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APPEALS TO THE KING IN COUNCIL.

A correspondent, whose letter we publish elsewhere, writes in terms of severe condemnation of the Lords of the Privy Council, who in giving judgment in the case of *Gordon* v. *Horne*, on appeal from the Supreme Court of Canada, did not accept as credible the statements of a witness whose credibility was accepted by the trial judge and by the judge of the Supreme Court.

It is necessary for a proper understanding of the discussion to note some features connected with it which do not appear in the letter above referred to. Our correspondent does not refer to the fact that the Supreme Court of British Columbia, consisting of three judges (as appears from the report in 42 S.C.R. 240), reversed the judgment of the trial judge. They apparently did not feel pressed with any necessity to defer to his view of the evidence, but, on the contrary, after a review of the evidence, disagreed with him. They were surely nearer the scene of action than even the Supreme Court of Canada, which our correspondent says also carefully considered the evidence and declined to interfere.

The result, therefore, seems to be that three judges in British Columbia, two in the Supreme Court of Canada, and four in England disagreed with the trial judge as to his view of the evidence, whilst only three judges of the Supreme Court of Canada (out of five) either declined to differ with the conclusion of the judge who had heard the evidence, or perhaps agreed with that conclusion.

The contention of our correspondent is that where the question at issue is simply one of fact that is not an issue which should be removed from the jurisdiction of the trial judge, who had the opportunity of hearing the witness, of testing his veracity, and of forming the safest opinion as to how far his evi-

dence was to be relied upon. This view of the case is undoubtedly the correct one, and the one generally acted upon. It is, however, equally true that there may be something in the surroundings of a case, in the bearing of other facts upon the statements made by the witness, to which the trial judge impressed by the personal demeanour of the witness, perhaps unconsciously influenced by some personal or local feeling, which the best of judges, being human, are liable to, did not give the weight to which such consideration were entitled; but which would influence a court dealing with the case presented in the cold light of the general principles which control the actions of men, and especially of men in business.

The law affecting this question is clearly set forth in the admirable judgment of Mr. Justice Riddell in *Beal* v. *Michigan Central R.R. Co.*, 19 O.L.R. 504. We quote his language on page 506:—

"Upon an appeal from the findings of a judge who has tried a case without a jury, the court appealed to does not and cannot abdicate its right and its duty to consider the evidence. Of course, 'when a finding of fact rests upon the result of oral evidence, it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons:' *Lodge Holes Colliery Co.* v. *Mayor, etc., of Wednesbury*, [1908] A.C. 323, at p. 326, per Lord Loreburn, L.C. And 'when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses:' *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704, at p. 705, per Lindley, M.R., giving the judgment of the Court of Appeal: *Bishop* v. *Bishop* (1907) 10 O.W.R. 177.

"But where the question is not, 'What witness is to be believed?' but, 'Give full credit to the witness who is believed, what is the inference?' the rule is not quite the same. And if it appear from the reasons given by the trial judge that he has misapprehended the effect of the evidence or failed to consider a material part of the evidence, and the evidence which has been

believed by him, when fairly read and considered as a whole, leads the appellate court to a clear conclusion that the findings of the trial judge are erroneous, it becomes the plain duty of the court to reverse these findings.*

In the case under discussion, as already pointed out, it would appear that the judges of the Supreme Court of British Columbia, where the action was tried, held an opinion similar to that expressed by the Privy Council. If this is correct our correspondent's contention, so far as this case is concerned, fails on his own shewing, even though he correctly states the general principles involved. However that may be, the case stated by our correspondent seems to us a very slight foundation, certainly so when attendant circumstances are disclosed, upon which to base a somewhat unfair and uncalled for reference to advisers of His Majesty in Council and comparing them in this with their Canadian brethren. Comparisons are generally odious, and should be especially so in the present case where we are justified in assuming the presence of the highest capacity and unfailing rectitude.

As to this phase of the subject we have no desire to decry the ability or learning of the Canadian Bench, but we must look the matter in the face and not be led away by partiality or prejudice. It is an obvious and well-known fact (1) that our judges in this country are selected almost entirely from the supporters of the Government then in power, and selected, moreover, for political reasons; (2) that the best men at our Bar are not generally chosen, partly for the reasons above referred to, and partly because the honour of the position is out-weighed by the inadequacy of their emolument. On the other hand the English Bench is selected from the very best men at the English Bar—men of the highest legal training that the world affords—the pick of a population of sixty millions, as compared with our six millions. We have had occasion to criticize from time to time the spirit of the "little Englander." Is there not some-

*See also cases cited in Holmested & Langton, p. 43, and *Price* v. *Bryant*, 4 O.A.R. 542.

thing equally "insular" in the tone of those who, for so-called patriotic reasons, indulge in the p ·ot cry, "Canada for the Canadians." What we need in Canada is the best thoughts, the best methods and the best men we can copy or get from any other land, and use them for the development of a great country, the success of which would be retarded by such short-sighted, prejudiced policy.

We hope it is not necessary at the present day to enter into any defence of the right of appeal to the Privy Council. That right is a constitutional one, and it is not only a right but a privilege. It might be necessary to guard against any abuse of it, and it might add to the value and influence of the court if there was habitually attending it a Canadian jurst who could guide its decisions in cases when local customs and local terms, familiar to ourselves but unknown to others, form part of the matter in question. That, however, is not the case in the matter before us.

Whether it would be possible to frame a rule that would exclude such questions as the veracity of a witness or other simple issues of fact, from the purview of a Court of Appeal, for in this respect the Privy Council is in exactly the same position as our Supreme Court, we very much doubt. Judges at Ottawa are just as likely to be mistaken in a case such as this as judges at Westminster.

With all due respect to our correspondent he must make a stronger case before he can induce us to accept the conclusions he would arrive at from the general tenour of his letter.

THE INTERNATIONAL CONFERENCE ON BILLS OF EXCHANGE.

From the first it was highly improbable that the adoption of any universal law with regard to bills of exchange, at any rate so far as Great Britain and the United States were concerned, would be the outcome of the conference which took place last year at The Hague, to which we re ·red shortly recently. In

the instructions to the British delegates it was stated that they were not to hold out any hope that the English rules of law were likely to be substantially modified and brought into conformity with continental rules, particularly in cases where the English rule prevails, not only in the United Kingdom, but also throughout the English-speaking world. But there were certain points on which the English law was doubtful, or where there were points of divergence between the different English-speaking communities, and in such cases it was pointed out to our representatives that it would evidently be desirable if a uniform rule could be arrived at, as the uniformity of the rule would be probably of more importance than the nature of the rule itself.

The attitude of this country, and the reasons therefor, were defined before the commencement of the conference, this position being made quite clear by Sir George Buchanan in his final speech in the following words:—

"However, it is our duty to affirm that it is impossible for our Government to go further or to depart from the attitude which it has taken from the beginning of this conference. It is no question of national pride or obstinacy which has given rise to this attitude, but the necessity of safeguarding the interests of our mercantile community. A law which governs more than 120,000,000 people—including the United Kingdom, the British colonies, and most of the States of the United States of America—without counting the vast population of the Indian Empire—cannot be modified without disturbing long-settled commercial relations and without creating divergencies in legislation among the members of the Anglo-Saxon family. It is possible that among the rules of English law there are some which are antiquated and inconvenient, but in its main lines our law does but incorporate the usages of our commerce. It is not an arbitrary law imposed by the Legislature on the commercial community; the Legislature has but given the sanction of law to the usages of our commerce and trade, and in modifying that law we should upset long established customs. There are other reasons in the domain of law which raise equal difficulties. We have no separate droit de change. We have no tribunals of commerce. We draw no distinction between traders and non-traders. Our commercial law is an integral part of our common law, and it is the

ordinary civil courts which give effect to its provisions in the same manner as they give effect to ordinary debts and obligations."

And practically the same attitude was taken up by the United States.

After a full discussion, a draft convention and draft uniform law applying only to bills of exchange and promissory notes payable to order was unanimously accepted by the delegates of more than thirty nations, and, as our representatives state, this draft uniform law approaches the English law rather more nearly than any existing continental code, but the points of divergence are numerous and, in some cases, of far-reaching importance. It has, however, no application to promissory notes payable to bearer or to cheques, and Sir M. D. Chalmers and Mr. F. H. Jackson, who may be said to have represented English law and commerce respectively at the conference, have prepared a critical memorandum dealing with the proposed uniform law and comparing its provisions with the English law, and making certain recommendations for its amendment in this country.

