some years ago. Two of His Majesty's counsel were engaged in the Lord Chief Justice's Court. During the luncheon interval, a wrangle took place as to where they should sit. The wrangle, unfortunately, developed into a kind of wrestling match. Other members of the Bar present intervened, but it was the usher of the court who saved the situation. With great presence of mind he prevented the learned Judge taking his seat until the quarrel came to an end, so there was no brawling "before the court itself." But the matter was too serious to stop there. The jurisdiction of the Benchers was involved, and as a punishment the names of the two disputants was screened in Hall for a short time. It is to the credit of the Bar of England that scenes such as this are few and far between. It may be supposed that learned counsel devote so much attention to forensic disputes that they have little energy or inclination for actual conflict with their professional brethren. Indeed, the comeraderie of counsel who are constantly against each other is most striking. I remember noticing—when I was a mere tyro in the profession—how two learned members of the Inner Bar who were against each other all day *coram* North, J., invariably walked home arm in arm in the evening!

Temple, August 25, 1916. W. VALENTINE BALL.

MATRIMONIAL JURISDICTION.

In the recent case of *Peppiatt* v. *Peppiatt*, 36 O.L.R., at p. 434, the following observation is made by the learned Chief Justice of Ontario, viz.:—"If marriages without the required consent are, as is contended they are, invalid, it was unnecessary to confer jurisdiction to declare and adjudge them to be invalid as the Supreme Court had that jurisdiction vested in it by the Judicature Act."

The jurisdiction of the Supreme Court of Ontario is by statute to be determined by the jurisdiction possessed by the English Courts of King's Bench, Chancery and Exchequer, at specified dates. Neither of these Courts had any matrimonial jurisdiction to pronounce the judicial annulment of marriages, it is therefore somewhat difficult to see how the Supreme Court of Ontario obtained it by the Judicature Act.

If the power to pronounce declaratory judgments is thought to give it, the opinion of Middleton, J., in *Reid* v. *Aull*, 32 O.L.R. 68, to the contrary, seems preferable. That learned Judge held that power to grant declaratory judgments is only exercisable in matters in which the Court has jurisdiction. When a Court has no matrimonial jurisdiction it cannot, of course, declare marriages null and void.

THE REPAIR OF FENCES.

The law concerning the repair of fences may not appear at first sight to be a matter of first-rate importance in these times when the average person has his mind occupied with very different things. But, unfortunately, experience shews that the fact of there being a common enemy in the field does not prevent neighbours from quarrelling. Apart from quarrels, there often arise serious questions of liability relative to fences and especially their repair, and in such times as these, when labour is scarce and money none too plentiful, the importance of such questions is augmented rather than diminished. Wherefore it is proposed in this article to deal briefly with the main points of law which affect neighbours in relation to their fences.

To deal with our subject logically, we ought to commence with the definition of a fence, as that is the way in which lawyers usually approach any legal topic. But everyone knows what a fence is, and knows also the main purposes of a fence. It is when we realise that one fence ordinarily serves the purpose, and that ordinarily that fence belongs to one man, that we begin to appreciate how nice questions may readily arise. Fo[illegible]he main

purpose of a fence is to prevent animals from straying on to the neighbour's land. *Sic utere tuo ut alienum non leadas* is the governing maxim. Lord Blackburn, when a judge of first instance, in the well-known case of *Fletcher* v. *Rylands* (1866, L. Rep. 1 Ex. 265, at p. 279), laid down the general proposition with great lucidity. "The person who for his own purposes," said his Lordship, "brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his own peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. The person whose grass or corn is eaten down by the escaping cattle of his neighbour is damnified without any fault of his own; and it seems but reasonable and just that his neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property."

In the last-mentioned case it was a question of confining water and not cattle, but the point is precisely the same. If a man has cattle on his land, and, of course, the rule applies to all kind of animals, he must keep them from wandering on to his neighbour's land, and, if he fails in this duty, he is liable for the consequences. To prevent this straying, he sees to it that his fences are in proper condition. This, indeed, is what is usually meant by the expression of "fencing obligations." But, as we have pointed out, there is ordinarily one fence between the adjoining lands. This brings us to the question of the ownership of fences.

The reader is, no doubt, familiar with what is said to be a presumption as to the ownership of a fence. It is often laid down that, where the ownership of a fence is in doubt, it is to be presumed that the fence is owned by the neighbour on the opposite side of the ditch. Needless to say, this rule only can apply where there is both a fence and ditch. In the country it is rare to come across a fence without a ditch at its side. But as often as not there is a ditch on both sides. However, let us take the simple case of a bank and hedge on the top of it between

the field of A. and the field of B. If the ditch is on A.'s side of the bank, the presumption is said to be that B. owns the bank, and, indeed, not only the bank, but also the ditch itself. The ground for this presumption—if, indeed, it can be called a presumption—is, according to the old case of *Vowles* v. *Miller* (1810, 3 Taunt. 137), that it is easier for a man about to make a bank by way of a fence to start digging from the extreme edge of his own land and to throw the excavated earth back towards his land until the ditch is of the desired depth. By doing this he is supposed to avoid the risk of trespass. In point of fact, this so-called presumption appears to us to be based on rather narrow and not very natural grounds. For when a bank and ditch have been in existence some years, the neighbour's cattle tramp down the edges of the ditch and feed on the herbage on the bank. In other words, if, indeed, this practice is really followed, the virtual result is to abandon the ditch in favour of the neighbour's cattle. Not only this, but there is a further reason for doubting the reality of this presumed practice, and that is that if the original maker of the bank and ditch, or his successors in title, wish to dig out the ditch from time to time—to scour it, as they say in some localities—he or they have to get over the fence to get to the work.

When we come to consider the matter, it seems to us that it would be a more reasonable presumption, based on a more probable hypothesis, that, when the bank and ditch were made, the owner commenced digging some feet back from the boundary of his land and threw the excavated soil towards his neighbour's land, thus keeping the ditch on his own side, and reserving in fact for himself the practical use of a greater part of his own property. However this may be, the Courts have certainly favoured the other view, and there are a number of cases in which the existence of the presumption has been recognised; amongst them we may refer the reader to the cases of *Noye* v. *Reed* (1827, 1 Man. & Ry. (K.B.) 63), and *Henniker* v. *Howard* (90 L.T. Rep. 157).

