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THE RIGHT OF DISALLOWANCE.

That judge must have been speaking in terms of bitter irony who, in giving his decision in a recent case, used these words: "The Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule human or divine. If it be that the plaintiffs acquired any rights, which I am far from finding, the Legislature had the power to take them away. The prohibition 'Thou shalt not steal' has no legal force upon the sovereign body, and there would be no necessity for compensation to be given."

In using this language Mr. Justice Riddell knew, what every student of history knows, and what every Christian believes, that disobedience of the moral law, as declared in the ten commandments, will bring its own punishment, alike upon the government which wilfully sets it aside, and upon the country which submits to be so governed. And this law is as applicable, both in its operation and in its results, to men as well as to governments and peoples. Nor is it a doctrine only for women and priests which men of affairs, in busy times like these, can venture to disregard. It has the sanction of religion, it has been accepted by the wisest, as well as the best, of human kind, but besides all this it has been attested by the experience of all ages. Countries brought to desolation, communities ruined, families reduced to poverty, and men and women driven to despair, shew what follows upon neglect of it.

On the other hand, Great Britain mainly owes her supremacy among the nations to the fact that, in general, her Parliament, speaking for the nation at large, and possessing all the power described in the judgment referred to, has never exercised it in the cause of injustice—that her statesmen, her merchants, her representatives in all parts of the world, both by sea and land,

have acted in the belief that duty and honour, as well as interest, required them to act in accordance with the precept that it is righteousness, not expediency, truth and not falsehood, honesty and not dishonesty, that exalt a nation, and bring prosperity and happiness to its people.

We will not insult the members of the Provincial Government by assuming them to be ignorant of, or careless in applying, the great principle upon which alone good government can be carried on, and therefore will assume that, in the action to which the learned judge referred in such significant terms, they had, or thought they had, good grounds for their procedure. We propose to enquire whether the position taken by Mr. Justice Riddell is constitutionally correct and if so how must that position be regarded?

In making this enquiry it is not necessary to enter into all the nice questions which arise from a careful consideration of the several jurisdictions of the Dominion and Provincial Legislatures. It may be broadly stated that, as regards the subjects over which the ninety-second section of the B.N.A. Act gives to the provinces exclusive jurisdiction, their authority cannot be questioned, but, it may be asked, while this is true, is there not, or ought not there to be, some means by which abuse of this authority may be prevented, and no ground given for the inferences plainly to be drawn from the judgment in the case referred to?

The omnipotence of the Imperial Parliament over the affairs of the United Kingdom, and those of its dependencies to which constitutional government has not been granted, may well be expressed in the terms used by the learned judge in describing the powers of the Provincial Legislature within its sphere of action—"it can do everything not naturally impossible." We will not apply the rest of the description for reasons to be shewn hereafter. The Imperial Parliament is bound by rules both human and divine, but they are rules of its own making, or arising naturally from its constitution and environments. In the first place it is a complex machine composed of forces acting

like the pendulum of a clock, of which the parts are so balanced that the expansion of the one keeps in check the contraction of the other. Thus hasty and ill-considered legislation is avoided, mistakes corrected, and careful revision provided for. Above all there is a body of public opinion to be reckoned with—a body of public opinion which is above passion, prejudice, or partisanship—which will tolerate no injustice or wrong-doing, and will punish any perpetration of either. Mistakes in public policy may be committed, but an act of aggression on private rights, or private property, never.

Contrast a body like this with the legislature of a province composed of a single chamber whose members, however naturally intelligent, are ill qualified by education or training to deal with complex questions of civil rights—who are strongly partisan, and who are liable to corrupt influences arising from the material development of the country. In the affairs dealt with by the Provincial legislature the public at large take little interest, and there is, therefore, no check from this source, such as prevails with regard to larger bodies which have more important questions to consider.

The only check upon the proceedings of the Provincial Legislatures is to be found in the power of disallowance of their Acts which the B.N.A. Act gives to the Governor-General in Council, and there is no doubt that this check was intended to be exercised for the prevention of injustice, and the protection of private rights, and stability of contracts, which might be affected by hasty and ill-considered legislation by the provincial assemblies. Such was the view of the Imperial authorities when the Act of Confederation was passed, and such was the view of leading men on both sides of politics when the terms of Confederation were being discussed.

This was the position taken by Sir John Macdonald with regard to the well-known case of the Rivers and Streams bill, which was twice passed by the Ontario Legislature, and twice disallowed by the Dominion Government. Speaking of the power of the Provincial Legislature Sir John said: "I think it

devolves upon this government to see that such power is not exercised in flagrant violation of private rights, and natural justice . . . especially when, as in this case, the Act overrides a decision of a court of competent jurisdiction."

In 1893 an Act was passed by the Nova Scotia Legislature which, in the opinion of Sir John Thompson, might have had the effect of prejudicing certain vested rights, and on this being pointed out to the Attorney-General of Nova Scotia the Act was amended accordingly. But whatever the intention of the framers of the Act of Confederation may have been, the long political rivalry between the Conservatives at Ottawa under Sir John Macdonald, and the Liberals at Toronto under Sir Oliver Mowat, would have prevented, and did prevent, any fair consideration of the question.

In the same year that the case in Nova Scotia above referred to arose, a railway company in Ontario complained that the operation of a certain Act of the Provincial Legislature would interfere with vested rights, without compensation, and the Minister of Justice held that if this contention were correct there would be sufficient reason for the exercise of the power of disallowance. The view taken by the Attorney-General of Ontario was expressed as follows: "I repudiate the notion of the petitioners that it is the office of the Dominion Government to sit in judgment on the right and justice of an Act of the Ontario Legislature relating to property and civil rights. That is a question for the exclusive judgment of the Provincial Legislature." As the Minister of Justice finally came to the conclusion that the Act would not have the effect complained of it was not disallowed.

The question of provincial rights thus became a purely party one, and unfortunately was so dealt with in the many matters of controversy which arose between the Dominion and Provincial Governments. The position of parties, so far as Ontario is concerned, has been reversed, and in the case now under consideration a Liberal Minister of Justice is called upon to review the action of a Conservative Provincial Legislature. Mr. Ayles-

worth, in his report on an application for disallowance of an Act which affected the parties in a controversy known as the Cobalt case, takes precisely the view for which we have been contending. He says: "There seems much ground for the belief that the famous B.N.A. Act contemplated, and probably intended, that the power of disallowance should afford to vested interests and the rights of property a safeguard and protection against destructive legislation," and then he goes on to say that the authorities cited on behalf of the petitioner would, if followed, require the disallowance of the Act, but that of later years different views have prevailed. Finally the Minister of Justice declares his opinion that "it is not intended by the B.N.A. Act that the power of disallowance shall be exercised for the purpose of annulling provincial legislation, even though Your Excellency's ministers consider the legislation unjust or oppressive, or in conflict with recognized legal principles, so long as such legislation is within the power of the Provincial Legislature to enact," and he concludes as follows: "The legislation in question, even though confiscation of property without compensation, and so an abuse of legislative power, does not fall within the limits of those cases in which the power of disallowance may be exercised." For these reasons, "though compelled to report strong disapproval of the policy of the statute," the Minister of Justice recommends that it be not disallowed.