The points on which the two laws differ are placed by this memorandum in four categories as follows:—

"(*a*) There are certain points which the English rule is antiquated and inconvenient, or where the law is obscure.

"(*b*) There are other points where the English and the foreign rule appear to be equally convenient, and where it might be well to adopt the foreign rule for the sake of uniformity after it has been enacted by the Legislatures of a large number of other important mercantile countries, more especially if, after consultation with our colonies and the United States, we find that they will be inclined to follow suit.

"(*c*) There are points of difference depending on differences in the underlying systems of which supplement the special code as to bills of exchange—the rules, for instance, which depend on the existence of tribunals of commerce, and the special procedure in force in countries where a sharp distinction is drawn between commercial and civil law and between traders and non-traders.

"(*d*) There are points where, in our opinion, the English law, founded as it is upon the usages of trade and bankers, is distinctly more convenient than the foreign rule."

And with regard to these points Sir M. D. Chalmers and Mr. F. H. Jackson go on to say:—

"If English mercantile opinion is in accordance with our views, we trust that there will be an opportunity to bring our views before the final conference, which will meet about a year hence to shape the draft uniform law into its final and complete form. Although England cannot join in the uniform law, it is important for us that that law should not contain provisions which are inimical to international commerce. Whatever shape the uniform law may eventually assume, it will undoubtedly be advantageous to have only one continental system to deal with, instead of the present multiplicity of divergent laws."

In the Blue Book containing all the correspondence relating to the conference will be found a translation of the uniform law, employing as far as possible the language of the English Act, and in a parallel column the corresponding provision of the Bills of Exchange Act, 1882, or, where such provision does not exist, a brief explanatory note. This has been prepared by our representatives, and clearly brings out the points of difference, while in their memorandum they discuss the more important points of divergence and the reasons which may be urged in favour of the English or the foreign rule. In the space at our disposal it is manifestly impossible to deal with these matters in detail, but certain suggestions for the amendment of our own law are made which our delegates consider might be carried out at once as desirable in themselves, without waiting for the adoption by other nations of the uniform law, which must be a matter of some delay as it is not yet in its final form, and will only be finally settled at a second conference.

Those amendments are as follows:—

"1. That days of grace should be abolished.

"2. That when a bill falls due on a non-business day, it should be payable on the next succeeding business day.

"3. That when the sum payable by a bill is expressed more than once in words, or more than once in figures, and there is a discrepancy, the lesser sum shall be the sum payable.

"4. That when a bill is expressed to be payable with interest and no rate of interest is specified, interest at the rate of 5 per cent. shall be understood.

"5. That where the acceptance consists of the simple signature of the drawee, it must be on the face of the bill.

"6. That where a bill is dishonoured by non-acceptance, a party who is liable on the bill may nevertheless accept it for honour.

"7. That payment for honour by the acceptor of a bill shall be prohibited.

"8. That where the holder of a bill loses his right of recourse on the bill by reason of his failure duly to present or protest it, or to give notice of dishonour, he shall not thereby lose his right of action on the consideration, but that if the drawer or indorser whom he sues has been prejudiced by that failure, such drawer or indorser shall be discharged from his liability on the consideration to the extent of any loss he may have suffered."

And it is difficult to see why they should not be forthwith adopted by the Legislature. The authors of the memorandum have also prepared the rough draft of a bill to carry them into effect, consisting of but five short operative clauses, and its passage through Parliament should not be a difficult matter.

There are two other recommendations made in order to simplify our law, namely:—

"1. That the Bank Holiday Acts should be consolidated. They are now three in number, and are not very easy to construe together. It is to be noted that the days appointed for bank holidays differ in England, Scotland, and Ireland.

"2. That the stamp laws relating to negotiable instruments should be consolidated. The Stamp Act, 1891, has now been amended eight or nine times, and the amendments are very complicated."

As to these there can be no possible objection. On the question of stamps, the conference by unanimous resolution, this country, however, standing aside, agreed that non-compliance with stamp laws should never be a ground for nullifying a bill of exchange or a promissory note, and that stamp laws should only be enforced by money penalties. On this, our representatives say that they would rather express no opinion without hearing what the revenue authorities have to say about it, but they point out that in the case of cheques English law relies on the pecuniary penalty. It certainly would seem that an amendment

of the law placing all these negotiable instruments on the same footing would be reasonable, for in the case of contracts, for instance, a penalty is considered sufficient to enforce the requirements of the law.

It will be seen that much might be done in the future to bring the law on bills of exchange more into line, and although, as we have said, a universal law, so far as this country is concerned, is, for the present, impossible, it would be for the advantage of the mercantile community if more uniformity were possible.—*Law Times.*

AMALGAMATION OF LAW AND EQUITY.

It is often said, with reference to the Judicature Acts and their effect, that they have failed to do what they were intended to do—to amalgamate the doctrines of law and equity. A typical example of such statements is that contained in a footnote on p. 10 of the introduction to Williams' Vendor and Purchaser, where the author says, speaking of *Scott* v. *Alvarez* (73 L.T. Rep. 43; (1895) 2 Ch. 603): "This case must have shattered the last ruins of the delusion that law and equity were fused by the Judicature Acts." No attempt appears yet to have been made to shew, by an ordered exposition of decisions given in the superior courts since the Judicature Acts came into operation, to what extent any fusion or amalgamation of law and equity has taken place, or to what extent the two great bodies of jurisprudence—common law and equity—still remain separate as before the Judicature Acts. That the "law" administered in the superior courts does now include elements of common law and equity more or less blended, instead of being merely fitted into one another like a mosaic, can hardly be denied. But it cannot be denied, on the other hand, that the admixture of law and equity is still rather in the nature of a mechanical mixture than a chemical combination. In fact, so long as any rule of law enforced by the courts can be definitely referred either to the common law system or to the equity system, it cannot be truly said

that the fusion or amalgamation of law and equity is complete. The amalgamation will be complete when it becomes immaterial to inquire whether a particular rule enforced by a court is a rule of common law or a rule of equity. Notwithstanding that this condition of things has not yet been reached, or is not even yet in sight, it is yet possible that a tendency in the direction of such a complete amalgamation may be visible. It is the purpose of this article to indicate how and where this tendency is visible, by referring to a few decisions of the courts which shew that the effect of the system of administering common law and equity together—the system introduced and rendered possible by the Judicature Acts—is to weld together the two bodies of jurisprudence in one undistinguishable whole.

There are some decided cases that shew what may be called the negative side of the tendency towards amalgamation, or the struggle of the two elements of law and equity to keep apart. The decisions and dicta in these cases, though actually retarding the movement of the two elements towards complete union, are nevertheless excellent illustrations of its existence. These cases will be referred to first, and in order of date.

Foster v. *Reeves* (67 L.T. Rep. 537; (1892) 2 Q.B. 255). This was a decision of the Court of Appeal, affirming the Divisional Court, which had reversed the judgment given in the County Court. The action was brought to recover rent under an agreement for a tenancy. The agreement was in writing, but not under seal, and by it the defendant had agreed to take a house for three years from a future date. Defendant took possession, but left before the expiration of the three years. The agreement, not being under seal, was ineffective as a lease at common law, but it was contended that, since in equity the agreement could have been ordered to be specifically performed, the defendant was to be treated as though he were party to an actual lease. This was the doctrine of *Walsh* v. *Lonsdale* (to be referred to presently). The Court of Appeal, however, held that this doctrine did not apply in the present case, since the County Court had no jurisdiction to order specific performance.

The plaintiff therefore failed to recover, as he would formerly have failed in a court of common law before the Judicature Acts, and was allowed no benefit upon any equitable grounds.