In practice, the question of repair of a fence between the lands of two adjoining owners is usually settled, at any rate in

agricultural districts, by a fair and sensible agreement between the owners. The nature of this agreement usually varies according to the locality. Sometimes the one owner or his tenant agrees to keep the ditch cleansed, while the other owner or his tenant undertakes the repair of the fence. In other cases the work is done jointly by a mutual contribution towards the labour. But where neighbours are reasonable there is little room for the lawyer. So we shall pursue our subject in another direction.

Apart from the point we commenced with—the repairing of fences to prevent the repairer's cattle straying and trespassing—is there such a thing as an obligation to repair a fence? This question must be answered in the affirmative. There are, indeed, several other grounds upon which a man may be made liable for not repairing a fence. We do not propose to deal with the position as between landlord and tenant. We shall deal only with cases where there is no relationship founded on tenure, between the parties. There are cases, as we shall see, where A.'s cattle or other animals getting through B.'s fence on to B.'s land and there suffering damage give A. a right of action against B. on the ground that B. ought at law to have kept his fence in such a state of repair that the animals could not have escaped from A.'s land.

The most usual case, apart from contract, where a man is held liable for not keeping his fences in such a state as to keep his neighbour's animals from wandering, arises under the Inclosure Acts. The general effect of these statutes was, of course, to allot in severalty lands which were formally subject to the old common field system of ownership, or which were part of the lord's waste subject to common rights. There were, of course, general Inclosure Acts, but, in the main, inclosures were carried out by local statutes. The method adopted was generally the same in every case, the variations being only in points of detail. The object aimed at was twofold. First, the partitioning of the lands amongst the various persons and classes of persons having various interests, estates, and rights in and over the lands. In carrying this into effect regard was had to the relative values of the respective interests, estates, and rights. Secondly, the laying out

in a convenient manner the respective allotments and the inclosing of these allotments. It is obvious that this latter object could only be effected by imposing on the allottees obligation to fence, at any rate, on some one side of the allotments assigned to them.

The face of the country two centuries ago was very different from what it is at present. We do not allude to the greater number of buildings, factories, and so forth, but to the great change that has come about by reason of the Inclosure Acts. The familiar sight of rectangular fields, with their hedges and ditches, was unknown two centuries ago. These rectangular fields are almost a sure indication that the fields were laid out under some inclosure award. This is more especially the case in agricultural parts and in older parts of the country—if we may use the expression. A surer sign that the land has been the subject-matter of an inclosure award is the existence of long, straight droveway roads, often unmetalled, which were designed as part of the inclosure scheme. When we remember that it was usual to impose in respect of each boundary a quasi-statutory obligation to fence and for ever afterwards to keep fenced each such boundary, we can appreciate that there are at the present day many owners bound to repair a fence for the benefit of their neighbors.

But fields laid out under inclosure awards have changed ownership many times over since the days of the Inclosure Acts. With changes of ownership, as, for instance, where one owner becomes possessed of what was originally the property of two adjoining allottees, the Inclosure Act obligations have disappeared. In many cases the fences themselves have been thrown down, and the passage of time has tended to destroy or remove those obligations. Moreover, although rather the exception than the rule, there were inclosures long before the advent of the Inclosure Acts. "Ancient inclosures" they were called. "Improvements" by the lord they were in theory. That is to say, the lord in fact granted, or was supposed to have granted, out parcels of his land in severalty to be inclosed by the grantee. In point of fact, as often as not, they were encroachments on the lord or on the commoner's rights. However that may be, this matter of inclosing, apart from the machinery of Inclosure Acts, brings us to

another form of obligation in respect to fences. This is what we may call the duty imposed by law to fence against a common.

At common law the tenants of the manor had a right—and in many cases still have that right—of enlarging animals upon the common. Inclosing was said to be against common right. (The word "common," used here, has a different sense to that in which it is used previously.) Every commoner having a right to enlarge his animals on the waste of the manor as of common right, a person who inclosed against common right, although such inclosing was legitimate and rightful, was supposed to take his rights subject to the commoners' rights, or, rather, to acquire his rights on such a footing that the commoners were not to be prejudiced. We do not suggest that the newly inclosed lands were still subject to the commoners' rights of depasturing on those lands, for, in point of fact, ordinarily an inclosure to be rightful predicated that a sufficient amount of pasture remained to the commoners for the full enjoyment of their pasturing rights. But, inasmuch as previously the commoners were not liable for trespass in allowing their animals to roam over the land in question, it was laid down that the owner of the newly inclosed land ought to keep up the fence between his property and the common. "The purpose of inclosing lands is that they may be used as cultivated land," said Chief Justice Cockburn in the case of *Barber* v. *Whiteley* (1865, 13 W.R. 774, at p. 775), "and since such a use of them, beneficial to the person to whom it is permitted, makes it the more necessary that the land should not be open indifferently to grazing animals, it is more likely that the obligation of preventing a trespass was imposed upon the occupier than on the tenants of the manor, who had rights of common on the waste, formerly exercisable without any such risks of distress, and who were a varying and uncertain body. Therefore, granting it to be a principle of law that where no obligation to fence is shewn upon either of two adjoining land-owners, each must take care his own cattle do not stray; yet a different legal relation arises where there is, on the one hand, a person inclosing from common land, and, on the other, a body of persons entitled by law exercise commonable rights on the land adjacent."

An obligation to fence, based on covenant, may, of course exist. But this obligation goes no further than the first covenantor. It is not an obligation that runs with the land, except, of course, as between landlord and tenant. If A. takes a conveyance of Whiteacre from B. and covenants to keep the fence in repair, and then conveys Whiteacre to C., B. cannot sue C. for failing to repair. A restrictive obligation undertaken by A. would be enforceable by B. against C. if C. had notice of it. But a covenant to repair a fence is not restrictive in this sense; it is an affirmative obligation.

Lastly, we ought to point out that, even in the case of the obligation to fence against a common, there are limits to the duty. In the more recent case of *Coaker* v. *Willcocks* (104 L.T. Rep. 769; (1911) 2 K.B. 124), the Court of Appeal held that the plaintiff, who was entitled to depasture animals on Dartmoor, could not call in question the defendant's having distrained *damage feasant* the plaintiff's sheep which had strayed over or through the defendant's fence. The defendant occupies a farm inclosed from the commonable land, and in effect admitted that he was bound to keep up the fence as against commonable animals, which, apparently, included sheep. But the plaintiff's sheep were of an imported breed, and it was shewn that a fence that would have kept out ordinary sheep was not sufficient to keep out sheep of this imported breed. The plaintiff's sheep were Scottish, and possessed of powers of jumping greater than those of the native-born breeds.—*Law Times* (*Eng.*).

