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ONTARIO WORKMEN'S COMPENSATION ACT. PROVISION ABOLISHING ACTIONS AT LAW.

The expediency of statutes of the type which is exemplified by the Ontario Act for the Compensation of Workmen at present under discussion in the Provincial Legislature, is now generally conceded. Even under the simplified forms of modern procedure the cost of ordinary actions at law is so great that, in a large proportion of instances in which injuries are sustained by servants in the course of their employment, they are faced with the alternative either of desisting from any attempt to recover damages, or of accepting a disadvantageous compromise. To no other class of cases, in fact, is the ironical remark made by Mr. Justice Maule in a famous trial, that "there is not one law for the rich and another for the poor," so strikingly applicable; and the hardship of the situation has been greatly aggravated, by a special cause—the operation of the doctrines concerning assumption of risks, common employment, and contributory negligence.

The essential and characteristic feature of all the statutes which have been passed for the purpose of remedying this inequitable state of affairs is a scheme under which injured workmen become entitled to a certain indemnity, irrespective of whether their injuries were or were not occasioned by the fault of their employers. The earliest legislation framed upon this model was the English Workmen's Compensation Act of 1897, which has been copied, with more or less variation, in other parts of the British Empire and in a large number of the American States. The English Act, both in its original and its amended form, expressly preserves the right of a workman to bring an action for injuries caused by his employer's breach of a common law or statutory duty, and one of the most important questions

to be settled by the Ontario Legislature is, whether this example shall be followed, or the remedies of the workmen entirely restricted to those specified in the Bill which has been laid before it.

The views of the learned Commissioner whose recommendations have determined the form of the Bill, are distinctly expressed in s. 15, which declares that the right to compensation which is given by Part I. of the Act "shall be in lieu of all rights and rights of action, statutory or otherwise, to which a workman or his dependants are or may be entitled against the employer * * * and no action in respect thereof shall lie." It is to be hoped, however, that even the opinion of so eminent an authority will not deter the Legislature from subjecting this section to close scrutiny and vigorous criticism. Its insertion in the Bill was presumably induced by a feeling that the preservation of the right to maintain actions at law would throw an unfairly heavy burden upon employers who were required to furnish the whole of the compensation fund. But it is submitted that this consideration is not conclusive, and that there are adequate grounds for maintaining that such a provision is prejudicial to the real interests of employers and workmen alike.

The fatal defect of the provision is that it necessarily operates so as to place culpable and non-culpable employers on the same level as regards their pecuniary liability for injuries received by workmen. This failure to discriminate between the two descriptions of employers will certainly tend to lower the average diligence exercised by employers as a whole. The process of deterioration may be slow, and its extent not susceptible of an exact estimate, but, as human nature is constituted, it is inevitable.

When viewed in relation to the interests of employers, the consequence thus indicated is manifestly undesirable, as producing an increase in the number of cases in which claims upon the compensation fund, created and supported by their contributions, will be presented and allowed, and thus subjecting the careful class of employers to an augmented burden due solely to the misconduct of the careless class. The certainty of this result is so clear that it is difficult to understand on what grounds the

employers can have reached the conclusion that, as a body, they would be benefited by procuring an immunity from actions at law. It does not seem to have occurred to them that, under the scheme proposed, all the members of their class, except those against whom damages would have been recoverable in such actions will be prejudiced to the extent that the compensation fund would have been relieved, if the culpable parties alone had been required to compensate the workmen injured by their negligence. The writer ventures to suggest that they should consider this phase of the subject more thoroughly than they seem to have done. The gist of the whole matter may be summed up in the simple question, Why should A., B., and C., who conduct their business properly, be answerable, even in the smallest degree, for the defaults of X., Y., and Z., who do not so conduct their business? Apparently such a question can be answered only in one way.

That the workmen will also be seriously prejudiced by a surrender of their right to recover from negligent employers damages computed on a common law basis, would seem to be equally certain. From their point of view the essential point to be borne in mind is that the preservation of this right would, by keeping alive the same motives which now influence employers to exercise proper care, tend as at present to diminish the risk of injury. Employers who know that lapses from the standard of reasonable care will expose them to the possibility of being compelled to pay larger sums to their workmen than they contribute to the compensation fund may be expected to order their business with far greater diligence than those whose liability is limited to the payment of the assessments for which the Bill provides. It is indisputable that, even under the existing system of substantive and adjective law, which, as already observed, renders litigation so precarious and expensive that workmen are frequently deterred from attempting to assert well-founded claims, they reap a constant advantage from the knowledge of these employers that any dereliction of duty will, if it causes an injury, possibly result in a law suit. The protective influences of the apprehension in-

duced by this knowledge would, of course, be far greater, if a cheaper procedure were available for injured workmen. Such a procedure might presumably be devised without any serious difficulty; but, however this may be, the conclusion seems to be unavoidable, that the abolition of the right of action in cases where negligence is involved would be even more prejudicial to workmen than to employers. In order to realize fully what such an abolition implies, they have only to consider that, if the section under discussion is adopted as it stands, they will be precluded from maintaining suits not only for injuries caused by breaches of common law duties, but also for those which result from a violation of the various statutes designed to promote the safety and health of employees in factories and elsewhere. The obligations of employers under these statutes would be enforceable only by means of criminal prosecutions. Even if workmen cannot procure immediately the boon of a simple and inexpensive procedure for the recovery of damages in actions at law, would it not be well to ensure that their existing rights in respect of such actions shall be kept intact for the present?

C. B. LABATT.

GOVERNMENTAL IMPAIRMENT OF A CONCESSION GRANTED BY THE GOVERNMENT—A REJOINDER TO A CRITIC.

In the February number of this JOURNAL I dealt with certain aspects of the power conferred by the British North America Act upon the Provincial Legislatures to pass laws "in relation to property and civil rights in the Provinces." Since my article was published I have received from a barrister a letter in which he takes exception to the correctness of one of my statements with regard to the character of a statute to which I alluded in the course of my argument. As this criticism proceeds from a gentleman of high standing in the profession, and may possibly reflect the opinion of other lawyers also, it calls for some notice.

The passage upon which my censor animadverts is the following:

> "If such a statute is admitted to be invalid, the inference is unavoidable, that a Provincial Legislature has no power to pass such enactments as those by virtue of which the Hydro-Electric Commission of Ontario was authorized to enter into competition with the Electrical Development Company *in the territory which the Provincial Government had stipulated not to evade.*" (See p. 45 of the article.)

The concluding words of this sentence are alleged to embody an erroneous theory as to the character of the contract referred to.

Before I proceed to discuss the truth of this allegation, I deem it only proper to admit that, when I wrote the words to which my correspondent objects, I had not examined the contract which I assumed to have been broken. I relied solely upon my recollection of the language used by the Minister of Justice and other members of Parliament, while the matter was being considered by the Dominion authorities. The circumstance that the transaction in question had been viewed by several responsible officials in a light which rendered it an apt illustration of my argument seems to me to have afforded a sufficient warrant for the very general reference which was made to it. The legality, expediency, righteousness of the legislation which I had in mind have been, for such a long period, treated as dead issues, that a merely academic interest now attaches to the question, whether the contract to which it related was or was not broken by the Government.

But the charge of error which my correspondent has laid against me renders it impossible for me to be satisfied with a plea of this sort. I have, therefore, examined a copy of the contract by which the rights and liabilities of the Electrical Development Company are determined. I find that the question, whether it was violated by the Government, depends mainly upon the scope and meaning of the following stipulation:—

> Clause 16:—The Commissioners will not themselves engage in making use of the water to generate electric, pneu-

matic or other power except for the purposes of the Park; provided that in case the said Commissioners shall have granted or at any time may have granted to any other person or corporation license to use the waters of the said Niagara or Welland Rivers and by reason of failure of such person or corporation to carry on the works so licensed the said Commissioners find it necessary to forfeit said license and take over said works, this clause shall not prohibit said Commissioners from operating such works for the generation and transmission, sale or lease of electricity or power.