Scott v. *Alvarez* (72 L.T. Rep. 455; 73 L.T. Rep. 43; (1895) 1 Ch. 596; 2 Ch. 603) has been referred to above as the subject of criticism in Williams' Vendor and Purchaser. The author goes to speak of the case as an authority for the proposition that in the same court and the same proceedings "a suitor may at the same time obtain and be denied substantial relief according as his claim is rested on the doctrines of equity or of law," but this condemnation seems too strong. *Scott* v. *Alvarez* certainly was a singular case. It was a vendor's action for specific performance of a contact to purchase land, and the defendant counterclaimed for a return of the deposit. The vendor had sold under stringent conditions, and the title turned out to be absolutely bad. The Court of Appeal held that the defendant (purchaser) was not entitled to be relieved of his liability under the contract, and could not, therefore, recover the deposit, but that the plaintiff (vendor) was not entitled to an order for specific performance. Lord Justice Lindley described this result as "not altogether satisfactory, but it is a logical consequence of the double jurisdiction of this court and of the extraordinary jurisdiction exercised by courts of equity." As Lord Justice Lopes said: "Specific performance is discretionary, and a court of equity will not decree it where the title is obviously a bad one." The vendor might, of course, have brought an action for damages successfully, and in effect he did succeed in getting damages, for he retained the deposit. To this extent the plaintiff was not "denied substantial relief," and the mere fact that he could not get specific performance is hardly such a "paradox" as Mr. Williams would have us believe, nor is it due merely to law and equity being separate systems not yet amalgamated into one. There is nothing strange in one remedy rather than another being appropriate under certain circumstances. But undoubtedly great stress was laid by the Lords Justices in *Scott* v. *Alvarez* upon the distinct origins of the two remedies of a claim

for damages and a claim for specific performance of the contract, and the conception of a court simply applying one rather than another of two possible remedies is put aside in favour of a "double jurisdiction" which is quite opposed to any theory of amalgamation. *Scott* v. *Alvarez* therefore shews the two elements of common law and equity closely interwoven, but refusing to coalesce.

In Manchester Brewery Company v. *Coombs* (82 L.T. Rep. 347; (1901) 2 Ch. 608) Mr. Justice Farwell made some observations on the decision in *Walsh* v. *Lonsdale* which tend to restrict the application of the doctrine of that case much as it was restricted in *Foster* v. *Reeves* (sup.). It was said that the doctrine of *Walsh* v. *Lonsdale* only applied where there was a contract to transfer a legal title, and where specific performance could be obtained between the same parties, in the same court, and at the same time as some legal question involved has to be determined Here the two elements of law and equity are kept distinct.

In *Worthing Corporation* v. *Heather* (95 L.T. Rep. 718, at p. 722; (1906) 2 Ch., at p. 540) Mr. Justice Warrington referred to the separate doctrines of law and equity, and took the view that for the purpose of the case before him "the court is sitting as a court of common law." This is exactly on the lines of the three cases already cited, and all four cases are typical illustrations of the juridical attitude which regards the two systems of common law and equity as streams still flowing side by side unmingled.

The first of the cases to be cited by way of illustrating the other attitude of mind—which regards law and equity as gradually intermingling—is *Pugh* v. *Heath* (46 L.T. Rep. 321; 7 App. Cas. 235). The case related to the right of a mortgagee to recover possession of land. Earl Cairns, referring to possible differences between a legal and an equitable mortgagee's remedies, said: "The court is now not a court of law or a court of equity; it is a court of complete jurisdiction." This observation though only made obiter, is a very strong expression of the

view that amalgamation and not double jurisdiction was the purpose of the Judicature Acts.

In the same month of the same year that *Pugh* v. *Heath* came before the House of Lords, the case of *Walsh* v. *Lonsdale* (46 L.T. Rep. 858; 21 Ch. Div. 9) was decided by the Court of Appeal. *Walsh* v. *Lonsdale* is the strongest case that can yet be cited from the reports in favour of the view that since the Judicature Acts law and equity are tending towards a real amalgamation in English jurisprudence. The action was brought by the plaintiff for illegal distress on the part of the defendant as his landlord. The plaintiff was in possession under an agreement for a lease only, and it was contended that distress for rent could not be justified under a mere agreement. The Court of Appeal thought otherwise. Jessel, M.R. said: "There is an agreement for a lease under which possession has been given. Now, since the Judicature Act the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one court, and equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance." Lord Justice Cotton said the landlord was right "if the lease under which the tenant must be taken to be holding this land or premises would give him rent beforehand." Lord Justice Lindley said: "I also think that the rights of the parties in this case turn upon the lease as it ought to be framed in pursuance of the contract into which these parties have entered." The expression used by Sir George Jessel is "one court"—not a double court.

There are some expressions used in *Warren* v. *Murray* (71 L.T. Rep. 458; (1894) 2 Q.B. 648), as to rights of entry being barred under the Limitation Acts, which indicate, quite as strongly as direct statements made regarding the Judicature

Acts, the tendency to look on equity as a part of the existing totality of rights and not a separate system of rights. Lord Esher speaks of "the actual legal rights of the parties, including in the words 'legal rights,' equitable as well as common law rights. . . . If the state of things is such that in equity they could not enter, then according to the law, including equity and common law, they could not enter at all."

Ellis v. *Kerr* (102 L.T. Rep. 417; (1910) 1 Ch. 529) was an action on a covenant, which failed by reason of the same persons being both covenantors and covenantees. Mr. Justice Warrington commenced his judgment by saying "that at law, before the fusion of law and equity by the Judicature Act, such an action as this could not have been maintained." The question was: Could the action "be maintained in this court, which is now administering principles both of common law and equity"? These expressions accord rather with the view of a single court of complete jurisdiction than with the view of a court of double jurisdiction.

As a concluding commentary upon the cases cited, the words of Maitland (Lectures on Equity, pp. 18, 20) may be quoted: "We ought to think of equity as a supplementary law, a sort of appendix added on to our code, or a sort of gloss written round our code, an appendix, a gloss, which used to be administered by court specially designed for that purpose, but which is now administered by the High Court of Justice as part of the code." And further on: "The day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law; suffice it that it is a well-established rule administered by the High Court of Justice." Maitland may have had in mind Lord Blackburn's words in *Pugh* v. *Heath* (*sup.*): "Some twenty years ago there might have been some difficulty, in this case, in saying whether the proper form of remedy was by ejectment at law or by a suit in Chancery; but now it is quite immaterial which of the two it is, if it can be shewn that there is a remedy."—*Law Times.*

It is not surprising that a large percentage of lawyers find their way into the various legislatures of the Anglo-Saxon countries, and their presence there cannot be but for the welfare of the people. We have a goodly proportion of them in the various Parliaments of the Dominion and provinces; but the number is not to be compared to the preponderance of lawyers in the legislative halls of the United States. The executive head of that country is a trained lawyer and jurist. In his Cabinet of nine members, he is advised by not less than seven lawyers, most of them distinguished at the Bar. The Senate is composed of ninety-two members, sixty-seven of whom belong to the profession of the law, and the presiding officer of the Senate also belongs to the same body. Two hundred and twelve members of the House of Representatives, which is composed of three hundred and ninety-eight members are also lawyers.

We learn from an esteemed contemporary that Judge Lawson, Dean of the Law School of Missouri State University, has recently returned from England, where he made an extended study of the criminal procedure of the courts of that country. The information he obtained there has convinced him that the courts of his own land "are a century behind those of England in the matter of criminal procedure." This is a somewhat remarkable admission, and is coupled with the assertion that "American practices leading to international delays and repeated postponements of cases are not known and would not be permitted if attempted in England." The same writer refers to the high standing of the judges of the English courts; speaking of them as being men of the highest type and well paid. Unfortunately, in Canada, as well as the United States, political influence is too strong a factor. The remarks with which the editor of the *Law Notes* concludes his observations has a certain application here as there: "Is it any wonder, then, that our courts are so far below the standard which they ought to attain? They do not appeal to the highest type of lawyers from any point of view, and no attempt is made to secure that type of lawyers for their presiding officers."

REVIEW OF CURRENT ENGLISH CASES.

FIDELITY BOND—SURETY—DEFAULT OF PRINCIPAL—PENAL INTEREST ON DEFALCATION—LIABILITY OF SURETY.

Board of Trade v. *Employers' Liability Assurance Corporation* (1910) 2 K.B. 649. This was an action on a fidelity bond given by the defendants to secure the due discharge of his duty by a trustee in bankruptcy, or if he should fail therein that the surety should "make good any loss or damage occasioned to the estate by any such default of the bankrupt." The principal improperly retained £50 in his hands for some years, and on his default being discovered he was removed from office, and pursuant to the Bankruptcy Act he was surcharged with interest at the rate of 20 per cent. per annum on the sum improperly retained. The principal made good the £50 but not the interest, the present action was brought to recover the interest against the sureties. Phillimore, J., who tried the action held that the defendants were liable, but the Court of Appeal (Williams, Moulton and Buckley, L.JJ.) reversed his decision, holding that the 20 per cent. interest was in the nature of a penalty which in a certain event the principal became liable to pay, but it was not covered by the language of the bond, so as to make the surety liable therefor, the principal on failure to pay this interest not being a breach of his duty as a trustee, and the penal interest for which he became liable not being a loss to the estate.