Prevalence of accidents arising from ignorance in experience and carelessness of automobile owners and their families who undertake to act as chauffeurs in the management of their automobiles requires a change in the law. At present only those who drive a motor vehicle for hire are required to take out a license. This is very well so far as it goes, but it does not go far enough. No one should be allowed to drive a vehicle capable, in inexperienced or incapable hands, of causing the death of innocent citizens, without a certificate of qualification for such a position. A few days ago, in the city of Toronto, an automobile driven by a girl who was practising the art ran onto a sidewalk and killed a woman.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

CONTRACT—ILLEGALITY—PUBLIC POLICY—ASSIGNMENTS OF PRESENT AND FUTURE EARNINGS—COVENANT NOT TO LEAVE EMPLOYMENT WITHOUT LEAVE OF ASSIGNEE.

Horwood v. *Millar's Timber & Trading Co.* (1916) 2 K.B. 44. It is satisfactory to know that not only is a slave free who breathes the air of England, but that it is also impossible even for a man validly to contract himself into a state of slavery. In this case a contract somewhat of that description was in question. One Bunyan was an employee of the defendant company and had became indebted to various persons, and by the contract in question the plaintiff agreed with Bunyan to pay these debts in consideration of Bunyan's assigning to the plaintiff all salary and wages or other moneys then and thereafter during the continuance of the security to become due to Bunyan, under his employment with the defendant company or any other employers, but subject to a proviso for redemption; and Bunyan thereby covenanted that he would repay the plaintiff by certain instalments and that during the continuance of this security he would not quit the defendants' or other of his employer's service without the consent in writing of the plaintiff, and that he would not attempt to borrow money, or part with, sell, or pledge his furniture, chattels, or effects, or obtain or endeavour to obtain credit, or suffer any one to pledge his credit, except his wife for necessaries, or make himself or his property legally or morally responsible for any sum of money; and that he would not, without the plaintiff's consent, remove from his then dwelling house, or take any other dwelling house. The plaintiff brought his action for an account of moneys due to Bunyan as an employee of the defendant company and for payment thereof to him as assignee. The defendants contended that the agreement was void as being contrary to public policy as it deprived the assignor of the means of subsistence. The Judge of the County Court in which the action was brought upheld this contention and dismissed the action, and the Divisional Court (Lush and Sankey, JJ.) affirmed his decision, holding that the contract was entire and indivisible and bad as contrary to public policy in that it unduly and improperly fettered the assignor in the free disposal of his labour.

LANDLORD AND TENANT—LESSEE HOLDING OVER—TENANCY FROM YEAR TO YEAR—TERMS IMPLIED BY LAW IN ABSENCE OF AGREEMENT—ASSIGNEE OF REVERSION—RIGHT TO SUE FOR BREACHES OF IMPLIED COVENANTS.

Wedd v. *Porter* (1916) 2 K.B. 91. This was an action by the assignee of the reversion to enforce an implied covenant by the lessee. The defendants, with another person since deceased, were lessees of the premises in question for the term of fourteen years, which expired by effluxion of time, and the defendants continued in possession. The lease had contained express covenants for repair, and for working the land according to the most improved system of husbandry in that part of the county where the demised premises were situate. It was agreed between the defendants and the lessor that the terms of the old lease should not apply and that the rent should be reduced to a specified sum. The action was brought for breach of an implied covenant to keep the buildings wind and water tight and to cultivate the land in a husbandlike manner. The action was referred to a referee who found that the defendants held over as tenants from year to year subject to the covenants contained in the lease so far as the same were applicable. The Divisional Court (Ridley and Shearman, JJ.) set aside the finding holding that the plaintiff as assignee of the reversion had no right to sue for breach of covenant because the lease was not under seal and, therefore, 32 Hen. 8, c. 34 (R.S.O. 155, s. 4) did not apply: but the Court of Appeal (Eady, Pickford and Bankes, L.JJ.) reversed that decision on the ground that 32 Hen. 8, c. 34 was confined to leases in writing, because no such provision was necessary in regard to implied covenants in respect of the breach of which the reversioner was entitled to sue at common law. Their Lordships also held that the parties having agreed that the terms of the lease should not apply to the new tenancy and having made no other provision to the contrary, there then arose an implied obligation on the part of the overholding tenants to farm the land in a husbandlike manner and to keep the buildings wind and water tight, which obligation the plaintiff as assignee of the reversion was entitled to enforce.

LAND—RIGHT OF SUPPORT—HOUSE BUILT OVER PARTLY WORKED MINE—FURTHER WORKING OF MINE BY NEW OWNER—SUBSIDENCE—LIABILITY OF MINE OWNER.

Manley v. *Burn* (1916) 2 K.B. 121. The plaintiff was the owner of a piece of land lying over a coal mine and of a house

built thereon in the year 1895. Prior to 1885 the owner of the mine excavated the upper strata under the plaintiff's house, but left pillars sufficient to support the land and house of the plaintiff. In 1885 the defendant became the lessee of the mine, the lower strata of which he worked till 1908, when his work resulted in the subsidence of the surface with resulting damage to the plaintiff's house. The action was brought to recover damages for the injury so occasioned. The only question in dispute was as to the measure of damages, the defendant contending that he was not liable for any damages attributable to the prior working of the mine: but Coleridge, J., who tried the action, rejected this contention, and gave judgment for the whole damage sustained, and the Court of Appeal (Eady, and Pickford, L.JJ., and Bray, J.) affirmed his decision, as Eady, L.J., remarks, "But for the defendant's wrongful act there would have been no damage to the plaintiff, and to that wrongful act all the damage must therefore be attributed."

ACTION—JUDGMENT FOR PRICE OF GOODS SOLD—JUDGMENT UNSATISFIED—SUBSEQUENT ACTION AGAINST ANOTHER PERSON FOR PRICE OF SAME GOODS—NO JOINT CONTRACT—TRANSIT IN REM JUDICATAM—INTERLOCUTORY OR FINAL ORDER.