The contention of my correspondent is that the restrictive words at the commencement of this clause shew that its operation is confined to processes which are connoted by the expression "generate," taken in a strict and narrow sense. But it is submitted that this construction of the agreement cannot be sustained on any reasonable ground. The manifest object of the clause was to obligate the Government to refrain from competing with the Company on any footing which would endanger the commercial success of the enterprise. Having regard to this fundamental consideration it is impossible to suppose that business men whose object was to secure their Company against injurious competition should have been content to obtain protection merely in respect of the single process of generating power. When we consider the matter with reference to industrial practice and industrial standards, the notion of such protection to be afforded to a bare generation of power, apart from the other processes incident to its subsequent transmission to consumers, becomes such a palpable anomaly that we are driven to assume that the parties who represented the Company in the negotiations with the Government must have had in mind these processes as well as that of generation, when the scope of the restrictive stipulation was being settled. The unavoidable inference, therefore, would seem to be that, although the expression "generate" was alone inserted in that stipulation, it was employed in a broad and comprehensive sense, as including all the operations required for the purpose of rendering the power to be generated commercially serviceable to the prospective cus-

tomers of the Company. On any other hypothesis the Government would have been simply undertaking not to interfere with the Company's business in regard to a single process which, when divorced from those which normally succeed the generation would be absolutely meaningless and ineffectual with relation to the objects for which the Company was formed. If my critic is justified in his contention that the Government merely consented to abstain from producing power, the Company would have been deliberately accepting an arrangement under which it was obvious that competition might render the other operations by means of which the sale of its power was to be consummated so unprofitable, that it would have to elect between the alternatives of withdrawing from business altogether, or of asserting the right which it had secured of operating at Niagara Falls, without any fear of rivalry, dynamos whose sole function would be the discharge of electricity into the circumambient air of Queen Victoria Park. It is safe to say that a stipulation which involves so preposterous a conclusion could not have been within the contemplation of the contracting parties.

But we are not left to determine their intention from this part of the clause alone. The whole of it may, and ought to be considered together for the purpose of arriving at its true construction. In this point of view the contents of the proviso may fairly be regarded as decisive against the contention of my correspondent. The effect of that proviso is, that the Commissioners shall be entitled to compete with the Company in the single contingency specified, viz., the forfeiture of a license granted by them to another person or corporation to use the waters of the Niagara or Welland Rivers. It is declared that, if such a forfeiture should occur, the Commissioners may, without violating the contract, operate "for the generation and transmission, sale or lease of electricity or power." These words, it is submitted, may reasonably be construed as showing that, although the expression "generate" is alone used in the main stipulation at the commencement of the clause, the actual intention of the parties was to provide against competition in

respect of all the processes enumerated in the proviso. Under any other theory, the specification of the processes additional to that of "generation" becomes a merely superfluous and meaningless detail. If my correspondent's view is correct, the privilege which the Government wished to reserve would have been adequately secured by a provision covering merely the "generation" of power.

There is also another consideration which points very strongly to the conclusion that the Government was guilty of a breach of the contract. Even if we assume that the stipulation was intended to be applicable only to the "generation" of power, in the narrow, technical sense of that expression, it would seem to be reasonably clear that, under the principle embodied in the maxim, *Qui facit per alium facit per se*, such a breach was committed when the Government undertook to sell electricity generated by a third party. It is difficult to suppose that a Court of Equity, if it were asked to enforce a similar clause in a contract between two private persons, would take a different view. Covenants in restraint of trade would manifestly be of little or no value, if they could be loaded by such a simple device as that of making arrangements which would enable the covenanters to secure, through the interposition of third parties, virtually the same advantages that they would obtain by carrying on business themselves within the prohibited areas.

C. B. LABATT.

LEGISLATIVE POWERS.

Mr. Labatt propounds a query of interest in a late number of the CANADA LAW JOURNAL based on the decision of the Privy Council in the case of the Alberta and Great Waterways Railway Co. (*Rex* v. *Royal Bank* (1913), A.C. 283). That case decided that an Act of the Alberta Legislature appropriating the proceeds of sale of the bonds of the company to the provincial revenue was ultra vires as derogating from the rights of the foreign bond holders and, therefore, being an Act "in relation

to civil rights" not "in the province." Mr. Labatt asks, "Could the legislature of a province make laws derogating from the rights of a foreign holder of shares in a company incorporated by such legislature?"

Before coming to the little I propose to say on this question I wish to advert, briefly, to a point mentioned by the learned writer of the said article in respect to the decision of the Privy Council. He says that the vital point of the case was the location of the proceeds of the sale of bonds and when that was fixed in Montreal the decision that followed was inevitable. I do not at all quarrel with that statement, but am inclined to doubt the implication, namely, that if the money had been in the Province of Alberta, the result must have been in favour of the validity of the Act. If the legislature may make laws in relation to "property in the province" and to "civil rights in the province," then the Act, while intra vires as relating to the property is still ultra vires as relating to the civil rights, and, I should say, if ultra vires in any respect is invalid.

But I referred to this matter more especially for the purpose of calling attention to the view advanced by Mr. Lefroy in the *Law Quarterly* for July, 1913. Shortly stated, his opinion is that the "civil rights in the province" mentioned in sub-clause 13 of sec. 92, British North America Act, mean only the right to resort to the provincial courts. If that be so necessarily there can be no such rights out of the province and the Act in question was not invalid as affecting civil rights. It is with great diffidence that I venture to question the opinion, on a matter of legislative power, of one who has become an authority on the subject, but in this case I am constrained to do so. I would say that the term "civil rights" used in connection with "property" in that clause means the right of an owner to protect his property, and resort to the courts is merely a mode of enforcing such right.

Mr. Lefroy says that, accepting his construction of the term "civil rights," the judgment of the Alberta courts upholding the Act should have been maintained. But it seems to

me that he gets himself into a dilemma there. He may mean that the Act does not relate to civil rights at all. If so, it was an Act relating to property out of the province and so ultra vires. Or, he may mean that it did relate to "civil rights in the province" as he construes that phrase. If so, it is difficult to conceive of any Act of the legislature which would not be intra vires on the same reasoning.

The view presented would make s. 92 of the British North America Act redundant in two respects. The words "in the province" in clause 13 would be superfluous and clause 14, respecting maintenance, etc., of provincial courts, unnecessary, as Mr. Lefroy claims that full control over these courts is conferred by s. 13.

I trust that I will be pardoned for this brief digression from my point of departure. The importance of the question and the high authority which mooted it must be my excuse.

To return to the original question propounded by Mr. Labatt I would say that the legislature of a province having authority to incorporate "companies for provincial purposes" no rights of a foreign shareholder in a company so incorporated could prevent it making any laws affecting the latter which otherwise would be within its competence.

If the position is sound, that the civil rights out of the province must be enforceable out of the province to invalidate an Act relating to such rights, then I conceive cadit quæstio, for obviously no rights of a shareholder can be enforced elsewhere than in the province of origin of the company. But irrespective of that position the fact that the rights of a shareholder exist only in common with those of the body of shareholders, and that any proceeding to enforce such rights must be on behalf of all shareholders, shews, to my mind, that the civil rights, if any there are to be affected by legislation, must be those of the body of shareholders, that is, of the company itself, and so "civil rights in the province."

C. H. MASTERS.

OUR FINAL TRIBUNAL OF APPEAL.

An address delivered on this subject by Hon. Sir Charles Hibbert Tupper, K.C.M.G., K.C., at the third annual meeting of the members of the Law Society of Alberta, is worthy of reproduction; and, perhaps, we are the more glad to give it to our readers as the conclusion he has arrived at is the same as has appealed to us, when he says "for myself I favour an Imperial Court of final appeal." After some preliminary remarks of a personal character, he continued as follows:—

"In the time allowed me, I have no opportunity to do more than outline a subject that possibly has engaged your attention already, but in the near future is likely to have the attention, not only of yourselves, but of the members of our profession from one end of Canada to the other, and that is the discussion which has been going on for some years in regard to the final tribunal of appeal. (Hear, hear.) I had the advantage, I don't think it is a general one, because these books do not seem to be circulated, of following the proceedings that have taken place at the different Imperial Conferences in London, running down to about 1911. And at all of these conferences it was interesting to observe—the whole of the colonies are practically represented (all of the self-governing colonies being represented)—the discussions. We have, in the first place, to observe this: that in regard to these lords of the sea and lords of the law in this country, as well as in other self-governing colonies of the empire, we have the security for our national rights, and the security for our private rights, and for neither of these great advantages do we pay one single farthing. That is a subject I think should be borne in mind in connection with the working out of the problem, particularly in regard to this matter of the Judicial Committee and the suggested reforms, because in all the years past that tribunal, whatever may be said about its continuance, has given us incalculable advantages and great benefit as, I say, absolutely free to us all and without charge. The questions involved, shortly put, seem to be as follows: whether

there shall remain an imperial final court of appeal: if so, shall it be the Judicial Committee as now constituted or a merger of that committee, so to speak, with the House of Lords, and if so what shall be the basis of the reorganization?