COMPROMISE—SOLICITOR'S AUTHORITY TO COMPROMISE ACTION—ASSENT OF CLIENT GIVEN UNDER MISUNDERSTANDING.

In *Little* v. *Spreadbury* (1910) 2 K.B. 658. In this action before it came on for trial, the solicitors of the parties arrived at a settlement and a memorandum thereof was signed by the solicitors. This memorandum was read over to the defendant by her solicitor or his son and the defendant seemed to assent to it, and thereupon the action was by consent of both sides struck out. It turned out afterwards that though the defendant seemed to

assent to the terms of settlement she did not in fact understand them, and did not mean to assent to them, and upon an agreement in writing containing the terms of the memorandum being submitted to the defendant for her signature she repudiated the settlement and refused to sign the agreement. The present action was to recover damages for breach by the defendant of the terms of settlement. The County Court Judge who tried the action held that the compromise in the circumstances was not binding and dismissed the action, but the Divisional Court (Bray and Coleridge, JJ.) reversed his decision on the ground that the defendant had led her solicitor to believe that she assented, and was consequently bound by his act.

Correspondence

APPEALS TO THE PRIVY COUNCIL.

To the Editor, CANADA LAW JOURNAL.

DEAR SIR,—

The decision of the Privy Council in the recent case of *Gordon* v. *Horne* (see 42 S.C.R. 240) calls for notice, as I think, not only from the profession, but from Canadians generally. In this case the Privy Council reversed the decision of the trial judge upon a pure question of fact, which decision had been affirmed by a majority of the Supreme Court of Canada.

The details of the case are not material. It is sufficient for the present purpose to say that it was common ground that the question presented for determination was purely one of fact, each party in his factum stating the question, to be what were the terms of a certain verbal agreement. The plaintiff gave one version of it, and the defendants quite another. The trial judge said in dismissing the plaintiff's action: "I accept Horne's evidence and believe it implicitly." Horne was the principal defendant in the suit. A majority of the Supreme Court of Canada consisting of the Chief Justice and Davies and Duff, JJ., said that after a careful consideration of the evidence they agreed with the trial judge.

One would have thought that their Lordships of the Judicial Committee might have left the final determination of such a matter to our own Canadian courts, assuming in them the requisite ability to deal with such a simple matter as the credibility of witnesses. It cannot be gainsaid that upon a question as to which of two parties is to be believed the judge who saw and heard the parties give their evidence is more likely to form a right judgment than judges who have not had that opportunity, and when, as in this case, such judge's decision was concurred in by four other Canadian judges, was it likely that the ends of justice would be better served by substituting for that opinion the view of four English judges sitting in Downing Street? The judicial misadventure in this case is that while five Canadian judges including the one who saw and heard them give their evidence believed the defendants, four others sitting in England preferred to believe the plaintiff. Lord Mersey, de-

livering the judgment of the Board and referring to Horne's evidence, says: "Their Lordships are unable to accept this statement." We pay our money and we take our choice. Locally, of course, there will be those who think that the estimate formed of a witness's credibility by Canadian judges is perhaps more likely to be correct than the one formed in London, and there are reasons why this should be so. The latter had no opportunity of observing the demeanour and appearance of the parties as they gave their evidence. Perhaps none of their Lordships had ever set foot in Canada and probably none of them have had any personal experience of a real estate boom in a Western town. The litigation originated in such local condition.

It is making a demand on "loyalty" and upon the imagination which neither will stand to ask us in Canada to believe that the question of which of two parties to a law suit ought to be believed can be more righteously decided in England than here.

A Board consisting of Lord Macnaghten, Lord Atkinson and Sir Arthur Wilson saw fit to grant leave to appeal in this case and they must therefore have considered that the opinion of the Judicial Committee on the question of which of these parties was to be believed would be superior to that formed by two Canadian courts, and this is not flattering to our Canadian judiciary, nor is it a view likely to be acquiesced in in Canada. It is said that the right of appeal to London is a bond of union with the Empire, but if the Judicial Committee is going to adopt a practice of entertaining appeals of this nature and of interfering with Canadian judgments in cases of this kind, it is likely in time to prove the reverse. If our Canadian judiciary is not adequate in point of ability to the determination of such a point as *Gordon* v. *Horne* presented, it ought to be made so, but Canadians believe that it is quite capable of deciding such matters and as we have some pride in our judiciary it is not flattering to our self-esteem to find judgments of our Supreme Court of Canada upon such questions brought over to Downing Street by order of the Judicial Committee for review by their Lordships. Is it lack of the necessary brains and legal talent to decide our own civil disputes that makes us submit them to London for adjudication or is the reason a purely sentimental one that we are in this way helping to maintain a union with the Empire or is it a feeling that the judges in London are free from influences or prejudices of an outside or local nature from which judges in our own country might not be free?

A word as to the cost of indulging this sentiment or whatever it is that leads us to have the judgments of our own courts reviewed in England. The party dissatisfied with the judgment of the Supreme Court of Canada in this case employed a galaxy of legal talent in London. As solicitors he had Messrs. Armitage, Chapple and Macnaghten. As counsel, Sir Robert Finlay and Hon. M. M. Macnaghten, on the application for leave, and, on the hearing of the appeal, Mr. Buckmaster, K.C., and Hon. M. M. Macnaghten. A board consisting of Lord Macnaghten, Lord Atkinson, Lord Mersey and Lord Shaw heard the appeal and reversed the decision, and the taxed costs the losing party had to pay the above solicitors and counsel amounted to $2,223, besides which he had his own solicitors and counsel to pay. The situation in Canada therefore is something like this. A man may establish his credibility to the satisfaction of the judge who saw and heard him, and of a majority of the Canadian judges before whom the case may come on appeal, but he is nevertheless liable to be summoned to London, England, and there learn that the Canadian judges were wrong in their estimate of him and be mulcted in thousands of dollars of costs.

There is still another aspect to the question of the advisability from a Canadian standpoint, of appeals to London in civil matters. It is probably safe to say that fifty per cent. of the population of Vancouver are Americans. A like condition probably prevails in the prairie Provinces of Alberta, Saskatchewan and Manitoba. Into the provinces West of the Great Lakes, there has been a tremendous immigration of citizens of the United States and that immigration still continues. Sentiment, if it survives at all as regards the Western provinces, must give way to economic conditions. This element will see little sense in travelling across the Atlantic to have their law suits determined by English judges at enormous expense, when in their own country of origin they have been able to obtain a Supreme Court for the final determination of litigation the equal of any court existing in England. If they have been able to do this, why should Canadians not be able to do so? If it is deemed unwise to entrust the Canadian judiciary with the final determination of constitutional questions or of questions of great public interest, or of cases involving grave questions of law, by all means let us have them decided in England. It is not the writer's opinion, nor the opinion of many other Canadians that it should be

deemed necessary to send even such questions as these to England for final determination.

With great submission the writer maintains that the Judicial Committee of the Privy Council ought not to interfere with the decision of the courts of any part of the Empire in cases of any other description than those above mentioned, that when it interferes with judgments of courts of last resort in the colonies in cases of minor importance such as *Gordon* v. *Horne*, if it does not inferentially belittle such courts in the estimation of the public it at all events puts litigants to a burdensome and grievous expense, and that it misconceived its functions in granting leave to appeal in *Gordon* v. *Horne* and in reversing the judgment of the trial judge and of the Supreme Court of Canada in that case.

I have written this letter with a view to suggesting the desirability from a Canadian point of view of some understanding being come to if practicable as to how far the "grace" of the Sovereign ought to be extended in the matter of reviewing decisions of the Supreme Court of Canada and of pointing out the difficulties the Canadian litigant labours under if the decision of two concurrent courts in his favour upon a pure question of fact is to be reviewed by the Judicial Committee of the Privy Council and, as happened in this instance, reversed.

Eight thousand miles is a long distance for a party to travel for the purpose of endeavouring to demonstrate that the judges in his own country correctly estimated his credibility.

Yours truly,

W. S. DEACON.

Vancouver.