It is not easy to follow the reasoning of Mr. Aylesworth. He admits at the outset a belief that the B.N.A. Act intended that the power of disallowance should be used for the protection of vested interests, and private rights, and later he comes to the conclusion that it was not so intended, and that, therefore, the Act should not be disallowed, even though his opinion clearly is that justice requires that it should be so dealt with.

It may be that it is better for the successful working of our federal constitution that the power of the Provincial Legislatures within their own sphere of action should be supreme and unquestioned, and it may be that such a conclusion has become a political necessity. If so we must abandon the hope of finding

in the power of disallowance that protection which the makers of our constitution thought they had provided, and accept the ruling of the Minister of Justice, and the dictum of Mr. Justice Riddell.

It does not follow, however, that we must remain content with the knowledge that the rights of property may be set aside, the stability of contracts interfered with, and the security of commercial enterprises attacked, without compensation being awarded, by a body which it is alleged has shewn so little regard for such obligations, and is so ill-qualified to deal with them as our Provincial assembly. If the power of disallowance is in such cases no longer to be exercised, why should not the party whose rights are in any way interfered with have an appeal to, say, the Supreme Court? Why should not questions of civil rights, where private interests are concerned, be dealt with precisely in the same way that constitutional questions are dealt with—and as they are dealt with in the United States?

There are undoubtedly many cases when it becomes necessary, in the public interest, that private rights should, for the specific object in view, be set aside, but in all such cases that object should be clearly stated, and such compensation as equity requires should be awarded. In the public interest it may be necessary that a railway should pass through my property, and to that public interest my right of private property must yield, but the necessity for doing so must be apparent, and the compensation given must be adequate to the injury suffered. The same rule should apply to all cases in which private rights are affected, and if it is not observed there should be some means of compelling its observance.

The procedure would be very simple. The party aggrieved could lay his complaint before the Minister of Justice, and if the minister felt, as Mr. Aylesworth felt in the Cobalt case, that injustice was being done, instead of recommending that the Act be disallowed he would advise the Governor in Council that the question at issue should be referred to the Supreme Court for consideration and adjustment, the operation of the Act being,

in the meantime, suspended. The question for the Supreme Court would be two-fold—first, did any public interest justify interference with a private right? and, secondly, whether such an interference was injurious and should be prevented, or whether it should be allowed with compensation. If the Supreme Court can be trusted to decide questions affecting the constitution, it is surely equally competent to decide questions affecting civil rights, such as are ordinarily dealt with by the courts, but which a body such as the Provincial Assembly is not competent to deal with, and which very often it has no sufficient opportunity of thoroughly considering.

A procedure such as is here suggested would have this advantage over disallowance, that by it an objectionable clause of a bill, otherwise unobjectionable, might be amended, as was done in the case of the Nova Scotia Act above referred to, the measure otherwise remaining unimpaired.

The numerous judgments recently given which uphold the doctrine that there is no appeal from the action of a Provincial Legislature, so long as it confines itself to subjects committed to it by the B.N.A. Act, has created a wide-spread feeling of alarm among men concerned with financial affairs. The well-grounded idea that the rights of property are less secure in Canada than in the United States and in Great Britain, or, as one eminent financier puts it, than even in Mexico, is not calculated to encourage the flow of capital to this country. On the contrary it puts us at a decided disadvantage as regards every kind of investment and industrial enterprise. The capitalist looking for investments sees that in the United States State Legislatures are not allowed to "make or enforce any law which shall prejudice the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the protection of the laws." Coming to this country he finds that the courts have concluded, contrary to the plain intention of the framers of our constitution, that in dealing with the rights of property, concerning which they

have exclusive jurisdiction, our Provincial legislators are not bound to regard either the provisions of Magna Charta or that still earlier code—the Ten Commandments.

It may be said that the Supreme Court has not that weight and influence which would justify the granting to it such power as is here proposed. If there is any ground for such an objection the remedy is easy. Make the position of the judges of that court as regards dignity and emolument such as to attract the best men of the profession.

Let it be felt that there can be no higher object of ambition than a seat upon the bench of a court possessed of such power and such influence for good, demanding not only the greatest professional attainments, but also the noblest sense of personal independence, and a readiness to accept responsibilities, and discharge duties second to none in the administration of justice, and the government of the State.

With a court so constituted, and possessed of such power, no doubt would be felt as to the security of private rights, the stability of contracts, or the safety of commercial enterprises.

LAW REFORM IN ONTARIO.

It will be remembered that the Attorney-General brought in, and there were passed, at the last session of the Ontario Legislature, a number of resolutions on the subject of law reform. It was thought desirable that these should stand over until next session so that the profession might have an opportunity of considering them, and, if they thought proper, of expressing their views on the various matters referred to therein.

Now that vacation is over and lawyers are settling down to business it will be convenient to have these resolutions accessible for reference and consideration. They are as follows:—

"That in the opinion of this House, with a view to the more prompt and satisfactory administration of justice in civil matters and the assessing of the cost thereof, it is expedient: 1. That

there should be but one Appellate Court for the province. 2. That all the judges of the Supreme Court of Judicature for Ontario should constitute the Appellate Court. 3. That the Appellate Court should sit in divisions, the members of which should be permanently assigned to them, or chosen from time to time by the judges from among themselves. 4. That the divisions should consist of five members, four of whom should be a quorum, except in election cases, and cases in which constitutional questions arise, for which five members should sit, and except in appeals from inferior courts, for the hearing of which three judges should form a quorum. 5. That the decision of the Court of Appeal should be final in all cases except where (*a*) constitutional questions arise, or (*b*) questions in which the construction or application of a statute of Canada are involved, or (*c*) the action is between a resident of Ontario and a person residing out of the province. 6. That the appeal of right to the Judicial Committee of the Imperial Privy Council should be abolished, and the prerogative right of granting leave to appeal to that tribunal, if retained, should be limited to cases in which large amounts are involved, or important questions of general interest arise. 7. That in matters of mere practice the decision of a judge of the Supreme Court, whether on appeal or a judge of first instance, should be final. 8. That provision be made to regulate examinations for discovery to prevent the excessive costs that are often incident to such examinations, and the undue prolongation of such examinations. 9. That the county and district courts shall have jurisdiction in all actions, whatever may be their nature or the amount involved, if both parties consent. 10. That the ordinary jurisdiction of the county and district courts should be increased. 11. That communications should be had with the Imperial and Dominion Governments with the view to legislation by the Imperial and Canadian Parliaments as to such of the foregoing matters as are not within the legislative authority of the province."