"I venture to put before you in connection with the consideration of this subject, points that will be so familiar that it almost seems as if I were carrying coals to Newcastle in directing your attention to them, but it would be well to observe the extraordinary history of this tribunal. I refer to the language of Lord Haldane at one of those conferences, when he put in almost the same words he used at the recent meeting of the American Bar Association in Montreal, very briefly, a history of the tribunal.

"On the question of treating the House of Lords as the one final Court of Appeal for the Over Seas Dominions, Lord Haldane said:—

' "It is a little interesting to bear in memory the origin of this. Originally the King was the fountain of justice for the courts in this country as for the courts of the Empire, but just as the House of Commons filched finance from the rest of Parliament, so the House of Lords filched the judicial jurisdiction from the King and it is by that process of abstraction, which is now a tradition of many centuries, that the House of Lords is the Supreme Court. Naturally and properly, the King is the fountain of justice and the Privy Council is the original form.'

"In Pike's Public Records (referring to appeals from the Channel Islands to the King in Council—the King of England originally being Duke of Normandy, the Channel Islands being King's possessions beyond the seas—as to how the analogy as applied to colonial possessions was acquired) the following passage occurs:—

" 'There we see hoy the Imperial idea, of which so much has been heard of late, has been made to fit in with the tradition handed down from the time of William the Conqueror.'

"At the instance of Guernsey in 1580 the first order-in-

council established rules of procedure. Originally the whole Privy Council constituted the judicial body.

"In 1833, through Lord Brougham, the Judicial Committee was constituted. Various schemes for re-organization were adopted in the years 1871, 1876, 1881, 1887, 1895, 1908, 1913, and the later years include the legislation making eligible judges from the different colonies and making the number different from one year to the other. You know, of course, as well as I do, that however satisfactory that readjustment might be made, it has usually failed because of the inadequate, or absence, in fact, of any allowance, allowance so far as our country is concerned, that would secure the attendance of the judges who were appointed to that committee; there is nothing, therefore, to enable us to judge of the result of their being added to the board or otherwise.

"But the body itself is peculiarly and essentially unique in the history of judiical tribunals. It is, of course, and has been said often, that not less than one-third of the human race look to it as its final court of appeal, and its jurisdiction covers 11,000,000 square miles, as against 1,600,000 of the Roman Empire.

"I myself think it is no discredit as a Canadian that we should have a final court of appeal outside of our country and maintained as this is, immediately in the capital of the Empire. In other words, I, personally, sympathize with the idea that we should have the right of appeal from a final court in this country. The Canadian must appreciate the fact of getting judgment, not merely of a court removed from local influences and that sort of thing, but a court which has included, on almost every occasion on which it has been composed, not merely the brightest legal luminaries in the world, but what has given that tribunal and gives the House of Lords such weight, the fact that at this court sit men with seasoned experience, men who have tried, in their professional life, and handled, perhaps, a thousand cases of a difficult character, compared with our leading men's one or ten cases of a similar character. (Hear,

hear). I have seen men, some of our ablest men, men who can compare with anyone as far as intellect is concerned, who have worried over a comparatively small matter of, say, Chancery practice. It is no discredit. Take any medical men who have been through colleges and travelled over the continent visiting the universities, who have told their clients to go to some specialist, probably a great surgeon in London. No discredit to them to say that, for the simple reason the man has made a special study of that particular branch and is not necessarily an abler man, but has more experience in that line.

"The following quotation gives us a peep behind the doors. It is taken from the report of the conference in 1911:—

"'The Lord Chancellor.—It might be as well that I should tell you what happens in the interior. Sometimes before the Privy Council the cases are quite obvious, and we are all agreed at once and the judgment is delivered at once. But that is not usual; as a rule, as you know, time is taken to consider these cases, and in the House of Lords they are mostly considered judgments for the final decision of any case. I do not mean to say for giving leave to appeal or anything of that sort. We meet, we sit there and discuss the whole thing from top to bottom always after the case is heard and the counsel have withdrawn. We discuss it, and agree to the lines upon which the case is to be decided. If there are dissents, which there are not often (dissents are rare), the point of view of the dissenting judge is weighed, considered and discussed. Sometimes we put it back, in order to have a fresh discussion if it is necessary, and after having fully discussed it and agreed together on the lines upon which the judgment is to be drawn, one, mostly taken in rotation of the judges who sit, writes the judgment. It is then printed and circulated to all the others for their criticism. They make their criticism if they dissent from anything, and when that has been done the final judgment is reprinted, is re-circulated if necessary, and then is delivered. So that there could not be more deliberation, and it is indeed quite a mistake I assure you to suppose that there is any sort of slackness in

that business. On the contrary, I am quite certain that all those who sit have a very strong sense of their responsibility. We have given the best we can. Whether it is good enough is another thing.'

"I would like to draw your attention to one or two interesting phases that came up in the discussion to which I have referred. I was, not long ago, interested in tracing myself the earlier decisions of the Judicial Committee after the reform brought about by Lord Brougham. I was surprised to find, as though by accident, one case in which the expression was made by the judge in delivering or reading the opinion that his brother so and so did not agree and giving the reasons of brother so and so and then referring to another dissenting opinion. Now such a thing as that is unheard of at the present day. It has been the rule for only one judge to read the reasons for judgment, and there is no suggestion as to whether there were differences before and whether any particular judge dissented; and the reason given at the conference was, which you all understand, no doubt, that it could not be done because this was a committee of the Privy Council, and, as they were advising the King, who had the right to accept or reject their advice, they were not at liberty to state who dissented from it.

"From 1836 on to 1878, you will find references to the differences of opinion. The delegates from New Zealand and Australia in the conference in London of 1911, argued that the present system was wrong (the non-giving of reasons for judgment); they wanted some security that there had been individual attention given to the arguments, and the security was that each judge should give his reasons for his decision.

"Then following the history of these conferences may I draw your attention to the fact that there was a conference of colonial judges in 1902 at the Colonial Office, who tried to solve this matter of the merger and that it resulted in failure. The subject was considered in 1907 again, and at that conference Sir Wilfrid Laurier, who was then Prime Minister, mentioned very tersely the points that had to be considered before that matter

was finally thrashed out. The province which he (Laurier) referred to especially was Quebec, and they were supposed to be very much attached to this right of appeal.

"Sir Wilfrid Laurier pointed out that the constitution of the committee required reconsideration. There was the question of retention of right to appeal involved and the provinces were to be considered as well as the Dominion and their particular view obtained. He suggested to leave it to the different Parliaments as to whether the right to appeal be retained or not.

"The Lord Chancellor thought the effect of the proposal to merge the House of Lords and the Judicial Committee would be to alter the tribunal to which English, Scotch and Irish appeals have always gone. English appeals have gone to the House of Lords from time immemorial, Scotch appeals since the union in 1707, and Irish appeals since 1800. This required consideration in the United Kingdom.

"Lord Haldane in 1900 pointed out in theory only were there two different tribunals whereas in fact the personnel was more or less identical.

"In 1911 an Imperial Appeal Court again was discussed.

"Lord Haldane said: 'The Lord Chancellor's proposal now is in substance to make only one court but to leave the other forms until such time—it may come very soon if one is to pay attention to what has been said recently in the House of Lords itself—as the whole judicial business is excluded from that assembly and combined in one court.'

"Among the arguments in favour of an Imperial Court of Final Jurisdiction are the following briefly summarized:—

"The removal of causes from the influence of local prepossessions.

"The absence of preconceived notions or local associations.

"The absence of suspicion of bias or partiality, personal or political.

"The Imperial Tribunal secures uniformity in administration of the law. It has peculiar value consequent upon adapta-

tion of many English statutes such as The Companies Act, The Sale of Goods Act, the Merchant Shipping Act.

"I quote from the valuable work of Lefroy as follows:—

" 'The second point with which the student of our Federation Act, and the decisions under it cannot fail to be impressed, is the splendid work done upon the interpretation and development of our constitutional system by the Judicial Committee of the Privy Council, assisted, of course, by the preliminary discussions and judgments of our own courts. The plenary power of Canadian legislatures over the internal affairs of the Dominion, so that in all matters of self-government, anything which is not within the power of the Dominion parliament is within the power of the provincial legislatures, and vice versa—the paramount authority of the federal parliament when legislating within its proper sphere in case of irreconcilable conflict with provincial legislation—and the right, at the same time, of provincial legislatures to legislate under their own powers, even though by so doing they may limit the range which would otherwise be open to the Dominion parliament—the principle that legislation which in one aspect is intra vires of the Dominion parliament, may, in another aspect, be intra vires also of the provincial legislatures—these are among the great and fundamental doctrines of our constitution which the Privy Council has established by a number of weighty judgments. And prominent among the names of those great jurists, whose work this has been, must always remain that of Lord Watson, of whom Lord Chancellor Haldane recently wrote: 'He filled in the skeleton which the Confederation Act had established, and in large measure shaped the growth of the fibre which grew round it. He established the independence of the provinces and their executives. He settled the burning controversies as to the liquor laws, and as to what government, Dominion or Provincial, had the title to gold and silver. His name will be long and gratefully remembered by Canadian statesmen.'