[We refer to this in our editorial columns.—ED. C.L.J.]

REPORTS AND NOTES OF CASES.

Dominion of Canada.

EXCHEQUER COURT

Cassels, J.] ADELINE PARENT *v.* THE KING. [May 4.

Government railway—Injury to the person—Vehicle on crossing—Speed of train—Sec. 34, R.S. 1906, c. 36—Faute commune—Reckless conduct of driver of vehicle—Identification.

Held, 1. As the point where the accident in question occurred was not a "thickly peopled portion of a . . . village," within the meaning of s. 34 of R.S. 1906, c. 36, the officials in charge of the engine and train were not guilty of negligence in running at a rate of speed greater than six miles an hour. *Andreas* v. *Canadian Pacific Ry. Co.*, 37 S.C.R. 1, applied.

2. Under the law of Quebec where the direct and immediate cause of an injury is the reckless conduct of the person injured the doctrine of *faute commune* does not apply, and he cannot recover anything against the other party.

3. Where a person of full age is injured in crossing a railway track by the reckless conduct of the driver of a vehicle in which he is being carried, as between the person injured and the railway authorities the former is identified with the driver in respect of such recklessness and must bear the responsibility for the accident.

Mills v. *Armstrong* (*The Bernina*), L.R. 13 A.C. 1, referred to and distinguished.

Lemeiux, K.C., for suppliant. *Chrysler*, K.C., for the Crown.

Cassels, J.] [Sept. 16.

HAVELOCK MCCOLL HART *v.* THE KING.

Railways—Siding—Undertaking in mitigation of damages in prior suit—Right of suppliant to maintain action.

In certain expropriation proceedings between the Crown and the suppliant's predecessor in title, the Crown, in mitigation of damages to lands not taken, filed an undertaking to lay down and maintain a railway track or siding, in front of, or adjoin-

ing, said lands and to permit the then owner, "his heirs, executors, administrators, assigns (and the owner or owners for the time being of the said lands and premises or any part thereof and each of them) "to use the same for the purpose of any lawful business to be carried on or done on the said lands or premises." By order of Court the suppliant's predecessor in title was declared to be entitled to the execution of such undertaking. The undertaking was given in 1907, and at that time the lands in question were not being used for any particular purpose. The Crown in execution of its undertaking subsequently laid down a siding in front of or adjoining the said lands. There was, however, a retaining wall between the siding and such lands, and the Crown informed the solicitor of the suppliant on the 5th October, 1909, that "at any time you may desire, we are prepared to open a way through this retaining wall so as to give access to the siding in order that you may conduct your business in the manner contemplated in the order of the Court"; but, although the suppliant presented his claim for damages on the basis that the Crown had not given him a siding suitable for carrying on a corn-meal milling business, at the time of the institution of the present proceedings nothing had been done to utilize the property for any particular business.

Held, that upon the facts the Crown had fully complied with the terms of the undertaking mentioned, and that the suppliant had not made out a claim for damages.

Quaere, whether the suppliant had any right to take proceedings to compel the execution of the undertaking by the Crown until the property was occupied for the purposes of some business.

2. Whether the suppliant would have any right to enforce a claim for damages in view of the fact that he had no assignment of any such claim from his predecessor in title.

W. B. A. Ritchie, K.C., and *E. P. Allison,* for suppliant. *R. T. McIlreith,* K.C., and *C. F. Tremaine,* for the Crown.

Cassels, J.] [Oct. 3.

IN RE EUGENE MICHAUD *v.* THE KING.

Contract—Railway ties—Inspection—Inspector exceeding authority in respect of acceptance—Subsequent rejection of ties improperly accepted—Right to recover price.

The suppliant, in reply to an advertisement calling for tenders for ties for the use of the Intercolonial Railway offered

to supply ties to the Crown for such purpose. The Crown expressed its willingness to purchase his ties provided they answered the requirements of the specifications mentioned in the advertisement for tenders. D., an inspector appointed by the Government, in excess of his authority and contrary to his instructions, undertook on behalf of the Crown to accept ties not up to the said specifications. On this becoming known to the Crown, D.'s inspection was stopped, and other persons were appointed to re-inspect the ties, who rejected a portion of those which D. had undertaken to accept. The suppliant claimed the price of the ties so rejected.

Held, confirming the report of the Registrar, as referee, that the Crown was not liable for the price of the ties which its inspector, wrongfully and in excess of his authority, had undertaken to accept.

F. St. Laurent, for suppliant. *Chrysler*, K.C., for the Crown.

Cassels, J.] [Oct. 6.

IN RE JAMES M. JOHNSTON *v.* THE KING AND FREDERIC COUSE *v.* THE KING.

Commissioners National Transcontinental Railway—Contract—Services connected with construction of eastern division—Disputed claim—Petition of right—Liability of Commissioners.

A petition of right will not lie in the case of a disputed claim founded upon a contract entered into with the Commissioners of the National Transcontinental Railway for services connected with the construction of the Eastern Division of such railway. Under the provisions of 3 Edw. VII. c. 71, the Commissioners are a body corporate, having capacity to sue and be sued on their contracts. Action, therefore, upon such a claim should be brought against the Commissioners and not against the Crown.

Travers Lewis, K.C., for suppliants. *C. J. R. Bethune*, for the Crown.

Cassels, J.] [Nov. 2.

THE KING *v.* JANE MARY JONES.

National Transcontinental Railway—Lands taken by Commissioners—Compensation—Arbitration—Jurisdiction of Exchequer Court—Construction of statutes.

Section 13 of 3 Edw. VII. c. 71, reads as follows:—

"The Commissioners may enter upon and take possession of any lands required for the purposes of the Eastern Division, and they shall lay off such lands by metes and bounds, and deposit of record a description and plan thereof in the office for the registry of deeds or the land titles office for the county or registration district in which such lands respectively are situate; and such deposit shall act as a dedication to the public of such lands, which shall thereupon be vested in the Crown saving always the lawful claim to compensation of any person interested therein."

Held, that, under the terms of section 15 of the above Act (read in connection with the provisions of the Railway Act (R.S. 1906, c. 37)), when lands have been taken and become vested in the Crown as provided by section 13, and the Commissioners cannot agree with the owner thereof as to compensation for the same, such compensation must be ascertained by a reference to arbitration, and not by proceedings taken in the Exchequer Court for such purpose.

National Transcontinental R., Ex p. Bouchard, 38 N.B.R. 346, not followed.

Newcombe, K.C., for the Crown. Nem. con.

Province of Nova Scotia.

SUPREME COURT.

Graham, E.J.—Trial.] [Oct. 1.

MILLET *v.* BEZANSON ET AL.

Trespass — Crown grant — Erroneous description — Burden of proof.

In an action for trespass to land by cutting logs plaintiff's title was derived under a grant from the Crown in which his land was described as lots Nos. 5, 6, and 7 in the second division of Block letter C., and as being bounded on the east by the rear lines of lots 16, 17, and 18 of the first division, Block letter B.

Held, 1. The burden of proving title was upon plaintiff.

2. Evidence was receivable consisting of acts of occupation, conveyances, submission to arbitration and a preliminary survey made by a deputy Crown land surveyor and produced from the files of the Crown land office, to shew that the words of the description referring to the numbers of lots on the rear line of the first division were used inadvertently for numbers 15, 16 and 17, and that the lot in dispute was not, therefore, within the limits of the grant under which plaintiff claimed.

DesBarres v. *Shey*, 29 L.T.N.S. 592, referred to.

Paton, K.C., for plaintiff. *Mellish* K.C., and *Kenny*, for defendants.

Longley, J.—Trial.] [Oct. 19.

PITTS *v.* CAMPBELL.

Landlord and tenant—Distress—Action by judgment creditor—Claim of fraudulent collusion—Bill of sale set aside—Costs.

The defendant. C., leased premises to M. and G. who for a time carried on business therein. M. and G. becoming insolvent, executed a bill of sale to C. which covered all their stock-in-trade. There being a doubt as to the legality of the bill of sale under the circumstances C. proceeded against the goods by way of distress for the amount of rent then due, and the goods being suffered by M. and G. to remain upon the premises, C. levied a second and third times for rent accruing subsequently and in this way secured the whole value of the goods.

Held, at the suit of plaintiff, a judgment creditor, that the bill of sale must be set aside as tending to hinder and delay creditors, etc., but that in the absence of stronger evidence of fraudulent collusion between the landlord and tenants his claim for an accounting must be refused.