Some other matters are referred to in a circular issued by the Ontario Bar Association as desirable subjects for consideration. These have been stated shortly as follows:—

"1. Unlicensed conveyancing. 2. Weekly reports and practice works to be published by the Law Society. 3. Freedom of contract between solicitor and client. 4. A block system of charges in litigation. 5. Simplification in the mode of commencing and prosecuting legal proceedings. 6. A practice judge. 7. A better Surrogate tariff and procedure. 8. A better division of work among the various legal officers. 9. Judges and officers to receive only their salaries. 10. The profession to be relieved from collecting revenue for the Government through stamps and fees paid to officers. 11. Positions requiring legal knowledge and training to be filled by lawyers only. 12. One opinion only from appellate courts. 13. Execution process to be made more effective. 14. Prompt delivery of judgments by all the judges. 15. Communication between the profession and the statute revisers."

As will be seen, some of the Government resolutions are of a far-reaching character, and, as regards appeals, especially appeals to the Judicial Committee of the Privy Council, are, we venture to think, rather an echo of the popular sentiment so much in evidence before the last Provincial elections, than as representing the sober thought of those most capable of forming an intelligent opinion on the subject.

Most of the matters referred to by the Ontario Bar Association as worthy of consideration have been repeatedly brought to the attention of the profession in these columns as requiring amendment on the part of the provincial legislature. The pronouncement of the Benchers of the Law Society of Upper Canada on the Government resolutions will be found in the proceedings of the society in 16 O.L.R. part 4.

The important matter of law reform will, we trust, be approached by members of the legislature without any reference to party politics and unbiassed by the crude thought of some newspaper men who too often write to please what they think to be the passing fancy of ignorant people, and in that way seek to increase their circulation, regardless of the importance of the issues involved or what may really be for the best interests of the community as a whole.

THE ADVANTAGES OF IGNORANCE.

There are occasional advantages in ignorance, and then, the denser the ignorance the better. This reflection comes to us on reading some remarks in reference to lawyers' fees by a learned divine who is reported to have said in a public address: "A man has no right to go into a profession for fees, for money. I am simply astounded at the lawyers' fees I read about. The fees of lawyers are, many of them, most unaccountable to me." A bull in a china shop would not have half so much fun if he were troubled with any qualms of conscience. Ignorance, therefore, for him, is bliss, as it is also for the preacher who thus airs his ignorance and cheerfully makes uncharitable remarks about other people. The principle of supply and demand is also a thing unknown to him. For our part we confess our ignorance as to the amount of this minister's salary, but we can only say that if it is small it is because he is not worth more, whilst if it is large it is so to the extent that he tickles the ears of his congregation. Brains and experience should demand their fair value; but lawyers as a rule are, in proportion to the accompanying conditions, paid less for their services than any other class in the community. Those of them who make most make less, for example, than a successful bank manager, though probably their advice frequently saves these managers from bringing disaster to their banks. "Ne sutor ultra crepidem" might be pondered to advantage by the minister in question, who is also reported to have said, "I would that I had but half the chance some lawyers have of doing good." It might perhaps occur to him, in some moment of introspection, to think that his best way of doing good would be to listen to what the Iron Duke said when he advised an equally erratic presbyter to attend to his marching orders, which he said, were to preach the gospel and not to prate about things of which he was profoundly ignorant. It might also have occurred to him that he, presumably, entered the ministry (and is well paid) for the very purpose of "doing good," so that he ought to have even more than "half the chance" lawyers have in that regard. But as to this we assert without fear of con-

tradiction that the latter give proportionately more in charity and do more for nothing than any other body of men, ministers included.

LAW CLERK OF THE HOUSE OF COMMONS.

The position of Law Clerk of the House of Commons, vacant by the death of Mr. F. A. McCord, has been filled by the appointment of the Assistant Law Clerk, Mr. A. H. O'Brien. The new Law Clerk is a B.A. of Toronto University and an M.A. of the University of Trinity College. He was called to the Bar in 1890, and practised in Toronto until 1896, when he was appointed Assistant Law Clerk at Ottawa. Mr. O'Brien was, for many years, one of the editors of this journal, and is the author of several well-known legal works, among them being "O'Brien's Conveyancer," which is now the recognized work on conveyancing precedents for the English-speaking provinces of Canada.

The Law Clerk of the House of Commons being Parliamentary counsel to the Government as well as solicitor to the House, the position is one of importance. In making the above appointment the Government is entitled to the credit of having carried out the very proper rule—although not always followed—of promoting an official who has shewn himself competent.

BILLS AND NOTES—HOLDER IN DUE COURSE.

A fine point on the subject of negotiable instruments has recently arisen both in England and the United States. It is discussed by our contemporary, *Case and Comment*, as follows:

A recent Iowa case, and two recent English decisions, have reached different results on a question of no small importance under the uniform negotiable instruments law. The decision of the Iowa court in *Vander Ploeg* v. *Van Zuuk*, (Iowa) 13 L.R.A. (N.S.) 490, 112 N.W. 307, holds that an innocent payee who takes a promissory note in which a blank has been wrongfully

filled by an agent of the maker cannot be protected, under the uniform negotiable instruments law, as a "holder in due course," to whom the instrument is negotiated after completion,—at least if the payee takes the note for a past indebtedness. The provision just quoted is a modification of the preceding provisions, which gives to the person in possession primâ facie authority to fill up blanks, declaring, however, that, in order "that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given, and within a reasonable time." It seems clear, therefore, that the terms of this statute give to a payee no protection as against the wrongful act of the maker's agent in filling up blanks, unless he is within the terms of the exception as a holder in due course, to whom the instrument is negotiated after completion. This the Iowa court holds he is not, and such conclusion is in accordance with the general understanding of the meaning of the language. Men do not ordinarily speak of the delivery of a note to a payee as a negotiation of it, and the accompanying words which describe the transaction as a negotiation of the instrument after completion, to a holder in due course, seem to accentuate the distinction between an original party to the instrument and one to whom it is subsequently transferred. This Iowa decision is supported by the English case of *Herdman* v. *Wheeler*, [1902] 1 K.B. 361, which is to the same effect, under the English negotiable instruments law, the material provisions of which are practically identical with those of the uniform negotiable instruments law now adopted in many states of the Union. But a later English decision of the Court of Appeal, in *Lloyd's Bank* v. *Cooke*, [1907] 1 K.B. 794, distinguishes and well-nigh supersedes the *Herdman Case*, by holding that, while the negotiable instruments law may not give the payee in such a case any protection against the wrongful act of the maker's agent in filling the blank, he may still invoke the common-law doctrine of estoppel. This doctrine was not discussed in the Iowa case, or in the *Herdman Case*, in each of which it seems to

have been assumed that the rights of the parties must be determined exclusively by the negotiable instruments law. Those decisions probably settle the construction of the statutory provisions; but they leave open the question of the effect of the statute to destroy the right which payees had previously enjoyed to invoke the doctrine of estoppel. The authorities are practically unanimous in favour of the right of the payee in such a case, unless it is taken away by statute.