"For myself I favour an Imperial Court of Final Appeal. Our right to self-government is in no manner affected. Such

a tribunal will the better procure a satisfactory adjustment of constitutional questions.

"Speaking independently of any party, I say as a lawyer, it seems to me possible and desirable, having in view just a few of the arguments that I have already suggested in connection with our experience under this eminent judicial body, that without yielding one jot or tittle of our self-respect or our rights to self-government, we should hold fast to that imperial link and, at any cost, the advantage to us being absolutely incalculable, and if there could be an imperial tribunal, on a basis satisfactory to the different colonies, satisfactory to the different portions of the different colonies, states or provinces, then, without any sacrifice we could have not merely one flag, one throne, but one real life, and that life guarded under, not merely the flag of the Empire, but guarded and saved by the institutions as they have been handed down to us, construed from time to time by the ablest legal intellects this great Empire can afford."

AMNESIA AND THE LAW—LOSS OF MEMORY—RESPONSIBILITY.

Prisoners frequently make the statement in court, writes Dr. T. D. Crothers in the March *Case and Comment*, that they have no recollection of the acts alleged, and have no conception of why they did certain things, and what their motive was. This appears to unthinking persons to be an excuse for the purpose of lessening the responsibility and diminishing the consequences of punishment, and is always regarded with suspicion. Exact scientific studies shew that it is often a reality which may be confirmed by a great variety of evidence, and direct and indirect experience.

In an experience of nearly half a century, in the treatment and study of drink and drug addicts, I have noted many examples of criminal conduct, due exclusively to this condition. Many of them were homicides, in which no motive or reason could be given for the act; others were frauds in contracts and

unusual credulities, and all traceable clearly to amnesia and paralysis of the memory centres.

Several examples of homicides, sudden, explosive, and violent, followed by suicide, have been noted. The act was committed during the amnesiac period, and on recovery, the horror of the acts caused them to take their lives. There are many instances of this character that are unknown.

Extreme remorse and depression following the awakening from the memory blank precipitates them into other more startling acts. This condition is a double personality of which Mr. Hyde and Dr. Jekyl are good illustrations. The assumption of amnesia in spirit and drug takers who commit overt acts is supported by a great variety of collateral evidence which careful analysis of conduct will sustain. It often happens that acts committed while in this condition when realized may disturb the brain to such an extent as to produce deliriums and delusions.

Examples of this are those persons who are very profuse and give exaggerated explanations of the crime committed, or most childish reasons, in a confused medley of statements that are obviously untrue.

An instance occurred in a very prominent family where the husband killed his wife and child, evidently in an amnesiac state. Soon after he became delirious and delusional, and shewed a variety of symptoms, which were misinterpreted as evidences of contrition.

In another case a homicide was committed by a very sensitive, intelligent man, who, on realizing what he had done, became so depressed that he developed acute tuberculosis, and died before the execution of the sentence. I have noted many criminals who were spirit and drug takers who became extremely melancholy, and developed acute organic diseases which caused their death. They were amnesiac cases, and the consciousness of their condition had destroyed all desire to live; and while asserting that they had no recollection of what had occurred, seemed profoundly indifferent to the punishment, and went to their death with a sense of relief.

There are other acts unexplainable except from amnesia and inability to realize the surroundings and their relation to them. Wills have been made, contracts signed, notes indorsed, statements made, which referred at once to a faulty brain, and yet the evidence was not regarded, and the person was considered responsible.

Many instances occur in which the faulty mental condition of the person is taken advantage of by designing men. The victim appears to be unusually credulous, reticent, and suspicious, and exhibits very unusual symptoms of derangement, which are clearly referable to faults of memory.

These are often transient periods which occur with the ordinary events of life, and are not recognized, unless some overt act calls attention to them.—*Legal News Items.*

SALES BY PERSONAL REPRESENTATIVES.

The decision in *Hewson* v. *Shelley* (109 L.T. Rep. 157; 1913), 2 Ch. 384), was on Saturday last reversed by the unanimous decision of the Court of Appeal (noted *post*, p. 531). It will be well to briefly recall the facts. Captain Hewson died in Jan. 1899. A diligent search was made for a will, but it proved fruitless, and letters were taken out by the widow, and the estate distributed as if on an intestacy. The administratrix sold some real property to the defendant. On the widow's death, Captain Hewson's will was discovered in an out-of-the-way place. In this will there was a specific devise of the property which had been sold, and the executors, having obtained a recall of the letters and proved the will, took proceedings against the purchaser for recovery of the property in question. Mr. Justice Astbury held, though with reluctance, that he was bound by authority to decide that the property had vested in the executors at Captain Hewson's death, and that consequently the administratrix had not passed it to the purchaser.

In the Court of Appeal the ancient cases of *Graysbrook* v. *Fox* (1565), 1 Ployd. 275), and *Abram* v. *Cunningham* (1677, 2

Lev. 182), were declared to be no longer law, though Lord Justice Buckley made a heroic attempt to distinguish the former case. What weighed very much with the court was the fact that limited administration was frequently granted, *e.g.*, during the absence or infancy of a person, during a case or even until a will was brought in for probate. It was impossible to suppose that the authority thus conferred on the administrator was nugatory, and yet, if the property had vested in the executor (possibly an unknown executor) at the death of the deceased, this seemed to be the necessary conclusion. Lord Justice Buckley felt the difficulty of an administrator dealing with the property, even for the purposes of paying funeral expenses and debts, if no property vested in him. An answer to this could be made, as trustees with a power of sale under a strict settlement have no property vested in them and still can sell. So there is a logical way out of the Lord Justice's difficulty (namely) by regarding the estate as vested in the unknown executors from the death of the deceased, but allowing the administrator to dispose of it under his implied power of sale for the purposes of administration. This would put the purchaser on inquiry as to whether the sale was for the purposes of administration or whether is was merely for the convenience of the widow and the coheiresses. In the former case it would be good, in the latter bad. As a matter of practice it is extremely inconvenient to have to inquire whether as a fact the debts and testamentary expenses have been paid. All of this is avoided by holding that whatever interest is in the unknown executors is divested by the letters of administration and vested again in the executors when the letters are revoked. Meanwhile the administrator can deal with the property of the deceased as if there was no will in existence.

We have referred to the decision as if it only affected administrators, but it also affects executors, as there is almost always the possibility of a subsequent will or codicil appointing other executors being discovered. In which case the estate would have been wrongly dealt with by the former ones, if the

Court of Appeal had permitted the decision of the court below to stand.

Lord Justice Phillimore also observed on the anomaly that the discovery of the will would, admittedly, not have invalidated the dealing of the administrator if there had been no executors of the will appointed, or all of them had predeceased the testator or had pronounced probate: (see, for instance, *Boxall* v. *Boxall*, 51 L.T. Rep. 771; 27 Ch. Div. 220). This anomaly is avoided by the decision of the Court of Appeal, and purchasers for value without notice of a will or another will, as the case may be, can henceforth deal with the legal personal representatives of a deceased without the misgivings which they have experienced since the judgment in *Hewson* v. *Shelley* was given last July.

There still remains the question whether the specific devisee cannot recover the proceeds of sale from the coheiresses who have all this time been enjoying what in reality belong to another. As Mrs. Hewson had a life interest in all her husband's property, and she died only in September, 1911, the devisee could not recover interest from any earlier date, but it is difficult to see how he can be barred when his right to possession accrued only two and a half years ago. In *Jervis* v. *Wolfestan* (30 L.T. Rep. 452, L. Rep. 18 Eq. 18), where an executor was held entitled to recover from the residuary legatees what had been paid to them in disregard of certain liabilities of the testator's estate which had subsequently ripened into a debt, Sir George Jessel said: "That has always been the law, and I think there is no unusual hardship in it. On the other hand, it has been thought to be a hardship that a man may not spend the income of what he has been paid, and the doctrine is now established, that if an executor recovers back assets he cannot recover any of the income, but he must take only the capital."