Held, nevertheless, that as plaintiff was justified under the circumstances in making his claim for an accounting, defendant must be refused costs of the claim dismissed.

D. McNeil, for plaintiff. *Gallant*, for defendant.

Longley, J.—Trial.] [Oct. 19.

MONAGHAN *v.* MCNEIL.

Intoxicating liquors—Wrongful seizure by Inspector—Action against.

Plaintiffs who were wholesale and retail liquor dealers in the city of H. shipped a quantity of intoxicating liquors to the

county of Inverness where the Liquor License Act was in force. The goods were consigned to plaintiff's own order and had not yet been delivered to the parties for whom they were intended. The goods were seized by the Inspector for the county but of his own motion and without having taken any of the proceedings for their seizure and confiscation provided by the Act.

Held, that plaintiffs being the owners of and having full control over the goods at the time of their seizure were entitled to recover the full value thereof against the Inspector.

D. McNeil, for plaintiffs. *Gallant*, for defendant.

Graham, E.J.—Trial.] [Oct. 20.

LEHIGH VALLEY COAL CO. *v.* KING.

Sale of goods—Terms of contract—Free discharge—Evidence as to memorandum in writing—Effect of.

Plaintiff company through one of their agents sold a quantity of coal to defendant and agreed to secure a vessel to carry the same at the rate of ninety cents per ton, which defendant subsequently agreed to increase to $1 per ton. Plaintiff's agent wrote his principals on the same day that the contract was made informing them that the terms of the contract were ninety cents freight and "free discharge," but in a memorandum of the terms of contract delivered to the defendant at the time of the making of the contract these words were not mentioned and defendant denied that they were discussed or agreed to.

Held, that, defendant had a right to rely upon the terms of contract as stated in the memorandum and that his version of the agreement supported by the memorandum must be adopted and that he was entitled to recover from plaintiff company the amount paid out by him for delivery in order to obtain possession of the coal.

J. J. Ritchie, K.C., for plaintiff. *Daniels*, K.C., for defendant.

Graham, E.J.—Trial.] [Oct. 20.

TAYLOR *v.* MCLAUGHLIN.

Sale of goods—Term F.O.B.—Effect of—Error as to date—Actual date may be shewn.

Defendant ordered from plaintiffs, manufacturers of safes, at Toronto, a safe of specified description and value, the safe to be delivered by plaintiffs F.O.B. Toronto, and to be paid for by defendant in one instalment, net cash, without interest.

The evidence shewed that the contract was made October 10, 1907, and was approved by plaintiffs a few days later, but by an error made by one of plaintiffs' employees the approval was made to appear as if made at a much later date and subsequent to the date of a letter in which defendant sought to rescind the contract.

Held, that, the date was not material and that the actual date could be shewn.

The printed form of contract contained a provision under which the title to the safe was to remain in plaintiffs until the whole of the purchase money was paid and these words were not struck out although they appeared to be applicable to cases where goods were sold on credit or the instalments were to extend over a period of time.

Held, that, while in the ordinary course the agreement for delivery F.O.B. would pass title, the court would not be justified in rejecting the clause not struck out retaining title in the plaintiffs until performance of the conditions provided for.

J. J. Ritchie, K.C., for plaintiffs. *J. M. Owen*, for defendant.

Graham, E.J.—Trial.] [Oct. 28.

BROOKES *v.* BROOKES.

Deed—Action claiming reformation—Laches—Limitation of actions.

Plaintiff brought an action to reform a deed made twenty-seven years previously, as to one lot of land included therein, on the ground, chiefly, that at the time the deed was made the lot of land in question was claimed by and was supposed to belong to defendant, under the will of the original owner. Defendant admitted that he had always asserted a claim to the land as alleged, but there was evidence shewing that plaintiff a number of years before action was brought became aware of the existence of the deed under which he claimed, and although he then knew of the will and the deed and of the claim asserted by defendant he took no steps to ascertain what his rights were. Since then defendant had sold the greater part of the land to a purchaser without notice.

Held, that, plaintiff had been negligent and that it was now too late to afford him relief.

The Statute of Limitations being pleaded plaintiff's only answer, after such a long lapse of time, would be that he did not discover the mistake until the very eve of the action.

Chesley, K.C., for plaintiff. *Roscoe*, K.C., and *Grierson*, for defendant.

Longley, J.—Trial.] [Nov. 3.

ATTORNEY-GENERAL EX REL. MORRISON *v.* LANDRY.

Trusts—Creation—Rights of cestui que trust—Enforcement of—School district—Ratepayers—Rights of minority—Proceedings in name of Attorney-General.

A sum of money raised by public subscription and in other ways was placed in the hands of the defendant L. and two others as trustees to purchase a house as a place of residence for the members of a religious Order then teaching in the public school of section 8 of the parish of D. and a memorandum was drawn up and signed by L. and his co-trustees in which it was set out that the place of residence to be purchased with the funds placed in their hands for that purpose was to be maintained by the Order so long as the members thereof remained at D., but in the event of their leaving the house was to become the property of the section and the trustees then holding office were to sell the house for the purposes of the school or the benefit of the section. L. and his associates acquired a property for the purpose intended, but took the deed to themselves without any qualification and the following day executed a deed to the Order in fee simple and without any reservations. Some months later the members of the Order decided to leave the province, and before doing so gave a deed in fee simple of the property to L. who proceeded to mortgage it to his brother F. L. to secure the sum of $700.

Held, 1. F. L. having been present at the meeting of ratepayers when the trustees were appointed must be held to have taken his mortgage with notice of the trust.

2. There being a trust in favour of the ratepayers generally the interests of the minority could not be affected by a resolution illegally passed by the majority instructing the discontinuance of proceedings against the trustees and that the present proceedings were properly brought in the name of the Attorney-General.

3. The trustees of the section had power under the Education Act, R.S.N.S. c. 52, s. 55, to accept a gift of property for the benefit of the section.

Ordered that defendants be declared to hold the property in trust for the ratepayers of the section and that they be required to execute a conveyance of the property to the trustees of the section free of incumbrances.

Wall, for plaintiff. *Ritchie* and *Robertson*, for defendants.

Graham, E.J.—Trial.] PARKER *v.* BLIGH. [Nov. 3.

Pledge of goods to secure advances—Tender—Requisites of.

Where goods are pledged as security for money advanced the bare refusal of the pledgee, without more, to deliver up the goods held for payment does not dispense with the production of the money by the person offering to pay the charges and asking for delivery of the goods.

J. J. Ritchie, K.C., and *Miller*, for plaintiff. *Roscoe*, K.C., for defendants.

Graham, E.J.—Trial.] [Nov. 4.

MESSENGER *v.* STEVENS.

Animals—Breachy cow—Liability of owner for damage caused by—Circumstantial evidence.

In an action claiming compensation for injuries to his cow resulting in its death, alleged to have been caused by a cow owned by defendant, the evidence was wholly circumstantial. During the morning plaintiff placed his cow in his pasture where there were no other animals. Sometime after noon defendant's cow, which was known to be a breachy animal, was found in a neighbour's oatfield and was driven out and into a lane adjoining plaintiff's pasture. Very shortly after, the fence between the lane and the pasture was found to have been broken, there were tracks leading to the place in the pasture where the injured cow was found lying, and there were marks on the ground which shewed that two animals had been engaged in a struggle there, the footprints corresponding in point of size with the two animals in question, the one being large and the other small.

Held, that the evidence led to the conclusion that the injuries were inflicted by defendant's cow, and that plaintiff was entitled to recover the proved value of his cow with costs.

Naas v. *Eisenhaur*, 41 N.S.R. 424, distinguished. *Lee* v. *Riley*, 18 C.B.N.S. 722, followed.

Roscoe, K.C., and *Miller*, for plaintiff. *J. J. Ritchie*, K.C., for defendant.

Province of Manitoba.

KING'S BENCH.

Macdonald, J. [August 26.

PATTERSON *v.* CENTRAL CANADA INS. CO.

Fire insurance—Meaning of words "stored or kept" in relation to gasoline on premises—Excessive claim for loss as a defence to action on policy—Provision in policy for settlement of amount of loss by arbitration.