A material change in the law, seriously increasing the risks of payees, would result, if it should be established that, under the negotiable instruments law, the doctrine of estoppel can no longer be invoked against a maker whose agent has wrongfully exercised his authority to fill blanks. In that case the payee of a negotiable instrument is allowed less protection than the payee or obligee of a non-negotiable instrument. That a misuse of authority to fill blanks, even in the case of a deed, is subject to the doctrine of estoppel, is illustrated in the case of *McCleery* v. *Wakefield*, 76 Iowa 529, 2 L.R.A. 529, 41 N.W. 210. The improbability that the legislature would intend this result is to be considered in construing the law. The statute expressly provides that "in any case not provided for in this Act the rules of the law merchant shall govern." This recognizes the Act as a codification of the laws on that subject, superseding the law merchant so far as they conflict. The doctrine of estoppel, as applied to non-negotiable instruments and contracts generally, is obviously unaffected by the statute. It may be argued, therefore, that the provisions in the negotiable instruments law with respect to filling blanks were intended to define the extent and limits of that right in case of negotiable paper only, and particularly with respect to the effect of the negotiable character of the instrument as distinguished from other contracts; and that there was no intention to give the payee of a negotiable instrument less protection against the wrongful acts of the maker's agent than would be given him if the instrument had no element of negotiability in it. As between the maker and the payee of an instrument, it may be urged that its negotiable form is of no importance, and that their rights depend upon common-law rules

governing contracts, and not upon the law merchant. If so, those rules would not be impliedly superseded by the statute. In expressly saving the rules of the law merchant in cases not provided for in the Act, the American statute does not, like the English Act, mention common-law rules; but this seems immaterial for the reason that neither statute was intended to codify rules of the common law beyond the scope of the law merchant. In the *Lloyd's Bank Case* the English court expressly declared that the negotiability of the document constituted no reason why the doctrine of estoppel should not apply, but rather the contrary, as that fact more clearly indicated an intention that the agent should use the instrument as a means of raising money. It seems highly improbable that the intent of the statute was to create this unfavourable discrimination against the payee of a negotiable instrument when compared with the obligee of a non-negotiable contract. In the light of the latest English case applying the doctrine of estoppel, which was not considered in the Iowa case, it may be proper to conclude that this phase of the subject still presents an open question for the courts of this country.

THE DAMNATION OF THE MODERN BAR.

The lawyer has been abused time out of mind, but somehow or another he has never seemed to mind it much. Every now and then he may say something concerning the attacks upon him, but not in anger, or by way of apology or defence. He treats his critics with about the same degree of good-humoured tolerance that a St. Bernard shews to a barking toy spaniel. If the spaniel chooses to bark, why, it's all right, because it doesn't hurt the big dog and may amuse the little one. Besides, it may afford the St. Bernard some pleasing reflections on the difference between big dogs and little ones.

Since, then, lawyers have been so generally and so long abused, why have they not resented it? There are several reasons. As has been suggested, the lawyer's indifference to abuse is partly due to a feeling of superiority to the abuse, if

not to the abusers. He knows full well that he has been and is intrusted with the making, with the construction, and with the enforcement of the laws. He realizes that inasmuch as he has been in a hopeless minority he would not have been invested with such full powers but for good reasons—reasons which have prevailed in spite of the expressed distrust of him. To paraphrase Bancroft's words, he knows that "in the exploration of the region of liberty not a cape has been turned or a river entered, but a lawyer has led the way."

It may be that the lawyer feels a sense of sureness of himself that is not felt by the generality of men. According to Plutarch, one of the two sentences inscribed upon the Delphic oracle was "Know thyself." The lawyer knows himself. Knowing himself, he knows other men. Bearing in mind David's lament for his hasty remark that "all men are liars," he makes due allowance for the intemperate or foolish remarks of an angry or a misguided man. He knows that the one will repent his utterances, and that the other is incapable of appreciating their folly.

Another reason for the lawyer's indifference to lay criticism is that he feels that if he has earned the approbation of his brethren, he has acted well his part. There is nothing he prizes more than the esteem of his fellow lawyers, and nothing he dreads more than their contempt. He knows that if he plays the game and plays it fairly, he will win generous applause, and that if he does not he will earn and receive professional ostracism. He feels that the good opinion of his brothers more than compensates for outside flings, and that without that good opinion nothing else is worth while.

Perhaps another reason for the lawyer's tolerant attitude is that he makes due allowance for the character or motives of those who censure him.

The most vociferous critic of the lawyer is the man who is, for cause, fearful of receiving justice. As compared to any other critic, his voice is as the bray of an ass to the chirp of a cricket. It is easy to dispose of this enterprising gentleman's

cry of "Stop thief!" A mere suggestion of his motive is sufficient. As Trumbull hath it:

> "No man e'er felt the halter draw,
> With good opinion of the law."

Or as Seymour D. Thompson said in one of his bar association addresses: "Lawyers have always been an inconvenience to despots. The tyrant is always stubbing his toe against the lawyer. Napoleon, the son of a lawyer, hated lawyers." Another despot's attitude towards lawyers is well illustrated by an anecdote concerning him which has been handed down. When Peter the Great, on his visit to Westminster Hall, was told, in answer to a question, that the people in wigs and black gowns were lawyers, he exclaimed: "Lawyers! I have but two in my dominions, and I believe that I shall hang one of them the moment I get home." The other one must have been Peter's "personal counsel"—to borrow a phrase the New York papers delight in using.

The incorrigible jester, with his merry quibs and gibes about the lawyer, comes on next to do his little turn. The lawyer simply can't find it in his heart to be harsh toward this sad wag. He regards him with good nature, and even with sympathy. He has heard the creaking of the machinery and has seen what a serious thing it is to be a funny man. Besides, he rather likes to study the species.

Well, well, says the lawyer when he hears his story, let the little man have his joke, if it pleases him. It doesn't do any harm, it doesn't do any harm. Besides, it's been some time since I heard that joke, and it doesn't do to go back on old friends. Perhaps the best evidence of the lawyer's sureness of his position is, not that he ignores criticism, but that he laughs at the jokes made at his expense.

While the lawyer is tolerant of all kinds of criticism, there is one kind that puzzles him on account of its want of logic, and that is the criticism of the so-called "corporation lawyers." He can understand an attack based on the charge that lawyers are dishonest, but he cannot understand an attack based on the charge that corporation lawyers are corporation lawyers. The

head and front of the corporation lawyer's offending seems to be that he makes money, wears a coat of good cloth, and rides instead of walks. It seems to be considered to be in some mysterious way unprofessional for a lawyer to serve artificial rather than natural persons and to reckon his income in thousands instead of in dollars. It is, of course, true that there are some disreputable corporation lawyers. But it is also true that the corporation lawyer, equally with all other lawyers, is amenable to the punishment meted out by the Bar to members who fail to live up to its best traditions, and that he is equally desirous of earning the esteem of his brother lawyers, and equally afraid of incurring their contempt.

Well, no matter what the other fellow may say while things are running smoothly, the moment he gets in a tight place or the moment he is confronted with a troublesome problem, or the moment he feels the need of some one to trust, he hies him straightway to the lawyer.