In *Re West* (101 L.T. Rep. 375; (1909), 2 Ch. 180), however, where another codicil was subsequently discovered, in which certain shares given by the earlier instruments to A. were bequeathed to B., it was held that B. was entitled to recover not

only the shares, but the dividends thereon as from the testator's death. If that case is followed, the devisee in *Hewson* v. *Shelley* would be entitled to the income as from the death of the tenant for life.—*Law Times.*

MODERN PLEADING.

The due administration of law loses nothing when it passes through the hands of Mr. Justice Middleton of the Supreme Court of Ontario. An illustration of this may be seen in the case of *Snider* v. *Snider*, 6 O.W.N. 80.

The plaintiff's claim was upon some promissory notes, but he followed up the claim with what the learned judge described as "a long and rambling account of the transaction," which apparently was not material to the issue. His further language on the subject may well be marked, learned and inwardly digested by solicitors of the present day:—

"Although the art of pleading has fallen into disrepute, it seems to me that, quite apart from the rules, reason and logic are not entirely dethroned, and that a litigant ought to be compelled to present his case decently clothed in appropriate English. It is said that the due purpose of language is to conceal thought; yet in the preparation of pleadings some evidence of at least rudimentary thought ought to be apparent."

In the old days of accurate pleading, special demurrers, etc., pleading was not only an art, but it taught lawyers to be exact, and to use language which expressed what was meant and appropriate to the occasion, and not redundant or slovenly, or capable of two meanings.

REVIEW OF CURRENT ENGLISH CASES.

SALE OF GOODS—HIRE AND PURCHASE—OPTION TO BUY—PLEDGE—CONVERSION—MEASURE OF DAMAGES.

Belsize Motor Supply Co. v. *Cox* (1914) 1 K.B. 244. This case turns to some extent on The Sale of Goods Act, 1893, of which we have no counterpart in Ontario. It is, however, deserving of attention because it deals with a question as to the measure of damages which is of general interest. All that need be stated here is that the defendants were pledgees of goods which the pledgors had leased from the plaintiffs, subject to an option to purchase. The pledge, as the court found, amounted to a conversion of the property, and the question then arose, What ought the measure of damages to be in the circumstances? The value of the goods, or the plaintiff's beneficial interest therein as unpaid vendors? Channell, J., who tried the action, came to the conclusion that the defendant was entitled to stand in the position of his pledgor, and as the pledgor was, under the agreement, entitled to the goods on payment of the balance of the price, so as against the defendant, who had an interest in the goods, that was the measure of damages.

RAILWAY—CARRIAGE OF GOODS—SPECIAL CONTRACT—"OWNER'S RISK"—"NON-DELIVERY OF ANY CONSIGNMENT"—NON-DELIVERY OF PART OF CONSIGNMENT.

Wills v. *Great Western Ry.* (1914) 1 K.B. 263. This was an action to recover damages for non-delivery of goods delivered to the defendants for carriage for hire. The goods were contracted to be carried at a reduced rate upon terms of a contract signed by the plaintiff which provided that the defendants were to be relieved from "all liability for loss, damage, mis-delivery, delay or detention" unless arising from the wilful misconduct of their servants, but not from any liability they might otherwise incur in the case of "non-delivery of any package or consignment fully and properly addressed," and that "no claim in respect of goods for loss or damage during the transit" should be allowed unless made "within three days after delivery of the goods, in respect of which the claim is made or in case of non-delivery of any package or consignment, within fourteen days after despatch."

The goods in question consisted of a quantity of carcases, and on the arrival of the consignment at its destination some of the carcases were missing. The plaintiffs made a claim within fourteen days after the despatch of the consignment. The defendants contended that this was a case of "loss" and not of "non delivery," and the claim was barred because not made within the three days, but the Divisional Court (Bray, and Lush, JJ.) were of the opinion that it was a case of "nondelivery," and that those words applied to part as well as to the whole of the consignment, and that the word "loss" in the contract did not include "non-delivery," as to which there was a special provision made.

SHOP ASSISTANT—WEEKLY HALF HOLIDAY—EMPLOYMENT ON HOLIDAY ABOUT BUSINESS OF SHOP—SHOPS ACT, 1912 (2-3 GEO. V. c. 3), s. 1.

George v. *James* (1914) 1 K.B. 278. By the English Shops Act, 1912, s. 1, "On at least one weekday in each week a shop assistant shall not be employed about the business of a shop after half-past one o'clock in the afternoon." The defendant was charged with violating this provision by employing his shop assistants on the weekly half holiday in distributing handbill advertisements of goods sold at the shop. On a case stated by magistrates it was held by the Divisional Court (Channell, Avory, and Atkin, JJ.) that the defendant was properly convicted of a breach of the Act. This case may possibly have a bearing on the construction of the Canada Lord's Day Act, R.S. C. c. 153, s. 6.

PRACTICE—JOINDER OF CAUSES OF ACTION—CLAIM BY EXECUTOR—PERSONAL CLAIM—RULES 1883, RULES 188, 192, 194—(ONT. RULE 71.)

Tredegar v. *Roberts* (1914) 1 K.B. 283. By the English Rules 192 (see Ont. Rule 71) claims by or against an executor as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued. In this case the plaintiff, as executor, sought to recover rent due to his testator's estate, and also joined a claim for rent of the same premises due to himself as tenant in reversion, and it was held by Astbury, J.,

that the two claims could not be joined, the claim as owner of the reversion not arising in reference to the estate of which he was executor. The plaintiff was therefore put to his election as to which of the causes of action he would proceed with.

COPYRIGHT—MUSICAL WORK—GRAMOPHONE RECORDS—RECORDS MADE BEFORE COMMENCEMENT OF ACT—SALE AFTER COMMENCEMENT OF ACT—INFRINGEMENT—COPYRIGHT ACT, 1911 (1-2 GEO. V. C. 46), SS. 1-2, 19, 24.

Monckton v. *Pathé Freres, etc.* (1914) 1 K.B. 395. This was an action to recover damages for the infringement of plaintiff's copyright in a musical composition. The work in question was composed and published prior to the passing of the Copyright Act, 1911. The defendants also, prior to the Act, made gramophone records of the work in Belgium. After the Act took effect they imported these records into England and there sold them, which was the infringement complained of. Phillimore, J., who tried the action, held that the plaintiffs could not recover, but the Court of Appeal (Williams, Buckley, and Kennedy, L.JJ.) reversed his decision.

CRIMINAL LAW—UNLAWFUL CARNAL KNOWLEDGE OF GIRL UNDER SIXTEEN—EVIDENCE OF PREVIOUS OFFENCE AGAINST THE SAME GIRL—PREVIOUS OFFENCE MORE THAN SIX MONTHS BEFORE COMMENCEMENT OF PROSECUTION.

The King v. *Shellmaker* (1914) 1 K.B. 414. This was a prosecution for unlawfully and carnally knowing a girl under sixteen within six months of the commencement of the prosecution, under a statute which provides that no prosecution for this offence shall be commenced more than six months after its commission. Evidence was admitted at the trial which shewed that the accused had had connection with the girl more than six months previous to the commencement of the prosecution, and the question was raised whether such evidence was properly admissible. The Court of Criminal Appeal (Isaacs, C.J., Channell, Bray, Avory, and Lush, JJ.) held that it was, and that it could not be rejected either on the ground of its shewing that the accused had been guilty of other offences than that with which he was charged, and was, therefore, likely to commit the crime charged against him; or on the ground that the alleged other offences took place more than six months prior to the commencement of the prosecution, the court observing that the limitation, as to time for prosecuting, did not affect the law of evidence.

SHIP—FIRE—FIRE CAUSED BY UNSEAWORTHINESS—"ACTUAL FAULT OR PRIVITY" OF OWNERS—MERCHANT SHIPPING ACT, 1894 (57-58 VICT. c. 60), s. 502.

Asiatic Petroleum Co. v. *Lennard's Carrying Co.* (1914), 1 K.B. 419. This was an action by the owners of a cargo against the shipowners to recover damages for loss of the cargo by fire. The defendants claimed immunity under s. 502 of the "Merchants Shipping Act, 1894," which provides that "the owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely:—(1) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship . . ." The vessel put to sea with her boilers in a defective condition by reason whereof the fire occurred. The managing owner of the vessel knew of the defective condition of the boilers, as Bray, J., found, who tried the action, and who, therefore, held that as the fire was occasioned by the unseaworthiness of the vessel to the defendants' knowledge, it could not be said that the fire occurred without their actual fault or privity, and, therefore, they were not entitled to the protection of the statute, and with this judgment the majority of the Court of Appeal (Buckley, and Hamilton, L.JJ.) agreed, but Williams, L.J., dissented, thinking that the ship owners were not responsible for the fault of the captain and manager in regard to putting to sea with the boilers in a defective condition. But see *Ingram* v. *Services Maritimes, etc.* (1914), 1 K.B. 541.