Isaacs v. *Salbstein* (1916) 2 K.B. 139. This was an action to recover the price of goods sold and the defence raised was that the plaintiff had previously brought another action against other parties and recovered judgment for the price of the same goods which remained unsatisfied. It was not claimed that these other parties were joint contractors with the present defendants nor that they were principals or agents of the present defendants. In these circumstances the learned Judge of the City of London Court held that the claim was merged in the judgment and therefore that the present action would not lie. But the Divisional Court (Lush, and Atkin, JJ.) reversed his decision, and directed a new trial; and the Court of Appeal (Eady, Pickford, and Bankes, L.JJ.) affirmed the judgment of the Divisonal Court, being of the opinion that the maxim of *transit in rem judicatam*, in the circumstances, had no application, and that the prior judgment not being against a joint debtor with, nor a principal or agent of, the defendant in the subsequent action, and being unsatisfied, it formed no bar to the present action. The question was raised

whether the order of the Divisional Court was a final or interlocutory order, and the Court of Appeal held that it was interlocutory.

INSURANCE (MARINE)—PERIL OF MEN OF WAR—RESTRAINTS OF PRINCES—SHIP PUTTING INTO NEUTRAL PORT TO AVOID CAPTURE—LOSS OF VENTURE—PROXIMATE CAUSE OF LOSS.

Becker v. *London Assurance Co.* (1916) 2 K.B., 156. The Court of Appeal (Eady, Pickford, and Bankes, L.J.J) have in this case affirmed the decision of Bailhache, J. (1915) 3 K.B. 410 (noted ante vol. 51, p. 491).

NEGLIGENCE—WARRANTY BY LESSEE OR MANAGER OF THEATRE —INJURY TO MEMBER OF AUDIENCE BY ACTOR DURING THEATRICAL PERFORMANCE.

Cox v. *Coulson* (1916) 2 K.B. 177. The plaintiff in this case had attended a theatrical performance at a theatre of which the defendant was lessee and manager, during the performance an actor discharged a pistol, which should have contained only a blank cartridge, but by some unexplained mischance there happened to be a second cartridge of smaller size in the pistol which, when the pistol was fired, struck the plaintiff and inflicted a serious wound on her wrist. On the trial of the action the County Court Judge held that it was an implied term of the contract between the plaintiff and defendant that all persons connected with the performance of the play should exercise reasonable care so that members of the audience should not be exposed to any danger which could be avoided by the exercise of such reasonable care and he gave judgment for the plaintiff for £50. The Divisional Court (Bailhache and Sherman, JJ.) was divided in opinion, Bailhache J., being of the opinion that the defendant impliedly warranted that the actors should not be guilty of negligence, and Sherman, J., thinking that the implied warranty extended no further than that no part of the performance should be in itself of a dangerous nature, the judgment of the County Court Judge was therefore affirmed. The Court of Appeal (Eady, Pickford, and Bankes, L.J.J.) however were of the opinion that the implied warranty found by the County Court Judge was too wide, and that the true relation between the plaintiff and defendant was that of inviter and invitee, and that the defendant owed the plaintiff a duty to use reasonable care that she was

not exposed to unusual danger, the existence of which the defendant knew or ought to have known, and therefore that there must be a new trial to inquire into the supervision exercised by the defendant over the firearms used in the theatrical performances, and the ammunition provided for them, and with the loading of the pistols.

PRACTICE—PARTIES—ACTION OF TORT—UNINCORPORATED SOCIETY—LIBEL PUBLISHED IN SOCIETY'S JOURNAL—"PERSONS HAVING THE SAME INTEREST IN ONE CAUSE OR MATTER"—LEAVE TO SUE ONE OR MORE MEMBERS ON BEHALF OF ALL—RULE 131—(ONT. RULE 75).

Mercantile Marine Service Assoc. v. *Toms* (1916) 2 K.B. 243. This was an action to recover damages for an alleged libel published in the journal of an unincorporated society, and the plaintiffs applied for leave to sue certain officers of the association on behalf of all the members, who numbered about 15,000. Low, J., dismissed an appeal from a district registrar refusing the application; and the Court of Appeal (Eady and Pickford, L.JJ.) affirmed his decision. Eady, L.J., points out that all the members of the association cannot be said to have the same interest in the matters in question, because, *primâ facie*, only those who published or authorized the publication of the alleged libel would be liable. He also intimates that Rule 131 (Ont. Rule 75) has no application to actions of tort.

PRIZE COURT—NEUTRAL VESSEL—CONTRABAND CARGO—INTENTION TO SUPPLY COAL TO ENEMY WARSHIPS—FALSE PAPERS—FRAUD—ABANDONMENT OF VOYAGE—DISPOSAL OF CARGO OTHERISE THAN TO ENEMY—CAPTURE ON RETURN VOYAGE—RESTITUTION—COSTS.

The Alwina (1916) P. 131. This was a prize case. The ship in question was a neutral vessel which left a British port with a cargo of coal consigned to a firm in Buenos Aires, but in fact intended for a German warship. On arriving at Teneriffe the master found that he was suspected, and abandoned the voyage and sold the cargo. In the course of her return voyage with a cargo of ore shipped from a Spanish port, she put in at Falmouth and was seized as a prize. Evans, P.P.D., held that, in the circumstances, the vessel must be restored to its owner, and that although the general rule is that when contraband cargo is discharged the liability of a vessel to seizure is at end, yet if the neutral vessel by means of

false papers or other deceitful practices to elude capture has carried a contraband cargo to the enemy, then it remains subject to confiscation on its return voyage: but he held that, as in the present case notwithstanding the deceit practised the delivery of the cargo to the enemy had in fact been abandoned, the vessel became exempt from capture. At the same time the use of false papers was a sufficient ground for ordering the owners to pay the cost and expenses of and incident to the capture and of the prize proceedings.

PRIZE COURT—CARGO—ANTE BELLUM SHIPMENT—PRODUCE OF ENEMY SOIL—SEIZURE—NEUTRAL CLAIMANTS.

The Asturian (1916) P. 150. This was another prize case. The facts were as follows. Before the outbreak of the war between Great Britain and Turkey a consignment of sultanas, the produce of Turkish vineyards owned by the consignors, was shipped by a Greek company having its head office in Athens and a branch at Smyrna, on a British vessel at Smyrna. On the arrival of the vessel in England the cargo was seized as a prize. The consignors contended that they had a neutral domicile, that the business at Smyrna was a mere branch and that in regard thereto they were entitled to the benefit of the privileges of the Turkish capitulations system whereby their character as owners of the vineyard was that of neutral subjects. But Evans, P.P.D., said that the capitulations were irrelevant, and that on the broad principle that the goods in question were produce of land in an enemy country they were subject to confiscation although shipped before the war.

HUSBAND AND WIFE—CRUELTY—CONDONATION—ACTS OF SUBSEQUENT CRUELTY SUFFICIENT TO DISPLACE CONDONATION.