"For it's Tommy this, an' Tommy that, an' 'Chuck him out, the brute!'
But it's 'Saviour of 'is country,' when the guns begin to shoot."

—*Law Notes.*

A point of interest in reference to criminal jurisdiction was referred to in a note of a case *Rex* v. *Warden of Dorchester Penitentiary*, ante, p. 358, which note, however, did not quite accurately bring out the point decided. The judgment of Mr. Justice White, who spoke for the court, decides that a police magistrate acting under s. 777 of the revised Criminal Code (formerly s. 788) has the same territorial jurisdiction as the General Sessions in Ontario; and consequently a police magistrate of the City of Halifax has power to hear and decide for an indictable offence of burglary committed in that part of the Province of Nova Scotia. The judgment in the above case was decided on the ground that as s. 777 confers the same jurisdiction on police magistrates as that possessed by the General Sessions of the Peace in Ontario, which court by s. 577 (formerly s. 640) has jurisdiction over the entire province, then such magistrates have a like discretion.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

WILL—CONSTRUCTION—GIFT OF RESIDUE TO A. AND "SIX CHILDREN NOW LIVING" OF B.—ALL BUT ONE OF CLASS, DEAD AT DATE OF WILL—PRESUMPTION OF MISTAKE—REJECTION OF SPECIFIED NUMBER.

In re Sharp, Maddison v. *Gill* (1908) 2 Ch. 190. The Court of Appeal (Cozens-Hardy, M.R., and Buckley and Kennedy, L.JJ.) have affirmed the decision of Joyce, J. (1908) 1 Ch. 372 (noted ante, p. 279), to the effect that where a testator gives his residue to A. and the six children of B. "now living," there being in fact only one child then living, the erroneous enumeration may be rejected, and the share given to the six will belong to the surviving one.

INTERNATIONAL COPYRIGHT—FOREIGN MUSICAL COMPOSITION—UNAUTHORIZED PERFORMANCE IN ENGLAND—BERNE CONVENTION, 1887, ARTS. 2, 11.

Sarpy v. *Holland* (1908) 2 Ch. 198 was an action brought for damages for infringement of an international copyright of a musical composition. Neville, J., held that the plaintiff had failed to support his copyright because the notice reserving copyright required by 45-46 Vict. c. 40, s. 1, was not printed on the published copies in English. The Court of Appeal (Cozens-Hardy, M.R., and Buckley and Kennedy, L.JJ.) held that in this view he was in error, because under the Berne Convention of 1887, and the orders in council adopting the same, the rights secured thereby to foreign composers is subject only to the conditions and formalities required by law in the country of the origin of the work; and on the true construction of the convention, the declaration forbidding public performance of the copyright composition, thereby required to be made on the title page, is sufficient if made in the language of the country of origin; and the provisions of 45-46 Vict. c. 40, consequently do not apply to foreign copyright musical compositions.

LANDLORD AND TENANT—COVENANT NOT TO ASSIGN WITHOUT CONSENT OF LESSOR—EXPROPRIATION OF LEASEHOLD SUBJECT TO COVENANT NOT TO ASSIGN—RIGHT OF EXPROPRIATORS TO ASSIGN LEASE WITHOUT CONSENT.

Metropolitan Water Board v. *Solomon* (1908) 2 Ch. 214. In this case the plaintiffs in pursuance of their statutory powers had

expropriated the interest of a lessee in certain leasehold premises, which were subject to a covenant by the lessee not to assign without the consent of the lessors. The plaintiffs subsequently found that they did not require the premises for their own use and proposed to underlet them to an intended tenant for the residue of the term less three days. The lessors on being applied to refused to consent to the under lease. The action was therefore brought for a declaration that the plaintiffs were entitled to make the proposed underlease without the lessor's consent. Joyce, J., however, dismissed the action, holding that the plaintiffs were not possessed of an absolute term of years, but merely of the estate and interest of the lessee whose rights they had expropriated, and that the term was subject to the liability of being terminated in the event of an assignment without the lessors' consent; and that the plaintiffs' statutory powers only enabled it to dispose of such estate or interest as they might have, and did not enable them to bar the defendant's right of entry for breach of the covenant in question.

PRACTICE—THIRD PARTY NOTICE—APPLICATION FOR LEAVE TO SERVE THIRD PARTY NOTICE—SERVICE ON PLAINTIFF—EX PARTE APPLICATION.

Furness v. *Pickering* (1908) 2 Ch. 224 seems to shew that hitherto there had been a different practice prevailing in the King's Bench and Chancery Divisions as to the mode of making applications for leave to serve third party notices; the rule apparently being to move ex parte in the King's Bench Division and on notice to the plaintiff in the Chancery Division. Joyce, J., was of the opinion that the application may properly be made ex parte in the Chancery Division, subject always to the jurisdiction to order the plaintiff to be notified if the court should see fit. In this case the action was against some directors of a company and the defendants sought to notify a co-director against whom they claimed contribution, and the order was made notwithstanding the opposition of the plaintiff.

COMPANY—ALLOTMENT OF SHARES—MINIMUM SUBSCRIPTION—CHEQUES FOR SHARES NOT PAID BEFORE ALLOTMENT—DELAY IN PRESENTMENT—INVALIDITY OF ALLOTMENT—NOTICE OF AVOIDANCE WITHIN ONE MONTH—LEGAL PROCEEDINGS AFTER A MONTH—COMPANIES ACT, 1900 (63-64 VICT. C. 48) SS. 4, 5—(7 EDW. VII. C. 34, SS. 106, 107 (ONT.)).

In re National Motor Mail Coach Co. (1908) 2 Ch. D. 228 a shareholder made a summary application to cancel the allot-

ment of shares to him, on the ground that at the time the allotment was made, the minimum subscription had not been received in cash by the company, and that therefore the allotment was invalid under the Companies Act, 1900 (63-64 Vict. c. 48), ss. 4, 5 (7 Edw. VII. c. 34, ss. 106, 107 Ont.). It appeared that for part of the minimum subscription cheques had been given to the company, but for some unexplained reason these cheques had not been presented or paid to the company until after the allotment had been made. Notice of avoidance had been served on the company within a month after the statutory meeting of the company, but the legal proceedings were not commenced until after the month had expired. Eady, J., following *Mears* v. *Western Canada Paper Pulp Co.* (1905) 2 Ch. 360, held that the payment by cheques is not a payment in cash, and that the cheques not having been paid before the allotment, the allotment was voidable; and that it was a sufficient compliance with s. 5 (Ont. Act., s. 107), that the notice of avoidance had been given within the month after the statutory meeting of the company, although the legal proceedings had not been commenced until after the month had expired.

COMPANY—ALLOTMENT BEFORE MINIMUM SUBSCRIPTION PAID IN CASH—LIABILITY OF DIRECTORS—"KNOWINGLY CONTRAVENE"—COMPANIES ACT, 1900 (63-64 VICT. C. 48) SS. 4, 5—7 EDW. VII. C. 34, SS. 106, 107 (ONT.)).