MAINTENANCE OF ACTION—COMMON INTEREST—TRADE UNION—SLANDER OF OFFICER OF UNION—ACTION BY OFFICER—UNION APPLYING FUNDS TO PAYING COSTS OF ACTION BY ITS OFFICER—ULTRA VIRES.

In *Oram* v. *Hutt* (1914) 1 Ch. 98, the Court of Appeal (Lords Parker, and Summer, and Warrington, J.) have affirmed the Judgment of Eady, J., 1913, 1 Ch. 259 (note, ante vol. 49, p. 224), holding that a trade union cannot legally apply the funds of the union in defraying the costs of an action brought by one of its officers for a slander of him in his capacity as an officer of the union, because they have no common interest in the action to justify such an application of their funds. Although

Lord Parker seems to suggest that a corporation cannot commit maintenance, and that no civil action would lie against it for damages for applying its funds in maintaining an action of a third party, yet he says the act was, nevertheless, tortious and therefore illegal. If the objection of maintenance were out of the way, the payment of the costs in question was unwarranted by the rules of the association, and therefore *ultra vires*. Both the other members of the court, however, put their judgment on the ground that the union was guilty of maintenance, and the payment, therefore, illegal.

MARRIAGE SETTLEMENT—COVENANT TO SETTLE PROPERTY—"INTEREST IN EXPECTANCY."

In *re Mudge* (1914) 1 Ch. 115. In this case the construction of a covenant in a marriage settlement dated in 1866, was in question. By the covenant in question the wife covenanted that any real or personal property to which she was then entitled for any estate or interest whatsoever in reversion, remainder or expectancy, should be settled on the trusts of the settlement. By the will of the settlor's mother, dated in 1862, a fifth share of her residuary estate was given to the settlor's sister Williamina, for life, with remainder to her children, but if she should die without issue (which event happened) her share was to go to her next-of-kin, as if she had not been married. The settlor's mother died in 1864, and Williamina died in 1912, whereupon the settlor, as one of her next-of-kin, became entitled to an aliquot part of Williamina's share of the residuary estate, and the question was whether this share was "in expectancy" within the meaning of the covenant. Neville, J., who tried the case, came to the conclusion that at the date of the settlement the possibility of the settlor becoming entitled to a share of the residuary estate bequeathed to Williamina was an interest "in expectancy," and was caught by the covenant; but the Court of Appeal (Cozens-Hardy, M.R., and Eady, and Phillimore, L.JJ.), were of the contrary opinion, holding it to have been at the date of the settlement a mere *spes successionis*, and as such not within the covenant.

WILL—CONSTRUCTION—GIFT TO NEPHEWS—"NEPHEWS" MEANING OF—NEPHEWS BY MARRIAGE.

In re Green, Bath v. *Cannon* (1914) 1 Ch. 134. In this case the will of the testatrix, which was in question, appointed "my

nephews" A.B., R.L., and W.H., to be executors and trustees of the will, and she thereby gave all her residuary estate upon trust for division "between my nephews and nieces living at the date of my decease." Two of the nephews named as executors and trustees were nephews of her first husband, the other was her own nephew. The question was whether, in these circumstances, nephews and nieces by marriage were included in the residuary bequest. Sargant, J., came to the conclusion that only nephews and nieces by consanguinity took, and that not even the two trustees, who were only nephews by marriage, were included. The learned judge considered the case, to a great extent, one of first impression.

INTERNATIONAL LAW—DIPLOMATIC AGENT—PRIVILEGE FROM SUIT —APPEARANCE—WAIVER—DIPLOMATIC PRIVILEGES ACT, 1708 (7 ANNE, CH. 12)—AUDITOR—LIABILITY OF AUDITOR—ULTRA VIRES PAYMENTS.

In *re Republic of Bolivia Exploration Syndicate* (1914) 1 Ch. 139. In this case two points arose. The first was on a question of privilege. This was an application by a liquidator in a winding up proceeding. One of the parties, who had been summoned, was the secretary of the Peruvian Legation. On being served with the summons he had entered an unconditional appearance, but on the return of the summons it was objected on his behalf that he was entitled to diplomatic privilege from suit. The liquidator admitted that the privilege existed, but contended that by the unconditional appearance it had been waived. Astbury, J., held that under the Diplomatic Privileges Act (7 Anne, ch. 12), the defendant was entitled to the privilege claimed, and that the entry of the appearance was not a waiver, because having regard to the defendant being a foreigner he could not be presumed to know that the entry of the appearance would be a waiver, and because he doubted whether a subordinate secretary could waive the privilege even if he desired to do so, without the sanction of his sovereign. We may note that the Statute 7 Anne, ch. 12, though not included in R.S.O. 1897, vol. 3, is, nevertheless, probably operative in Ontario and all other parts of the Empire. On the other branch of the case, as to the liability of auditors; the facts were that by the company's memorandum of association and a resolution of the board of directors a commission for placing shares of the company was authorized, and the auditors in reliance on this memorandum

and resolution, passed certain payments for commission in their balance sheet, without discovering and drawing attention to the fact that they were not authorized by Table A, 1906, and it was held that in the circumstances the auditors were not liable for this omission. The auditors had also passed certain payments in the following circumstances. A solicitor who became a director three months after the incorporation of the company, was subsequently paid certain sums for agreed costs of incorporation and other sums for costs, rent of office and clerical assistance. These payments were confirmed by a board, of which the solicitor was a member. The auditors did not discover or draw attention to the fact that as there was no power under Table A for a director to contract with the company, the solicitor could not charge profit costs, and that the payments were pro tanto unauthorized. But Astbury, J., held that in the special circumstances of the case the auditors were not liable for this omission.

WILL—RESIDUE—TRUST FOR SALE OR CONVERSION—POWER TO POSTPONE CONVERSION—SHARES IN LIMITED COMPANY—RIGHT OF BENEFICIARY TO TRANSFER OF HIS PROPORTION OF SHARES—DISCRETION OF TRUSTEES.

In *re Marshall, Marshall* v. *Marshall* (1914) 1 Ch. 192. A testator by his will devised and bequeathed his residuary real and personal estate, which included a large number of shares in a limited company, to trustees upon trust to convert, with power to them in their uncontrolled discretion to postpone conversion as long as they should think fit, and in particular to retain any shares and securities of the company held by him at his death. He then divided his estate into certain shares, some of which he settled. Several of the trustees were directors of the company and had large holdings of shares; and it was stated that if the shares owned by the estate were all kept together the trustees would have a preponderating influence in the company, and for this reason the trustees desired to postpone conversion. In the events which had happened, two sons and two grandsons had become absolutely entitled to their respective shares in the residue and claimed to have transferred to them their respective proportions of the shares in the company. Warrington, J., who heard the application, held that the trustees were entitled to exercise the discretion given them by the will, and considered that the granting of the application might possibly prejudicially affect the rights of the other parties in the

rest of the shares, but the Court of Appeal (Cozens-Hardy, M.R., and Eady, and Phillimore, L.JJ.) did not agree with him and considered that the right of the trustees to postpone conversion ought not to prevail as against the right of a beneficiary absolutely entitled. The application was, therefore, granted.

TENANT FOR LIFE AND REMAINDERMAN—CAPITAL OR INCOME—POSTPONEMENT OF CLAIMS FOR PRINCIPAL—SCHEME OF ARRANGEMENT—PARTIAL PAYMENT OF INTEREST.