Moss v. *Moss* (1916) P. 155. This was an appeal from a judgment of Horridge, J., granting a wife a judicial separation on the ground of cruelty. The principal acts of cruelty relied on and which would have justified the granting of a separation had been condoned by the wife continuing to live with her husband, but further acts of cruelty subsequently committed by the husband which, though not sufficient in themselves to justify a separation, were relied on by the wife as being sufficient to displace the condonation of the prior acts of cruelty, and the Court of Appeal (Lord Cozens-Hardy, M.R., and Phillimore, L.J., and Sargant, J.) were of the opinion that

the subsequent acts taken with those condoned justified the wife in a reasonable apprehension of bodily harm had the effect of displacing the condonation. In delivering the judgment of the Court of Appeal, Phillimore, L.J., discusses the difference between condonation of adultery and like offences which entitle a party to a divorce, and the condonation of offences which only entitle the injured party to a separation.

VENDOR AND PURCHASER—OBJECTION TO TITLE—NOTICE OF TRUST—RECITAL OF TRUST—PRACTICE OF CONVEYANCERS.

In re Chafer & Randall (1916) 2 Ch. 8. This was an application under the Vendors and Purchasers Act. By the deed under which the vendor acquired the property in question it was recited that Forbes, the grantor, held the property in question as trustee partly for himself and partly for the grantee and that they had agreed to a partition of the lands whereby the lands in question were to be conveyed to the grantee. The purchaser delivered a requisition asking how Forbes became trustee and if by deed calling for an abstract and production thereof. The vendor refused to comply with the requisition, relying on the practice of conveyancers. Younger, J., upheld the vendor's contention and the Court of Appeal (Lord Cozens-Hardy, M.R., and Phillimore, L.J., and Sargant, J.) affirmed his decision, being of the opinion that as the recital as to the nature of the trust was clear and unambiguous the purchaser was not entitled to call for any further information about it.

WILL—BEQUEST TO CHILDREN WHEN THE YOUNGEST ATTAINS THIRTY—CHILDREN DYING UNDER THIRTY NOT EXCLUDED—CONTINGENCY NOT IMPLIED—REMOTENESS.

In re Lodwig, Lodwig v. *Evans* (1916) 2 Ch. 26. The question in this case related to a will whereby the testator gave his residuary estate to trustees upon trust to sell and convert and out of the proceeds pay a weekly sum to her daughter-in-law Katie until her youngest child attained the age of thirty years, and then to divide the trust funds between Katie and her children in equal shares, and in the event of any grandchildren dying leaving lawful issue surviving, the share of the parent so dying was to be divided between his or her children. The heir and sole next of kin of the testator claimed that the trusts of the residue except as regards the payment of the weekly

sum to Katie were void for remoteness, because rightly construed it was contended that the gift to the grandchildren was subject to the implied contingency of their attaining thirty years. But Sargant, J., held that there was no such implied contingency but merely a postponement of the period of distribution, and therefore that the gift to the grandchildren was valid; and that the interests of the grandchildren who survived the testator were vested and not contingent on their attaining thirty years, and with this conclusion the Court of Appeal (Lord Cozens-Hardy, M.R., and Pickford, and Neville, L.JJ.) concurred.

TRUSTEE — ADMINISTRATION — ORIGINATING SUMMONS—ACCOUNTS—DEFENCE OF STATUTE OF LIMITATIONS.

In re Williams, Jones v. *Williams* (1916) 2 Ch. 38. In this matter on the return of an originating summons a reference had been directed to take the accounts of a trustee. On the reference the trustee brought in voluminous accounts, and after the vouching of the accounts had proceeded for some time, the defendant for the first time claimed the benefit of the Statute of Limitations Trustee Act 1888 (51-52 Vict. c. 59) s. 8, (R.S.O. c. 75, s. 47). The Master did not decide whether or not the defendants were entitled to the benefit of the defence, but simply certified what would be due if the defence were allowed, and what would be the state of the accounts if the defence were disallowed. On the case coming on for further directions, Neville, J., held that the defence ought to have been set up on the return of the originating summons, and that it was too late to set it up in the Master's office. But see Holmested's Jud. Act, p. 940.

WILL—CONSTRUCTION—GIFT TO TENANT FOR LIFE—REMAINDER TO TESTATOR'S CHILDREN—GIFT OVER IF CHILD SHOULD "DIE WITHOUT LEGAL ISSUE"—PERIOD OF DIVISION.

In re Roberts, Roberts v. *Morgan* (1916) 2 Ch. 42. In this case a will was in question whereby the testator gave his widow an estate for life in his real and personal property and directed that after his death his property should be divided among his four children in manner specified. And he then declared that "if any of my said daughters or sons die without leaving legal issue, his, her, or their share shall be divided between the survivor or survivors of him or her or them so dying without leaving legal issue" as tenants in common. All

the four children survived the widow and afterwards two of them died leaving legal issue, and the other two died without leaving issue. Sargant, J., who tried the action, held that the gift over, or divesting, was only to take effect if a child of the testator died without leaving legal issue in the lifetime of the testator's widow, and that in the event which happened the children all took vested and indefeasable estates.

DEED—CONSTRUCTION—ESTATE FOR LIFE BY IMPLICATION

In re Stanley, Maddocks v. *Andrews* (1916) 2 ch. 50. In this case the construction of a deed of settlement made in 1860, was in question whereby the settlor settled household property of his own in trust for his daughters, Mrs. Morgan and Mrs. Rees "for and during their joint lives as tenants in common and not as joint tenants" and from and immediately after the decease of the survivors of them . . . then to the use of their (*sic*) respective child or children of the said Mrs. Morgan and Mrs. Rees share and share alike as tenants in common and not as joint tenants." Mrs. Morgan died in 1887 leaving children, and Mrs. Rees died in 1914 without having had a child. Sargant, J., who tried the action, held that on the death of Mrs. Morgan, Mrs. Rees took a life estate by implication in Mrs. Morgan's moiety; and that on the death of Mrs. Rees the children of Mrs. Morgan took the whole of the settled property. The argument that the words "and not as joint tenants" precluded the implication of a life estate in favour of Mrs. Rees, and of any right of the children of Mrs. Morgan to the share of Mrs. Morgan, was overruled as being opposed to the authorities.

COMPANY—WINDING-UP—ARREARS OF DIVIDENDS ON PREFERENTIAL SHARES—SURPLUS ASSETS—NO DIVIDENDS DECLARED.