1. The proper construction to be given to the words "stored or kept" in a condition of a fire insurance policy providing against liability of the company for loss or damage occurring while gasoline, etc., is stored or kept on the premises, is that they do not apply to a small quantity kept on hand for domestic purposes, but import the idea of warehousing or depositing for safe custody or keeping in stock for trading purposes.

Thompson v. *Equity Fire Ins. Co.*, Privy Council decision not yet reported, but reversing 41 S.C.R. 491, followed.

A clause in a policy of fire insurance providing for the settlement of the amount of the loss or damage suffered by the insured by arbitration, whether the right to recover is disputed or not and independently of all other questions, unless made by the policy a condition precedent to the right to bring an action, will not prevent the insured from sueing without taking any steps towards such arbitration.

Scott v. *Avery*, 5 H.L. 811, and *Caledonic Ins. Co.* v. *Gilmour* (1893) A.C. 85, followed.

The goods, insured for $1,000 were valued at $1,400 in the application. After the fire, the plaintiff in his proofs of loss swore that his loss was $2,359.50, but the trial judge estimated the loss at only $400.

Held, that this inflation of values was not fraudulent to the extent of vitiating the policy.

Howell and *Garland*, for plaintiff. *S. H. McKay*, for defendants.

Prendergast, J.] [August 18.

WINNIPEG OIL COMPANY *v.* CANADIAN NORTHERN RY. CO.

Railway Act, R.S.C. 1906, *c.* 37, *s.* 298—*Evidence—Fire started by sparks from locomotive.*

The plaintiff's premises, adjoining the defendants' railway, were discovered to be on fire about five minutes after the pas-

sage of one of the defendants' trains, hauled by two engines up a heavy grade. It was proved that the wind at the time would have carried any sparks from the locomotives directly towards the premises and that it is usual for engines, under such circumstances, although well and properly equipped, to throw off sparks and cinders. The evidence also satisfied the judge that it was in a high degree improbable that the fire could have been caused in any other way, although no negligence in the operation of the train was shewn and no one saw any sparks alight.

Held, that there should be a finding that the fire was caused by sparks from the engines and that the plaintiffs were entitled to a verdict under s. 298, R.S.C. 1906, c. 37.

Tate v. *C. P. R.*, 16 M.R. 391, followed.

Affleck and *Fillmour*, for plaintiffs. *Clark*, K.C., for defendants.

Prendergast, J.] [Sept. 6.

NORTH-WEST THRESHER CO. *v.* BOURDIN.

Fraudulent conveyance—Purchase of land from provincial government—Lien on land created by purchaser—Subsequent transfer of purchaser's interest to third party.

The defendant Bourdin purchased the land in question from the government of Manitoba in May, 1904, paying $64 on account and agreeing to pay the balance in yearly instalments. In January, 1905, he created a lien on the land in favour of the plaintiffs, who registered it. He made no further payments to the government, but put improvements on the land estimated at $100. He gave a quit claim deed of it in August, 1906, to the defendant, Le Seach. The Land Department ignored the lien of the plaintiffs and, upon Le Seach paying the balance of the purchase money, issued a patent for the land to him.

Held, that it should be inferred from these facts that the government had treated Bourdin's interest in the land as forfeited because of his default in payment and had intentionally set aside the plaintiffs' registered lien, and that the patent to Le Seach could not be set aside for improvidence or on any other ground.

Kilgour, for plaintiffs. *Bowman*, for defendants.

Robson, J.] CASS *v.* CANADA TRADERS. [Sept. 8.

Real Property Act—Caveat—Petition of caveator must be founded on caveat.

A caveat filed under s. 133 of the Real Property Act, R.S.M. 1902, c. 148, must accurately set forth the title, estate or interest in the land claimed by the caveator, and a petition filed by the caveator after notice served upon him by the caveatee, under s. 131 of the Act, requiring the caveator to take proceedings upon his caveat, must be one asserting substantially the same title, estate or interest as that stated in the caveat, or it will be dismissed.

McArthur v. *Glass*, 6 M.R. 224; *McKay* v. *Nanton*, 7 M.R. 250, and *Martin* v. *Morden*, 9 M.R. 565, followed.

Hough, K.C., for caveator. *L. J. Elliott*, for caveatee.

Province of British Columbia.

SUPREME COURT.

Clement, J.] REX *v.* SCHYFFER. [Oct. 21.

Criminal law—Arrest on telegram—Legality of—Criminal Code ss. 30, 33, 347, 355 *and* 649.

The applicant had been arrested, without a warrant, by the chief of police for Vancouver at the instance of a private detective there who had received a telegram from a private detective in Montreal. The offence alleged was that the accused had, in Montreal, received a ring with instructions to hand it over to a third person. A second ring he had, as alleged, stolen from such third person directly. He converted it to his own use and left for British Columbia.

Held, that this was not an offence within the meaning of Crim. Code s. 355 for which an arrest could be made without a warrant.

S. S. Taylor, K.C., in support of the application. *J. K. Kennedy*, contra.

Hunter, C.J.] [Oct. 10.

MOORE *v.* CROW'S NEST PASS COAL CO.

Practice—Workmen's compensation—Pleadings—Power of arbitrator to allow applicant to amend his particulars.

An arbitrator appointed under the Workmen's Compensation Act, 1902, has the same power as to amendments of pleadings in proceedings before him as a judge has in a civil action.

Eckstein, for the applicant. *G. H. Thompson*, for respondent company.

Murphy, J.] REX *v.* FORSHAW. [Oct. 27.

Municipal law—Certiorari—Power to impose license—Discrimination between vehicles drawn by horses used for hire and vehicles propelled by power—Vancouver Incorporation Act, 1900.

Pursuant to sub-ss. 130 and 131, of s. 125, of the Vancouver Incorporation Act, 1900, empowering the council to regulate and license owners and drivers of stage coaches, livery, feed and sale stables and of horses, drays, express waggons, carts, cabs, carriages, omnibuses, automobiles and other vehicles used for hire, the council passed a by-law imposing a license for each vehicle drawn by one or two horses, $5 per annum; by more than two horses, $10; and for each automobile or taxicab carrying up to seven passengers, $25; over seven passengers, $50 per annum. On an application for a writ of certiorari to bring up a conviction under the by-law on the ground that it made a discrimination between vehicles drawn by horses, used for hire, and other vehicles used for hire,

Held, that the conviction was valid.

Reid, K.C., for the application. *J. K. Kennedy*, for the city, contra.

Full Court.] [Oct. 27.

WHITE *v.* MAYNARD & STOCKHAM.

Principal and agent—Sale of land — Commission — Purchaser found by agent—Owner giving subsequent option for sale to third party—Sale by such third party to purchaser found by agent.

An owner who had listed his property with an agent for sale on certain terms, subsequently gave an option for sale to a third

party. The latter, when the time for taking up his option arrived, had the property conveyed directly to a party originally found by the agent, and with whom the agent was negotiating for a sale. The purchase price was the same in both cases.

Held, on appeal, reversing the finding of Lampman, Co. J., at the trial, that the circumstances connected with the granting of the option precluded any idea of a mere agency on the part of the option holder, and his position as purchaser was not affected by the fact of his selling to the purchaser with whom the agent was negotiating.

Book Reviews.

A treatise on the effect of the Contract of Sale on the legal rights of property and possession in goods, wares and merchandise. By LORD BLACKBURN. Third edition by W. N. Raeburn and L. C. Thomas, with Canadian notes by Hon. Mr. Justice Russell, of the Supreme Court of Nova Scotia. London: Stevens & Sons, Limited. Toronto: Canada Law Book Company, Limited. Philadelphia: Cromarty Law Book Company, Limited, Law Publishers. 1910.

Nothing need be said to the profession as to the scope and character of this, one of the best of English law books, but it is well to call attention to the new departure of including in the present edition notes of all Canadian cases which appropriately find their place in such a treatise as this. No one could be found in this country more competent for this task than Mr. Justice Russell, both a lawyer and a scholar, whose legal training and present position peculiarly fit him for giving the profession the best that can be given in the premises.

The preface to the Canadian notes tells its own story:—

"An endeavour has been made to include in the Canadian notes a statement of the point decided in every important case to be found in the reports and wherever the point raised has been one of special importance or difficulty, an outline of the reasoning has been given. Several cases have been omitted in which the point raised has been merely the application of a well-recognized principle to circumstances of no special complexity, but the annotator is pretty confident that no case decided in any court in Canada has been omitted which is not of a negligible character."