Burton v. *Bevan* (1908) 2 Ch. 240 is another case arising out of the improper allotment of shares before the minimum subscription had been received in cash. In this cash, however, the action was brought by a shareholder against a director for contravention of ss. 4 and 5 (ss. 106, 107, Ont. Statute), relating to the allotment of shares and the question was whether the defendant had "knowingly" contravened the Act. It appeared that the defendant was not present at the meeting of directors when the allotment was made, but had attended a subsequent meeting of which the minutes of the prior meeting were confirmed and a resolution passed to apply for a certificate to commence business, and it was held by Neville, J., that this act did not make the defendant liable for what had been done at the prior meeting and that on the facts had not been aware of the facts and had not knowingly been guilty of a contravention of the Act, and the action therefore failed.

IMPERFECT GIFT OF PERSONALTY—APPOINTMENT OF DONEE AS EXECUTOR—BONDS PAYABLE TO BEARER—INTENTION TO GIVE.

In re Stewart, Stewart v. *McLaughlin* (1908) 2 Ch. 251. Neville, J., here holds that where a testator with the intention of benefiting his wife had shortly before his death purchased three bonds payable to bearer, which remained in his broker's hands, at the time of his death, and by his will he appointed his wife one of his executors, that this appointment, following *Strong* v. *Bird* (1874) L.R. 18 Eq. 315, had the effect of completing the imperfect gift of the bonds in favour of the wife, and he also held that the principle of *Strong* v. *Bird* is not confined to the case of the release of a debt due from the executor to the testator, and that it was immaterial that the donee is not the sole executor.

FRIENDLY SOCIETY—ARBITRATION UNDER RULES—COSTS—JURISDICTION TO AWARD COSTS.

In *Catt* v. *Wood* (1908) 2 K.B. 458, the plaintiff, a member of a friendly society, claimed to restrain the officers of the society from suspending him from the society in the following circumstances. The Friendly Societies Act, 1896, provides that disputes between members and the society are to be settled in the manner provided for by rules of the society. The plaintiff and his son were members of a Foresters' Society which was within the Act, and by the rules of the society it was provided that disputes should be settled by arbitration and that the decision of the arbitration and appeal committee should be final, and that any member refusing to comply should be suspended. The rules also provided that the arbitration committee might order either party to an arbitration to pay costs. The plaintiff's son became lunatic and was removed to an asylum. The plaintiff, in his son's name, but really to recoup himself for his son's maintenance, applied to the society for sick pay, which claim was referred to arbitration and decided in the son's favour; and sick pay was awarded from a certain date. The plaintiff then claimed that it ought to commence earlier. This claim was also referred to arbitration and decided against the father, who was ordered to pay costs, which he refused to do and was suspended from membership under the rules. The plaintiff claimed that the rule providing for suspension was ultra vires, but Coleridge, J., who tried the action, held that it was not, and the Court of Appeal (Williams, Farwell and Kennedy, L.JJ.) affirmed his

decision, and it was also held that the plaintiff's claim against the society for sick pay was brought by him in his capacity as a member against whom an order for costs could properly be made, and that even if the claim was in strictness on the part of the son, the plaintiff was "a party" to the arbitration proceedings within the meaning of the rules and as such liable to be ordered to pay costs.

TRUSTEE AND CESTUI QUE TRUST—BREACH OF TRUST—CONFLICTING EQUITIES—LEGAL TITLE—NEGLIGENCE.

Burgis v. *Constantine* (1908) 2 K.B. 484 is an illustration of the maxim that where the equities are equal the law must prevail, and also of that other maxim "Qui prior est tempore potior est jure." In this case in furtherance of a project for the formation of a company to purchase a ship, the plaintiffs, who were the owners of shares in a ship, transferred them to one Wilfrid Hine, the senior partner in a firm of Hine & Co., which managed the ship's business, as trustee for them, with power to sell the shares if the company was formed, and Wilfrid Hine was registered as owner of the shares so transferred. The project of forming a company proved abortive; but the plaintiffs allowed the shares to remain in the name of Wilfrid Hine. Subsequently Alfred Hine, who acted as the manager of Hine & Co.'s business, procured Wilfrid Hine to sign a blank form of mortgage. This he took to Holman, an agent of the defendant, who filled it up as a mortgage to secure £4,000, on the faith of which the defendant advanced the £4,000 to Alfred Hine, which was used for the purposes of Hine & Co.'s business. The pretended mortgage was duly registered, and the plaintiffs brought the present action to set it aside, and for a declaration that it was null and void, and that the defendant was not entitled to be registered as mortgagee. Bigham, J., who tried the action held that the mortgage in question having been executed in blank was null and void, but he considered that the defendant was, nevertheless, entitled to an equitable charge on the ship for the money advanced, and so ordered. The Court of Appeal (Barnes, P.P.D., and Moulton and Farwell, L.JJ.) reversed his decision, in so far as it awarded a charge in favour of the defendant. As the Court of Appeal points out, the mortgage being a nullity, although Wilfrid Hine might be liable in damages on an agreement to give a mortgage to secure the money advanced, yet not being the beneficial owner of the ship, the contract could not have been specifically enforced as against him.

PRACTICE—BILL OF COSTS—SOLICITOR AND CLIENT—COUNSEL FEES UNPAID AT TIME OF DELIVERY OF SOLICITOR'S BILL.

In *Sadd* v. *Griffin* (1098) 2 K.B. 510 the Court of Appeal (Moulton and Farwell, L.JJ.) have decided that it is improper for a solicitor to include in his bill of costs delivered to his client counsel fees which have been incurred, but not actually paid when the bill is delivered, and in so doing reversed the contrary decision of Jelf, J.

PRINCIPAL AND AGENT—STOCK BROKER—RIGHT OF BROKER TO INDEMNITY FROM CUSTOMER—PAYMENT MADE BY BROKER WITHOUT CUSTOMER'S AUTHORITY.

In *Johnson* v. *Kearley* (1908) 2 K.B. 514 the Court of Appeal (Barnes, P.P.D., and Moulton and Farwell, L.JJ.) have affirmed the judgment of Bucknill, J., (1908) 2 K.B. 82, noted ante, p. 485. Farwell, L.J., however, dissented; as intimated in the previous note of the case, the decision of the majority of the court it is to be feared will hardly commend itself to the common sense of the ordinary stock broker, and even Barnes, P.P.D., is constrained to admit that the plaintiff's case was destitute of merits.

PRINCIPAL AND AGENT—LUNATIC NOT SO FOUND—PERSON APPOINTED UNDER LUNACY ACT TO CARRY ON BUSINESS OF LUNATIC—PERSONAL LIABILITY OF AGENT.