In re New Chinese Antimony Co. (1916) 2 Ch. 115. This was a liquidation proceeding. The company in liquidation had issued preferential shares partly paid up, and the preference shareholders were entitled to a cumulative preferential dividend of ten per cent. per annum on the amount paid, and in a winding-up to have the surplus assets applied first, in paying off their capital, and, second, in paying the arrears (if any) of the preferential dividend up to the commencement of the winding-up. The articles provided that no dividends should be declared except out of profits. No dividends were ever

declared, and the last balance sheet prior to the winding-up showed a loss to date of £9,000. At the time the winding-up order was made the company had a large quantity of antimony on hand which had since so risen in price that the assets were sufficient to cover the loss, and pay all arrears of preferential dividends, and also a dividend upon the ordinary shares. On an application by the liquidator for directions, Neville, J., held that the arrears of preferential dividends payable could not be limited to dividends actually declared, but that the preference shareholders were entitled to dividends on their shares from the date of their issue up to the commencement of the winding-up.

EASEMENT — WATER — UNDERGROUND PIPE — SEVERANCE OF TWO TENEMENTS—APPURTENANCES—IMPLIED GRANT OF EASEMENT—TWENTY YEARS' ENJOYMENT—JUS TERTII.

Schwann v. *Cotton* (1916) 2 Ch. 120. In this case the owner of two parcels of land, A and B, in 1893, openly laid a pipe through A to B for the purpose of conveying water to B from a well on a parcel of land C, owned by a stranger, but there was no evidence of any grant by the owner of C, or of the circumstances in which the pipe came to be laid, but the water so conveyed was used for the purposes of the house and garden on parcel B. The owner of parcels A and B died in 1902 leaving a will devising parcel A to the defendants' predecessors in title, and devising parcel B to the plaintiffs' predecessors in title. The existence of the underground pipe was unknown to the defendants, who acquired title without actual notice of its existence. In 1914 in the course of making a new roadway the pipe running through parcel A was discovered, and taken up, and the supply of water to parcel B was thereby cut off. The action was brought to restrain this interference with the plaintiffs' easement. It was contended on behalf of the defendant that the easement claimed was precarious because the source of supply was not constant, but Astbury, J., who tried the action, found that the well was fed by percolation from an underground stream and was continuous, and therefore the easement claimed might be, and in fact was, the subject of an implied grant, and passed to the devisee of B as an appurtenance of parcel B. The defendant further claimed that there was no evidence of any grant from the owner of parcel C, but Astbury, J., held that even if the defendant was entitled to rely on the *jus tertii* he had failed to establish it, inasmuch as *primâ facie* the twenty

years' enjoyment of the water though not known to the present owner was known to his predecessor in 1893 and was therefore not clam; and moreover, the mere fact that the artificial or apparently permanent stone well from which the water was derived was fed by percolation did not necessarily prevent the acquisition of an easement to take water from that well.

INDEMNITY—ASSIGNMENT OF AGREEMENT TO INDEMNIFY TO PRINCIPAL CREDITOR—AMOUNT RECOVERABLE AS INDEMNITY.

British Union and National Ins. Co. v. *Rawson* (1916) 2 Ch. 152. The plaintiff company in this case had recovered judgment against a married woman in respect of a liability against which the defendant had agreed to indemnify her, and she assigned to the plaintiffs the right of indemnity. The defendant contended that the married woman had no separate estate and was therefore never in a position to pay the debt, and had not suffered, and could not suffer any loss or damage, and therefore nothing was recoverable, and also that the benefit of the contract of indemnity was not assignable or, at all events, could only be assigned to someone who had discharged the liability for which the indemnity was given. But Astbury, J., who tried the action, overruled these contentions, holding that the agreement for indemnity was separate property and was assignable to the principal creditors, and that the assignees were entitled to recover the full amount of their claim.

WILL—DEVISE TO A. AND "HIS MALE HEIRS FOR EVER"—WORDS OF LIMITATION OR PURCHASE—ESTATE IN TAIL MALE—RULE IN SHELLEY'S CASE.

Silcocks v. *Silcocks* (1916) 2 Ch. 161. In this case Younger, J., determined that a devise of real estate to A. "and his male heirs forever," was governed by the rule in Shelley's case; and that the devisee took an estate in tail male either in possession, or remainder, according to whether the devise was not, or was, preceded by a prior life estate to some other person.

PRACTICE—SET-OFF OF COSTS—LIEN OF SOLICITOR—INDEPENDENT ACTION—ACTION ARISING OUT OF THE SAME TRANSACTION—RULE 989—(ONT. RULES 665, 666).

Puddephatt v. *Leith* (1916) 2 Ch. 168. Two independent actions had been brought in respect of matters arising out of

the same transaction, and the question arose as to whether a set-off of costs of one action against those in the other might be ordered notwithstanding the existence of the solicitors' lien. Younger, J., held that under Rule 989 he had a discretion, and inasmuch as the claim in one action might have been set up by way of counterclaim in the other, it ought to be allowed and be so ordered.

APPOINTMENT—DIVIDENDS—DECLARATION OF DIVIDEND AFTER DEATH OF TENANT FOR LIFE—TENANT FOR LIFE AND REMAINDERMAN—APPORTIONMENT ACT 1879 (33-34 VICT. c. 35) ss. 2, 5.—(R.S.O., c. 156, ss. 2, 3, 4).

In re Muirhead, Muirhead v. *Hill* (1916) 2 Ch. 181. After the death in July, 1915, of a tenant for life of certain shares in a railway company, the company in September, 1915, declared a dividend on such shares for the half year preceding June 30, 1915, and it was held by Eve, J., that the apportionment Act, 1870 (see R.S.O. 156, ss. 2, 3, 4) applied and that the personal representative of the deceased tenant for life was entitled to the whole of these dividends. As under the Apportionment Act the tenant for life was entitled to the dividends accrued or to accrue down to the date of her death in July, 1915, and the remainderman to those which should subsequently accrue, and the mere fact that the dividends were not actually declared until after the death of the tenant for life was held not to defeat her right.

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—CONTRACT CONTAINED IN LETTER—SUBSEQUENT CORRESPONDENCE NOT AMOUNTING TO A NEW CONTRACT.