In *re Pennington, Pennington* v. *Pennington* (1914) 1 Ch. 203. This was a contest between a tenant for life and remainderman. The facts were that residuary estate was given to trustees upon trust for the testator's two sons for life with remainder to their respective children, with power to the trustees to retain the securities in which the estate was invested. The testator declared that the income, whether the retained investments were authorized or not, and whether of a permanent or wasting character, should be applied "as if the same were income arising from the proceeds of conversion, no part thereof being liable to be retained as capital." Part of the estate consisted of debentures guaranteed by a guarantee society, on which the principal and interest were in default, and the guarantee society was being wound up. In the winding up proceedings a scheme of arrangement had been sanctioned under which the time for the payment of the claims of the creditors were postponed until 31st December, 1918, and in the meantime the liquidators were to pay or make up the interest on such claims to 3 per cent. per annum. The question was whether the interest should, in the circumstances, be apportioned between capital and interest or whether the tenants for life were entitled to the whole of it as income. Joyce, J., held in favour of apportionment, but the Court of Appeal (Cozens-Hardy, M.R., Eady, and Phillimore, L.JJ.), however, were of the contrary opinion, and held that the tenants for life alone were entitled.

LANDLORD AND TENANT—DEMISE OF ROOM—RIGHT TO OUTSIDE WALL—EVIDENCE.

Goldfoot v. *Welch* (1914) 1 Ch. 213. This was an action by a tenant of the rooms on the first and second floors of a house to restrain his landlord from affixing advertisements of Lipton's tea on the outside walls of the demised premises. The rooms in

question were used by the plaintiff to carry on his business as a dentist, and the defendant sought by parol evidence to shew that the external walls were excluded from the demise; but Eve, J., who tried the action, held that such evidence was inadmissible, and that the demise of the rooms included the external walls of the premises in the absence of any agreement to the contrary.

WILL—CONSTRUCTION—GIFT TO CHILDREN OF CHILD OF TESTATOR WHO "SHALL DIE IN MY LIFETIME"—CHILD DEAD, AT DATE OF WILL LEAVING CHILDREN.

In *re Williams, Metcalf* v. *Williams* (1914) 1 Ch. 219. By the will in question in this case the testator gave his residuary estate "in trust for all my children living at my decease, who being sons shall attain 21 years, or being daughters shall attain 21 years or marry. . . . Provided that if any child of me shall die in my lifetime leaving children who shall survive me and being sons shall attain 21 years or being daughters shall attain that age or marry, then in such case the last-mentioned children shall take equally the share which their parent would have taken if such parent survived me and attained the age of 21 years." To the knowledge of the testator one of his sons was dead at the date of the will, leaving two children who survived the testator. The other children of the testator survived him, and some of them had attained 21 at the date of the will. The question was whether the two children were entitled to the share which would have gone to their father if he had survived the testator. Sargant, J., decided in favour of the two grandchildren, holding that the words "shall die," did not necessarily import dying after the date of the will, and that as the words "shall attain 21 years" included those of the children who had already attained that age at the date of the will, so he thought the words "shall die" included the child who had already died at the date of the will. Nor did the fact that the testator by his will had given two small legacies to the two grandchildren contingent on their attaining 21, in the opinion of the learned judge, afford any indication of an intention to exclude them from participation in the residue.

REPOPTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] SNELL v. BRICKLES. [Feb. 23.

Vendor and purchaser—Contract for sale of land—Payment by instalments—Specified dates—Time of essence—Forfeiture —Penalty—Payment declared to be deposit.

Held, 1. Where a contract for the sale of land provides for payment of the purchase money by instalments at specified dates, that time shall be strictly of the essence of the contract, and that in default of payment of any instalment on the day named the vendor may rescind and retain all monies paid on account, such condition of forfeiture of the monies paid is only in the nature of a penalty If default occurs and the vendor declares the contract at an end the court may still grant the purchaser relief by way of specific performance: *Kilmer* v. *British Columbia Orchard Lands Co.* (1913), A.C. 319.

2. (Affirming the judgment appealed from, 28 O.L.R. 358, Fitzpatrick, C.J., and Anglin, J., dissenting), that when by the contract the first payment of the purchase money is stated to be made "as deposit accompanying this offer to be returned to me if offer not accepted" and it contains the above provisions as to time being of the essence and forfeiture of payments in case of default, the deposit of the initial payment is only security for performance and the principle of the above case may apply to entitle the purchaser to relief.

Appeal allowed with costs.

Proudfoot, K.C., for appellant. *J. E. Jones*, for respondent.

N.S.] [March 2.

ATTORNEY-GENERAL OF CANADA v. CITY OF SYDNEY.

Militia Act—R.S.C. (1896), *c.* 41—"*Senior Officer* . . . *present at any locality*"—*Military district—Right of action —4 Edw. VII. c.* 23, *s.* 86.

By s. 16 of the Militia Act, Canada is divided into Military districts of which the Province of Nova Scotia is one. By s.

34 "the Senior Officer present at any locality" may, on requisition from three justices of the peace, call out the troops in aid of the Civil power wherever a riot or disturbance of the peace has occurred or is anticipated.

Held, Brodeur, J., dissenting, that "the Senior Officer present at any locality" is not necessarily the senior officer of corps stationed at the place where the riot occurs or is likely to occur. The justices, in their discretion, may requisition the senior officer of any available force.

By s. 34, sub-s. 6, of the above Act the officer commanding the troops so called out may in his own name take action against the municipality in which the riot occurred to recover the amount of the expenses thereby incurred which are to be paid to His Majesty when recovered. By 4 Edw. VII. c. 23, s. 86, this right of action was vested in His Majesty.

Held, that an action was properly brought in the name of the Attorney-General of Canada to recover the expenses of calling out the troops on the occasion of an industrial strike in the city of Sydney, part of which expenses were incurred before, and part after, the last-mentioned Act came into force.

Appeal allowed with costs.

Newcombe, K.C., for appellant. *Finlay Macdonald*, for respondent.

Province of Ontario

SUPREME COURT.

Middleton, J.] SHIPMAN *v.* PHINN. [March 9.

Supreme Court of Ontario—Jurisdiction as to negligence resulting in collision in inland waters—Concurrent jurisdiction of Exchequer Court of Canada, Admiralty Side.

The question in this case was whether the Supreme Court of Ontario had jurisdiction to entertain the action.

MIDDLETON, J.:—The defendant contends that this court has no jurisdiction over the subject-matter of the action, and that the plaintiff's remedy must be sought in the Exchequer Court of Canada, which is a Court of Admiralty within the meaning of the Colonial Courts of Admiralty Act, 1890. The plaintiff,

on the other hand, contends that, although he undoubtedly might resort to the Exchequer Court, yet this court has a concurrent jurisdiction in all cases of negligence resulting in collision in inland waters. It is sought to renew the ancient and at one time bitter controversy between the Admiralty and Common Law Courts.

In the Fourth Institute, c. 22, will be found, under the head "Articuli Admiralitatis," the complaint of the Lord Admiral of England to the King's most excellent Majesty against the Judges of the Realm concerning prohibitions granted to the Court of Admiralty, and the answers of the Judges to such complaint. . . . Lord Coke triumphantly vindicates the exclusive jurisdiction of the Common Law Courts in all such cases, and the right to prohibit the encroachments of the "Admirall."

And see the statutes 2 Hen. IV. c. 11 and 15 R. II. c. 3.

Story, in his judgment in the celebrated case of *De Lovio* v. *Boit* (1815), 2 Gallison 398, defends the jurisdiction of the Admiral. . . . It is important to note that Story claims no more for the Maritime Courts than concurrent jurisdiction with the Common Law Courts.

Story's judgment, though at first not universally accepted, is now generally regarded as an authoritative exposition of the law upon the whole subject. Twenty-seven years later, in *Hale* v. *Washington*, 2 Story 176, he reaffirms what is stated in the earlier case. The most learned and hostile criticism is probably to be found in the judgment of Mr Justice Johnson, 12 Wheaton 611; but the point there in controversy is far removed from that now before me.

Statutes were from time to time passed in England enlarging the Admiralty jurisdiction; but, throughout, the concurrent common law jurisdiction, save as to occurrences on the high seas, was always recognized. These statutes may be found collected in the preface to the 1st edition, reprinted in the 3rd edition, of Pritchard's Admiralty Digest, and in the introduction to Roscoe's Admiralty Law.

In Ontario the High Court was given all the jurisdiction possessed by the Courts of Common Law in England on the 5th day of December, 1889. See the Judicature Act, R.S.O. 1887 c. 51, s. 25. This jurisdiction has been now vested in the Supreme Court of Ontario, R.S.O. 1914, c. 56, s. 3.

Before the 5th December, 1859, the Admiralty jurisdiction

in England had been greatly enlarged by the Acts of 1848 and 1854; but, so far as actions such as this are concerned, the jurisdiction was still entirely concurrent. Cases in the Common Law Courts for negligence in navigating a ship are found collected in the 2nd edition (1863) of Bullen and Leake, p. 319.