In *Plumpton* v. *Burkinshaw* (1908) 2 K.B. 572, the defendant had been appointed under the Lunacy Act, 1890 (53-54 Viet. c. 5), ss. 116, 120, 124, to carry on the business of a lunatic not so found. The business was carried on in the name of a firm, and the defendant ordered goods in the name of the firm from the plaintiff for the price of which the action was brought against the defendant personally. The action was tried by Sutton, J., who held that the defendant was not liable, and his decision was affirmed by the Court of Appeal (Barnes, P.P.D., and Moulton and Farwell, L.JJ.) on the ground that the effect of the order in lunacy was to constitute the defendant agent for the lunatic, and in the absence of any evidence of intention on the part of the defendant to pledge his personal credit, or hold himself out as principal, he was not liable.

PRACTICE—ACTION BY FIRM—ORDER FOR DISCOVERY—REFUSAL OF ONE PLAINTIFF TO MAKE DISCOVERY—APPLICATION BY CO-PLAINTIFF FOR ATTACHMENT—JURISDICTION.

Seal v. *Kingston* (1908) 2 K.B. 579 presents a somewhat peculiar state of facts. It was an application by a plaintiff to

commit his co-plaintiff for contempt in not obeying an order for discovery obtained by the defendant. The plaintiffs were members of a firm, but the disobedient plaintiff had refused to allow his name to be used as plaintiff except on the terms of being first indemnified against liability for costs by his co-plaintiff. An order for a better affidavit on discovery of documents had been obtained by the defendant and served in the usual way, with which the recalcitrant plaintiff declined to comply. It was, of course, objected that the order having been obtained by the defendant it was not competent for a plaintiff to take proceedings to enforce it. And Ridley, J., appears to have adopted that view, and refused to make any order, on the ground of his supposed want of jurisdiction. The Court of Appeal (Barnes, P.P.D., and Farwell, L.J.), however, came to the opposite conclusion, and held that the application might properly be entertained.

STATUTE OF LIMITATIONS—21 JAC. I. C. 16—(R.S.O. C. 324, S. 38) —PAYMENT OF CHEQUE POSTPONED—DATE OF PAYMENT—IMPLIED PROMISE TO PAY BALANCE OF DEBT—9 GEO. IV. C. 14, S. 1—(R.S.O. C. 124, S. 1).

Marreco v. *Richardson* (1908) 2 K.B. 584. This was an action brought on a solicitor's bill and the question at issue was whether or not the claim was barred by the Statute of Limitations, 21 Jac. I., c. 16 (R.S.O. c 324, s. 38). On May 10, 1900, a cheque in part payment was given by the defendant to the plaintiff's testator, and at the same interview it was verbally agreed that the cheque should not be presented for payment before 20 June. On 20 June, 1900, the cheque was paid. The action was commenced on 19 June, 1908, the case, therefore, turned on the point whether the payment for the purpose of taking the case out of the statute was to be deemed to have been made on 10 May or 20 June. Bray, J., who tried the action held that it must be taken to have been made on the 10 May, and therefore that the plaintiff's claim was barred, and the Court of Appeal (Barnes, P.P.D., and Moulton and Farwell, L.J.J.) affirmed his decision.

NEGLIGENCE—WATER COMPANY—LIABILITY TO RE-INSTATE PAVEMENT—SUBSIDENCE—OMISSION OF MUNICIPAL AUTHORITY TO REPAIR.

Hartley v. *Rochdale* (1908) 2 K.B. 594 was an action brought by the plaintiff against the defendants, who supplied water to a

municipality, for damages occasioned by the plaintiff falling owing to a subsidence of the pavement, caused by the defendants. By their special Act the defendants were bound to restore pavements taken up by them, for the purpose of their works, to a proper condition, and in case of any subsequent subsidence within twelve months were bound to make necessary repairs. In October, 1904, an excavation was made by the defendants. In July, 1905, the defendants instructed the road authority to reinstate the flags, which they did at the defendants' expense. From that time till June, 1907, when the accident happened to the plaintiff, nothing was done. The judge of the County Court found that the accident happened owing to the pavement being out of repair and that this had been the case ever since October, 1905, and that the state of the pavement was due to the defendants not having duly performed their statutory duty to restore the pavement to proper repair, and he consequently held that the plaintiff was entitled to recover damages against the defendants, and that the omission of the road authority to make necessary repairs afforded the defendants no defence, and with this conclusion a Divisional Court (Darling and Phillimore, JJ.) agreed.

CONTRACT—COST OF "GENERATING LIGHT"—"ACTUAL COST."

Bulawayo v. *Bulawayo Waterworks Co.* (1908) A.C. 241 was an appeal from the Supreme Court of the Cape of Good Hope. The point in dispute was the construction of a contract under which the defendants contracted to furnish the plaintiff corporation with electric light for street lamps on the terms of being paid a price therefor "at such rates as will yield to the contractors a return equal to 10 per cent. over the actual cost of generating light." The Colonial court held that the generating of the light included all operations for the production of the light at the street lamps and that "the actual cost" included all that the production of the light cost including depreciation of plant, rent, taxes and insurance of works, and the Judicial Committee affirmed the decision.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Moss, C.J.O., Osler, Garrow, Maclaren, JJ.A.]

[From Teetzel, J.

FARAH *v.* GLEN LAKE MINING CO.

Crown patent—Mining land—Trespass—Counterclaim to set aside patent for fraud, error or improvidence—Jurisdiction of High Court—Parties—Attorney-General—Fiat—Con. Rule 241*—Land Titles Act—Bonâ fide purchaser for value without notice—Injunction—Damages.*

In all cases of patents for lands issued through fraud or in error or improvidence, the High Court has power, under ss. 41, 42 of the Judicature, notwithstanding the repeal and non-reenactment in terms of s. 29 of R.S.O. 1877, c. 23, in an action instituted in respect of such lands situate within its jurisdiction, to declare such patents to be void, and this remedy may be accorded in an action by a private individual, to which the Attorney-General may or may not be a party, but to the institution of which his consent is not necessary. The operation of Con. Rule 241 may properly be confined to cases in which it may be necessary to resort for remedy to a writ of scire facias.

In an action to restrain the defendants from trespassing or mining upon or removing ore from a small parcel of land in a mining district, the defendants disputed the plaintiffs' title and asserted title in themselves as assignees of the mining claim of one C., comprising the parcel in dispute. The defendants also counterclaimed, alleging inadvertence, omission, or mistake and claiming a declaration that the letters patent obtained by the plaintiffs did not give them the title to the parcel in dispute, or that, if they did, the letters patent should be repealed, in so far as the parcel in question was concerned, and an injunction and damages.

Held, that the matters set up by the defendants in their counterclaim would properly form the subject of an action which might have been instituted by the defendants, without obtain-

ing the Attorney-General's fiat or his consent in any other form, in respect of the patent for land granted by the Crown to the plaintiffs, and, that being so, the counterclaim was maintainable in this action, without the necessity of adding the Attorney-General as a party or of obtaining his fiat or consent.