Perry v. *Suffields* (1916) 2 Ch. 187. This was an action for the specific performance of a contract for the sale of land. The contract was contained in letters, and after a complete contract had been arrived at by letters, the parties continued correspondence on which the purchaser relied as affording evidence that there had been no completed contract between the parties, but Sargant, J., held, and the Court of Appeal (Lord Cozens-Hardy, M.R., Pickford, L.J., and Neville, J.) agreed with him, that where there is a complete contract arrived at by letter, any subsequent correspondence not amounting to a new contract cannot, without the consent of both parties, get rid of the contract which they have already made.

WILL—LIMITATION TO A. OR LIFE, REMAINDER TO B. IN TAIL—CODICIL GIVING A. AN EXCLUSIVE POWER BY DEED OR WILL TO APPOINT TO A CLASS—REVOCATION OF CODICIL—RESTORATION OF CODICIL ON PROMISE OF A, NOT TO INTERFERE WITH B'S SUCCESSION—APPOINTMENT BY A. TO HIMSELF—FRAUD—INVALID APPOINTMENT.

Tharp v. *Tharp* (1916) 2 Ch. 205. This was an appeal from the decision of Nevilie, J. (1916) 1 Ch. 142, (see ante p. 191), and in the course of the argument an agreement was arrived at and the appeal was dropped.

WILL—CONSTRUCTION—EXECUTORY GIFT VESTING—PERIOD OF DISTRIBUTION—DEFEASANCE.

Ward v. *Brown* (1916) 2 A.C. 121. This case, though an appeal from the Supreme Court of Jamaica, deals with a point of general interest. The testator by the will in question directed that the trustees therein named should stand possessed of his residuary estate in trust to pay out of the income certain annuities to his wife and children, and that immediately after the death of his wife they should stand possessed thereof for all his children in specified proportions. It further provided that "if any child shall die in my lifetime *or after my decease* leaving a child or children who shall survive *me*, then in every such case such last-mentioned child or children shall take, and if more than one equally, the share which his or her parent would have taken of and in the residuary trust funds if such parent had survived me." It will be noticed that the latter clause provides for the death of a child before "or after the decease" of the testator, and also apparently contemplates that the child of such deceased child, in order to take, must have been born in the testator's lifetime. On the part of the appellants it was claimed that the will should be construed as if the words "or after my decease" were struck out, and on the part of the respondents it was claimed that the will should be construed as if the word "me" were struck out. The Judicial Committee of the Privy Council (Lords Dunedin, Shaw, and Sumner, and Sir Edward Barton) came to the conclusion that the effect of the will was to give a vested interest to each of the children living at the testator's death, subject to a defeasance in favour of the child or children of any such child dying prior to the period fixed for distribution, *i.e.*, the death of the testator's widow.

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Ont.] [24 June, 1916.

PIONEER BANK v. CANADIAN BANK OF COMMERCE.

Guarantee-Sale of Goods—Payment of Draft—Guarantee by Bank—Bill of Lading—Goods at Personal Risk of Consignor.

M., of Toronto, ordered two cases of oranges from a purchasing agent in California and the Pioneer Bank cashed a draft on M. for the cost on receipt of the following telegram from the Bank of Commerce: "We guarantee payment of drafts on J. J. M. with bills of lading attached covering two cases oranges, etc." The goods were shipped and consigned by the bill of lading to "Mutual Orange Distributors (shippers), notify J. J. M." A note was printed on it to deliver without B/L on written order of shippers. When the goods arrived M. refused to accept them and an action was brought on the bank's guarantee.

Held, affirming the judgment of the Appellate Division, (34 Ont. L.R. 531) Idington, J., dissenting, that the Bs/L were not in a form to protect the defendant bank; that they left the goods under the entire control of the shippers and the guarantors were deprived of its security on the responsibility of its customer or of the carrier; and that, though an action against M. for the price of the goods might have succeeded, that on the guarantee must fail.

Appeal dismissed with costs.

Saunders, K.C., for appellant; *R. C. H. Cassels*, for respondent.

N.B.] [June 24, 1916.

DONOVAN v. EXCELSIOR LIFE INSURANCE CO.

Life Insurance—Delivery of Policy—Condition—Instructions to Agent.

D. applied to an insurance agent in St. John, N.B., for $1,000 insurance on her life. The application was accepted,

the premium paid and the policy forwarded to the agent with instructions to reconcile a discrepancy between the application and the doctor's return as to D.'s age before delivering it. The agent then ascertained that the age of 64 given in the application should have been 65, and obtained from D. the additional premium required for a $1,000 policy at that age. A new policy was sent by the head office to the agent who did not deliver it on hearing that D. was ill. She died a few days later. The beneficiary brought action for specific performance of the contract to deliver a policy for $1,000 or for payment of that amount. A condition of the policy sent to the agent was that it should not take effect until delivered, the first premium paid and the official receipt surrendered during the lieftime and continued good health of the assured.

Held, affirming the judgment of the Supreme Court of New Brunswick (43 N.B. Rep. 580), and of the trial Judge (43 N.B. Rep. 325), Davies and Brodeur, JJ., dissenting, that there was no completed contract of insurance between the company and D. at the time of the latter's death as the condition as to delivery and surrender of the receipt during the lifetime and continued good health of the assured was not complied with. *North American Life Assurance Co.* v. *Elson*, 33 S.C.R. 383, distinguished.

Appeal dismissed with costs.

Daniel Mullin, K.C., for appellant; *Fred. R. Taylor*, K.C., for respondents.

Ont.] GILLIES v. BROWN. [June 24.

Debtor and Creditor—Surety—Statute of Frauds—Advances to Company—Third party's promise to pay.

B., a director of a mining company advanced money for the company's purposes which G., the president and largest shareholder, orally agreed to pay.

Held, affirming the decision of the Appellate Division, (35 Ont. L.R. 218) which reversed the judgment for the defendant at the trial (34 Ont. L.R. 210), Idington, J., dissenting, that this was not a promise to pay a debt of the company and void as a contract by virtue of the fourth section of the Statute of Frauds; that G. was a primary debtor for

moneys advanced by B. and liable to the latter for their repayment.

Appeal dismissed with costs.

Tilley, K.C., and *H. S. White*, for appellant; *McCullough*, for respondent.

Bd. of Rway. Commrs.] [June 24.

INGERSOLL TELEPHONE CO. v. BELL TELEPHONE CO.

Railway Board—Powers—Railway Act and Amendments—Bell Telephone Co.—Use of Long Distance Lines—Compensation—Loss of Local Business—Competing Companies—Special Toll.