The Law Quarterly Review. London: Stevens & Sons, Limited, 119-120 Chancery Lane.

The October number of this Review, edited by Sir Frederick Pollock, contains the usual interesting notes on current cases, as well as the following articles, contributed by writers of eminence: The Native States of India, Limitations of the powers of Common Law Corporations, Burgage Tenure in Mediæval England, The Co-operative Nature of English Sovereignty, The Shoreditch Assessment case, The Newport Dock dispute, The Jurisdiction of the Inns at Court over the Inns of Chancery, Hallam and the Indemnity Acts, Hospital ships and the carriage of passengers and crews of destroyed prizes, A Note on the Hague Award in the Atlantic Fisheries Arbitration; all excellent and interesting reading.

Flotsam and Jetsam.

ANCIENT CEREMONIES AND RENT CUSTOMS:—Certain officers of the corporation of the city of London attended recently before the King's Remembrancer, in open court in the High Court of Justice, to perform a certain ancient ceremony and to render certain quit rents and services on behalf of the corporation due for lands and tenements in the counties of Salop and Middlesex. The proceedings took place in one of the courts erected in the Judge's Quadrangle, in the presence of a number of visitors. The proceedings opened with a short account of the ceremony given by Master Mellor. He said that the services had been rendered for about 700 years in open court. When these services were established it was not usual to pay rent in money. The piece of land in Shropshire was woodland and that in Middlesex was a piece on which originally a blacksmith's forge had stood. Then followed the rendering of the quit rents and services. The city solicitor (Sir Homewood Crawford) cut one fagot with a hatchet and another with a billhook. He then counted out six horseshoes and 61 nails. At the end the King's Remembrancer said, "good number."—*Times.*

We have reason to be proud of our administration of the criminal law, and justly so, for the two recent trials at the Old Bailey of Dr. Crippen and Miss Le Neve afford excellent ex-

amples of our criminal justice—speedy, thorough, and impartial. There is one matter, however, to which we desire to refer, for it is to be hoped that this will be the last occasion upon which we shall have the very unedifying spectacle of seeing any of our criminal courts practically turned into a theatre. Publicity in trials of this nature is, of course, essential, but the court itself should be reserved for those whose business it is to be present, including the press; while those members of the public who desire to satisfy their morbid curiosity should be relegated to the public gallery, and that on the principle of first come, first served. The ticket system is objectionable in the highest degree, and we sincerely trust that for the future His Majesty's judges will take care that there shall be no repetition of the incidents of these trials.—*Law Times.*

The misrepresentation of a servant as to his age in his contract of employment to a railroad company does not affect his right to recover for injuries, unless his immaturity immediately contributed to such injures.—Supreme Court, Alabama, July 6.

THE MOTOR FIEND:—"The motor-car is now a recognized institution in this country. It is all the more necessary, therefore, to control its vagaries. The railway companies on their own lands are heavily mulcted for any accident because they can be brought to book," says the *Broad Arrow—The Naval and Military Gazette.* The motor fiend rushes through lands and over roads for which he pays little or nothing, kills human beings and animals, and, unless his number can be taken, drives off scot-free. Not only does he amuse himself at the risk of life, but he even pays myrmidons to enable him to evade the police. This is bad enough on the great high roads, but side-roads, with no footpaths, are almost equally at the mercy of these selfish individuals. —*Exchange.*

MODERN NEWSPAPERS:—"Time was—middle-aged people can remember it—when English newspapers were a model and an example to the world's Press," says the *Saturday Review.* "Now, every crowded thoroughfare is blatant with the latest thing in horror and lubricity. We cannot quite see why this nuisance should be tolerated. Grant that everything stated in a

court of law may be reproduced for popular sale, it does not follow that the advertisement of it should be permitted." This sort of thing is not an inherent privilege of citizenship.

DEFAMATION: Publication of fiction purporting to be "news" — A libel without justification. — The circumstances of the case of *Snyder* v. *New York Press Co.*, 121 N.Y. Suppl. 944, were somewhat extraordinary. A short newspaper article was published to the effect that, upon the assurance of a process server that Mrs. Snyder was anxious to see him, the naïve Irish maid admitted him to the bathroom while she was in the bath tub; that the mistress screamed, but was nevertheless served with a subpœna; and that motion was made to have subpœna vacated on the ground that it was impossible for the process server to identify her under the circumstances. Defendant contended that the article was innocent, and belonged to the class generally recognized as having a "news value." The Appellate Division of the Supreme Court of New York held that it was difficult to perceive what news value it could have, and impossible to discover its literary value, and that if newspapers saw fit to give their readers fiction instead of news they did so at their peril. In the opinion of the court it was libelous, as holding plaintiff up to ridicule and lowering her character in the estimation of the community.

A number of years before the late Chief Justice Melville W. Fuller was appointed to the United States Supreme Court, he presided, at the request of a Chicago coroner, at an inquest at which one of the jurors, after the usual swearing in, arose and pompously objected against service, alleging that he was the general manager of an important concern and was wasting valuable time by sitting as a juror at an inquest.

Judge Fuller, turning to the clerk, said: "Mr. Simpson, kindly hand me 'Jervis,' the authority on juries."

After consulting the book a moment, he turned to the unwilling juror:—

"Upon reference to 'Jervis' I find, sir, that no persons are exempt from service as jurors except idiots, imbeciles and lunatics. Now under which heading do *you* claim exemption?"

Judge Gaynor related a little anecdote while lying at the hospital, after the dastardly attempt on his life, which proved that the mayor was cognizant of certain evils and not at all adverse to giving them publicity.

"I knew a man over my way," said the judge with a smile, "who had formerly been a bartender. Going into politics he was elected a police justice. With some dread he heard his first case. Mary McMannis was up before him for drunkenness. The ex-bartender looked at her for a moment, and then said, sternly:—

"Well, what are you here for?"

"If yer please, yer Honour," said Mary, "the copper beyant pulled me in, sayin' I was drunk. An' I doan't drink, yer Honour; I doan't drink."

"All right, said the justice, absent-mindedly, "all right; have a cigar."

Many suggestions have from time to time been made for the improvement of our present system of trial by jury. A proposal has been put forth that after hearing the evidence and the judge's summing up, each juror shall, without consultation with any of his fellow jurors, write his verdict on a slip of paper. There is food for thought in this proposal. The strong-minded, pig-headed, blatant juror often affects the opinions of his fellow jurors. Moreover, many dispositions unknowingly lean to the views of a majority. The objection to the suggestion seems to us to be the risk of more trials being abortive owing to the disagreement of the jury. Such a system would, we think, involve the verdict of the majority being accepted.—*Law Notes.*

In the admission of women as lawyers the States lead. Mrs. Judith Foster, the well-known American woman lawyer and Republican campaign orator, was admitted to the Iowa Bar as long ago as 1872. Mrs. Myra Bradwell, who was refused admission to the Bar in Illinois before the law was passed making women eligible, founded a law newspaper, and was in partnership with her husband. Their daughter is now chairman of the Legal News Publishing Company. Among the official positions held at the present time by women lawyers in America are Assistant Attorney-General of the Philippine Islands, Examiner in Chancery to the United States Supreme Court, and assistant counsel to the

Corporation of Chicago. New Zealand was the first of our colonies to admit women to practice law, and Canada followed. Miss Greta Greig was the first women barrister admitted at the law courts at Melbourne. In India, Miss Cornelia Sorabji, who holds an English law degree and the Kaiser-i-Hind Medal, furnishes legal assistance to Indian wards and widows in the management of their estates through the Bengal Court of Wards. —*Law Notes.*

Lord Westbury when at the Bar was an impatient man with his juniors. On one occasion a junior repeatedly urged his leader to take a certain point, which the latter persisted was contemptible. The case went badly, and at last the leader took his junior's advice. The argument produced a marked effect on the judge, and in the end judgment was given for Lord Westbury's client. After glancing at the judge, he turned round to his junior. "I do believe," he muttered coldly, "this silly old man has taken your absurd point."

The great John Clerk used to address the Court of Session in broad Scotch, and he did not attempt to refine his accent when he pleaded in the House of Lords. One of his answers to the Lord Chancellor is very widely known to all lawyers. He was speaking in a case regarding water rights, and was making frequent references to "the watter." "Mr. Clerk," interposed the Chancellor, "do they spell water with two 't's' in your country?" "Na, my Lord, but they spell mainners with twa 'n's'."