In 1873, in England, the Court of Admiralty became an integral portion of the Supreme Court of Judicature; and by the Judicature Act of 1875 provision was made for the hearing in that Division of all actions of which it had hitherto taken cognizance concurrently with the Courts of Common Law. This change, having been made subsequent to 1859, would not in any way affect the jurisdiction of the Supreme Court of Ontario.

While the Exchequer Court is given very wide jurisdiction under the Colonial Courts of Admiralty Act, that jurisdiction is concurrent, and there is nothing to displace the jurisdiction of the ordinary Common Law Courts.

I, therefore, determine the point of law raised in favour of the plaintiff; and, in pursuance of the arrangement made at the argument, this judgment will be embodied in the formal judgment disposing of the case upon the merits, so that the whole question may be open upon one appeal. Costs occasioned by the raising of this legal question will be paid to the plaintiff in any event.

T. H. Paine, for plaintiff. *H. A. Barbidge*, for defendant.

SUPREME COURT.

Middleton, J.] RE HILKER. [March 11.

Infant—Application of father for habeas corpus—Infant removed out of jurisdiction by foster parents—Children's Protection Act.

Motion by the father of an infant for a writ of habeas corpus. On 28th May, 1907, the child was made a ward of the Children's Aid Society of Waterloo, the judge having found it to be a neglected child within the meaning of the statute (the Children's Protection Act). The child was then placed in an approved foster home, the foster parents at that time residing within Ontario. The foster parents have now removed out of Ontario, having gone, it is said, to Alberta, taking the child

with them. The father now desires to have the child restored to his custody.

MIDDLETON, J.:—I do not think that I should grant a writ of habeas corpus, under the circumstances. In *Regina* v. *Barnardo*, 23 Q.B.D. 305, where there was a case of strong suspicion, it was said that the writ ought to be granted so that a return might be made shewing that the child was out of the jurisdiction as alleged, and thus the truth of the return might be tried; but where the truth and the fact set up are not only admitted, but the facts are stated by the applicant, no useful purpose would be served by the formal issue of a writ and by having a formal return which it is not desired to controvert. Clearly, the applicant must resort to the court of the province where the child now is. These courts alone have jurisdiction over its person.

In so saying, I do not desire to deny that our court might exercise a coercive jurisdiction to compel the bringing back of the child to Ontario, if it was thought that the child had been removed therefrom contumaciously, and with a view of defeating proceedings taken or to be taken in our courts. Motion refused.

Hassard, for applicant. *Cartwright*, K.C., for Children's Aid Society.

Province of British Columbia.

SUPREME COURT.

Gregory, J.] HILL v. HANDY. [March 5.

Vendor and purchaser—Absolute foreclosure—Motion to reopen—Bad faith of vendor.

Where a vendor had obtained an order nisi in a foreclosure action by misrepresenting the facts, and an order absolute because of the defendant's ignorance of the order nisi, he being out of the province, travelling on business, and where on his return the defendant was prompt in applying to reopen, the order absolute was set aside. It being further found that the evidence tendered by the plaintiff at the taking of accounts was false, a new accounting was ordered.

Campbell v. *Holyland*, 7 Ch. Div. 166, followed.

C. M. Woodworth, for defendant. *W. B. A. Ritchie*, K.C., for plaintiff.

NOTE.—Though this case does not give any new law, it is of interest, and, under the circumstances, its ruling was probably correct. The present value of it is as a reminder to practitioners of the uncertainty attending final orders in foreclosure suits. Nowadays a foreclosure order has because a sort of football to be kicked hither and thither. It might almost be said that there should be read into final orders in such actions in these days a provision that the foreclosure is only until further ordered, or until such time as the mortgagee may have sold the property to a *bonâ fide* purchaser without notice. This uncertainty is to be deplored, and is disconcerting to those who have to take titles through mortgages.

Book Reviews.

Conveyancing and other Forms. Precedents for every Province and Territory of Canada, comprising forms in common use, special clauses, Notes on the law and references to cases and statutes. Fifth Edition. By A. H. O'BRIEN, M.A., Barrister-at-law, Counsel to the Speaker, and late Law Clerk of the House of Commons of Canada; Assistant Editor of the Canada Law Journal. Toronto: Canada Law Book Company, Limited. Philadelphia: Cromarty Law Book Company, 1112 Chestnut Street. 1914.

As a book of most constant reference in all Provinces of the Dominion this is undoubtedly the book of the year. It has been long wished for and now comes to us much enlarged, with more copious notes, and, as far as Ontario is concerned, giving references to the Revised Statutes of 1914; a great advantage by the way to Ontario practitioners, at the present time, as these statutes are not as yet available to the profession though they came into force on the 1st of last month.

It is interesting to note that "O'Brien's Conveyancer" is the first book in the history of Canada that has come to a fifth edition. The first book was a small-sized volume of 526 pages, published in 1893. The second (in the present larger form) was published in 1902, and contained 592 pages. The third edi-

tion, published in 1906, had 842 pages. The fourth appeared in 1910 with 938 pages. The last edition has grown to 1125 pages. This increase is largely caused by the requirements of the Western Provinces; more attention having in this edition been given to forms desirable to the profession in those ever-increasing portions of the Dominion. The painstaking accuracy of the author is so well known and appreciated by those who have used previous editions that it is unnecessary to enlarge upon this most important feature of a work of this character.

"O'Brien's Conveyancer" is a household word in almost every lawyer's office in the Dominion. We only regret that so-called "conveyancers," who are not lawyers and other invaders of the profession buy it also, and so are enabled to deprive the profession of some of their legitimate business.

Bench and Bar

Judicial Appointments.

John Wilson Elliott, of the Town of Milton, Province of Ontario, K.C., to be Judge of the County Court of the County of Halton, in the said Province, vice His Honour Judge Gorham, deceased. (Feb. 23.)

Emerson Coatsworth, of the City of Toronto, Province of Ontario, K.C., to be the Junior Judge of the County Court of the County of York, in the said Province, with rank and precedence next after the Judge of the said Court, vice Edward Morgan, Esquire, who has retired from the said office. (Feb. 23.)

Harry Anson Lavell, of the Town of Smith's Falls, Province of Ontario, Barrister-at-law, to be Judge of the County Court of the County of Frontenac, in the said Province, vice Cornelius Valleau Price, Esquire, who has retired from the said office. (Feb. 23.)

Clement Rowland Hanning, of the Town of Preston, Province of Ontario, K.C., to be Judge of the County Court of the County of Waterloo, in the said Province, vice Duncan Chisholm, Esquire, who has retired from the said office. (Feb. 23.)

James Henderson Scott, of the Town of Walkerton, Province of Ontario, K.C., to be Judge of the County Court of the County of Lanark, in the said Province, vice William Stevens Senkler, Esquire, who has retired from the said office. (Feb. 23.)

Arthur Thomas Boles, of the Town of Leamington, Province of Ontario, Barrister-at-law, to be Judge of the County Court of the County of Norfolk, in the said Province, vice James Robb, Esquire, who has retired from the said office. (Feb. 23.)

Francis Ronan Powell, of the Town of Parry Sound, Province of Ontario, K.C., to be Judge of the District Court of the Provincial Judicial District of Parry Sound, in the said Province, vice Patrick McCurry, Esquire, who has retired from the said office. (Feb. 23.)

Flotsam and Jetsam.

Lord Haldane announced at Edinburgh that Sir Alfred Cripps, the new peer, would join the supreme tribunal of Empire, which would now number twelve law lords. There was something comforting, Lord Haldane added, to think of the difference in strength of that tribunal between a year ago and to-day. It had always been his ambition to have something to do with making the tribunal the greatest the world had ever seen. The work was unending with an Empire like Britain's.

A good story is told of the late Lord Ashbourne, who was at one time Lord Chancellor of Ireland. Occasionally, says the *Law Times*, in the court of Appeal, Lord Ashbourne would make up his mind to bring a case to an end before the rising of the court, and it was highly instructive to watch the proceeding.

A junior who was not conscious of his humor, stood up to open what appeared to be a short interlocutory appeal. Lord Ashbourne, after a sentence or two had been spoken, interjected, "Now Mr. ——, why should we reverse the King's Bench on a point like this?"

"My Lord," rejoined counsel, "there are six reasons why the order should be reversed."

"Then," said the president of the court, "suppose we commence with your three best."

"No, my Lord," said counsel, "I could not consent to that, because I have frequently succeeded in this court upon my bad points."

Lord Ashbourne collapsed, and for once was unable to have his own way in the court of appeal.—*The Green Bag.*