Under the provisions of the Railway Act and its amendments by 7 & 8 Edw. VII., ch. 61, the Railway Board had power to authorize a charge in addition to the established rates of the Bell Telephone Co. as compensation for the use of its long distance lines. Idington, J., contra.

By said Acts the Board is authorized to provide compensation to the Bell Telephone Co. for loss in its local exchange business occasioned by giving independent companies long distance connection. Davies and Idington, JJ., contra.

The Board has power also to authorize payment of a special rate by companies competing with the Bell Co. who obtain long distance connection though non-competing companies are not subjected thereto. Idington, J., contra.

Appeal dismissed with costs.

Gamble, K.C., for appellants; *Cowan*, K.C., and *Hoyles* for the respondents.

Ont.] DORAN v. MCKINNON. [June 24.

Contract—Purchase of Bonds—Statute of Frauds—Memorandum in Writing—Correspondence—Relation of Documents—Parol Evidence.

In an action against D. claiming damages for breach of contract to purchase bonds, a telegram from D. to his partner was produced saying, "I absolutely bought them yesterday after our 'phone conversation they agreeing to our terms."

Held, that parol evidence was properly received to shew that terms had been stated by D. over his signature, that they

were the only terms and were those referred to in the telegram and the two constituted a sufficient memorandum in writing to satisfy the Statute of Frauds. *Ridgeway* v. *Wharton*, 6 H.L. Cas. 238, and *Bauman* v. *James*, 3 Ch. App. 508, followed. Duff, J., dissented.

Appeal dismissed with costs.

Rowell, K.C., and *J. E. Lawson*, for appellant; *J. B. Clarke*, K.C., for respondents.

Obituary.

HON. MR. JUSTICE GARROW.

Honorable James Thompson Garrow was a Justice of the First Division of the Appellate Court of Ontario. He died on the 31st day of August, A.D. 1916, at Allandale, while on his way to Toronto from his summer residence on the Georgian Bay.

Mr. Garrow was of Scottish descent, and was born at Chippawa, Ontario, on the 11th of March, 1843. He was called to the Bar in Michaelmas term, 1869, and practised his profession at Goderich until his appointment to the Bench. His practice was a general one but he specialized on the equity side. His merits as a sound general lawyer soon obtained recognition, and his services were for years retained on one side or the other of every important case in the County of Huron. He was also well known at the Assize Courts and Appellate Courts.

Mr. Garrow lived a useful and busy life, taking part in municipal matters, being Reeve of Goderich town for many years and Warden of the County. In politics he was a Liberal and represented the West Riding of Huron for twelve years, and during said period was for some time a member of the Cabinet without portfolio.

He was appointed Q.C. (Dom.) in 1885 during the Marquis of Lansdowne's administration and by the Provincial Government in 1899. On the 20th day of March, 1902, he became a Justice of the Court of Appeal for Ontario, which position he held with great advantage to the public till the time of his death.

Mr. Justice Garrow was a man of great natural gifts and as a Judge he maintained the highest traditions of the Bench and was known to the profession as a learned and able jurist, shewing marked ability and careful research. A marked feature of his character was his gentle courtesy. On the Bench he was a model

of courtesy, patient and dignified. As in a measure representing the Bar, we venture to draw special attention to this, as these attributes are of more importance in the administration of justice than some seem to think.

A gentleman of the highest character, he enjoyed the respect and confidence of the public and profession in a marked degree and will be missed by a large circle of friends as well as by the Bar who thoroughly appreciated his sterling worth.

War Notes.

We are glad to see that the Lieutenant-Governor of Manitoba, recently appointed, issues a proclamation, in which, after referring to the general day of Thanksgiving, he adds the following:—"And whereas, while we have much cause for thankfulness for the success which has attended the efforts of our brave sons in arms and of those of the Empire and its Allies, we are, by reason of war, in the midst of grave dangers, great sufferings, losses and bereavements, existing and threatened, in the which our people need the aid and comfort of Almighty God." The proclamation continues as follows:—"Now, therefore, we do invite and request the people of our Province of Manitoba, in their homes and devoutly assembling in the churches of our cities, towns and rural districts for Thanksgiving, to unite also in confession and in supplication to Almighty God that, in His grace and mercy, He may grant to us and to our armies immediate help to the end that our enemies may be overcome and our nation established in righteousness, and that those among us who suffer and who mourn may be comforted."

We had recently to take exception to a proclamation issued in the Province of Ontario for leaving out that which the Lieutenant-Governor of Manitoba has so happily and appropriately expressed, and we have great pleasure in calling attention to his words.

It is abundantly clear that the wastage of the war is much greater and cannot be supplied by the present volume of recruits.

The inefficiency of the volunteer system is now admitted by the fact that various Boards and officials have been appointed to deal with recruiting, in the vain attempt to get those men to enlist by moral suasion who have so far declined to accept the

burden and responsibility of their citizenship. We venture to predict that all this machinery will largely be a failure unless there is added to it the power of compulsion.

A classification of those who can and should serve their country in the present crisis in various capacities is, of course, a primary necessity, and we presume the machinery now in process of construction will be primarily used for that purpose. But the experience of the past is a sufficient indication that something more is required. Those who so far have not enlisted in some branch of service, may now, after all that has been said to them in public on the subject, not unfairly be called slackers or shirkers; and it is sufficiently evident that they intend to remain so. Compulsion is therefore a necessity. Their refusal to take up their share of the burden shows that they are dead to any sense of duty or to any feeling of shame.

It is said that there are political and racial difficulties in the way of compulsion. Possibly there are, but these difficulties have to be faced by those who have undertaken the burden of carrying to a successful issue our share in the great struggle in which the Empire is engaged. If those in authority would do their duty fearlessly and effectively, they would find that the country is at their back in compelling every man to do his bit in that position or branch of service most suitable to his capacity.

We are sorry to learn that Charles A. Moss, K.C., well known in Toronto and its Province, has been seriously wounded in France.

Ward Wright, of the firm of Rowell, Reid, Wood & Wright, Toronto, has also been wounded, but it is believed not seriously. They are said to be doing well.

Both of these left Canada as Majors in the 81st Overseas Battalion; and both relinquished their rank to enable them to get to the firing line. Captain Moss again received his majority shortly afterwards. We trust that good news may soon come as to their wounds.

As we go to press the news comes that Major Moss has died of his wounds at a hospital in Rouen, France, on the 25th instant. A grievous loss to the Bar and his many friends. We tender our deepest sympathy to the family of this distinguished lawyer, and gallant soldier.