Held, however, upon the evidence, that the plaintiff E., who acquired the interests of the original plaintiffs in the land in question pendente lite, did so for value and without notice of the action or counterclaim, and therefore, having regard to the provisions of the Land Titles Act, under which the plaintiffs' title was registered, he was in the position of a registered purchaser for valuable consideration without notice, and the relief sought by the counterclaim could not be enforced as against him, the right to an injunction followed upon his ownership of the land, but neither he nor his co-plaintiffs were entitled to damages.

Judgment of TEETZEL, J., varied.

W. M. Douglas, K.C., and *E. J. Hearn,* K.C., *Wallace Nesbitt,* K.C., *A. M. Stewart, R. McKay* and *C. H. Ritchie,* K.C., for the various parties.

Moss, C.J.O., Osler, Garrow, Maclaren, JJ.A.]

[From Riddell, J.

MORITZ *v.* CANADA WOOD SPECIALTY CO.

Foreign judgment—Action on—Judgment recovered in England against defendants in Ontario—Jurisdiction—Breach of contract—Place of performance—Service out of the jurisdiction—English Order XI., Rule 1 (*e*)*—Alternative claim on original cause of action—Merger—Election—Appeal—Parties.*

Under Order XI., Rule 1 (*e*), of the English Rules of the Supreme Court, 1883, which corresponds substantially with Rule 162(*e*) of the Ontario Consolidated Rules of 1897, providing that service out of the jurisdiction of a writ of summons may be ordered whenever the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, it is not necessary in order to confer jurisdiction to shew that the whole of the contract is to be performed within the jurisdiction; it is sufficient if there is a breach of that part of it, if any, which is to be performed

there: but the action must be based on such a breach, and the jurisdiction of the home court is not attracted in respect of a breach of that part of the contract which is to be performed abroad, by reason of a breach of another part of it which is to be performed within the jurisdiction.

The plaintiff, living in England, brought an action in England against the defendants, an incorporated company, doing business in Ontario, for damages for breach of contract to deliver certain goods. By the terms of the contract the delivery was to be at the port of shipment in America, and payment was to be made on receipt of and in exchange for shipping documents in England.

Held, that the breach upon which the action was based took place at the American port, and the defendants, not having been subject to the English court either by residence or submission in the contract, there was no jurisdiction in that court under Order XI. to summon the defendants to appear before it, or to entertain the action, and the judgment obtained in England in that action (the defendants not appearing), however effectual it might be in England, not having been moved against there, was of no avail to support an action upon it in Ontario.

Held, however, that the original cause of action had not merged in the judgment, and the plaintiff was entitled to succeed upon an alternative claim thereupon, made in the action brought in Ontario on the English judgment.

The trial Judge held both causes of action to be proved, and the plaintiff elected to take judgment in respect of the claim based upon the English judgment.

Held, that the plaintiff was not so bound by his election that he was prevented from taking judgment upon the alternative claim when he was held by the Court of Appeal, upon the defendants' appeal, not entitled to succeed upon the English judgment.

Held, also, that an order was properly made at the trial adding as plaintiffs the personal representatives of the original plaintiff, who died after the commencement of the action, and that the action was properly constituted.

Judgment of RIDDELL, J., varied.

Lynch-Staunton, K.C., for defendants, appellants. *Kirwan Martin*, for plaintiffs.

Moss, C.J.O., Osler, Garrow, Maclaren, Anglin, JJ.A.]
[From Divisional Court.

FOSTER *v.* ANDERSON.

Vendor and purchaser—Contract for sale of land—Time of essence—Time for completion—Delay of purchaser—Default of vendor to tender—Conveyance—Duty as to preparation—Misdescription of land—Statute of Frauds—Misrepresentation—Mistake—Specific performance.

The contract for the sale and purchase of land set up by the plaintiff, the purchaser, consisted of a written offer by him to buy and a written acceptance by the defendant of his offer. The offer contained, inter alia, the following provisions: "This offer to be accepted by Sept. 25, A.D., 1906, otherwise void, and sale to be completed on or before the 10th day of October, 1906." "Time shall be of the essence of this offer." "Deed . . . to be prepared at the expense of the vendor and mortgage at my expense."

Held, that time was of the essence as to all the terms of the contract, but that the duty of the purchaser to make tender of his purchase money did not arise until the vendor had done that which it was incumbent upon her to do to put herself in a position to complete the sale; it was her duty to prepare the conveyance and submit the same for approval, having regard to the provision last quoted, and having failed to do so, her default precluded her from setting up the lapse of the time at which the sale should have been completed as an answer to the plaintiff's claim for specific performance.

Among the words of description of the parcel of land in question, the contract contained the words, "being the premises known as number 22 Ann street." The correct number was 24, there was no number 22, and the defendant owned no other property in Ann Street.

Held, that there being a description which identified the parcel without the aid of the street number, the words quoted might be rejected as surplusage, and there remained sufficient, with parol evidence, to satisfy the Statute of Frauds.

OSLER, J.A., dubitante.

Held, also, upon the evidence, that misrepresentation and mistake such as would afford ground for refusing specific performance were not shewn.

Judgment of a Divisional Court, 15 O.L.R. 362, awarding specific performance affirmed.

G. H. Watson, K.C., and *F. J. Roche*, for the defendant, appellant. *A. H. Marsh*, K.C., and *W. J. Clark*, for the plaintiff.

Full Court.] [July 6.

CANADIAN RAILWAY ACCIDENT CO. *v.* KELLY.

Practice—Commission to take evidence of plaintiff abroad—Application for—Material for, sufficiency of.

Appeal from the order of DUBUC, C.J., affirming the order of the referee granting the plaintiffs' application for the issue of a commission to take the evidence of the plaintiffs' officers and employees at Ottawa, Ontario, and of the plaintiffs' books there. The head office of the plaintiffs was in Ottawa.

This action was to compel the defendant to account for certain moneys received or which should have been collected by him as the local agent of the company in Winnipeg, and the plaintiffs filed affidavits tending to shew that the books were in constant use at the head office and could not be brought to Winnipeg without great inconvenience and loss, also that it would be practically impossible to carry on the business of the company at its head office if all the officers, whose evidence would be necessary at the trial, had to be absent from the head office in order to attend the trial in Winnipeg.

By the court.—A plaintiff suing in a foreign forum should not ordinarily be excused from appearing there and giving his evidence: per Chitty, J., in *Ross* v. *Woodford* (1894), 1 Ch., at page 42. The proof that the interests of justice require the issue of the commission to take the plaintiffs' evidence abroad should be of the clearest kind and there should be evidence, not upon information and belief, but of the best nature that could be got. The issue of such a commission should be the exception and should only be resorted to when the inconvenience or expense would otherwise pretty nearly thwart the ends of justice. *Keeley* v. *Wateley*, 9 Times L.R. 571, followed.

The court was not satisfied that all the books must be kept at the head office of the company all the time, and it appeared probable that, if the evidence were taken at Ottawa on commission, the defendant might have to go there himself in order to instruct counsel on cross-examination of the witnesses as to the entries in the books.

Held, that the material was insufficient to warrant an order for the commission asked for and that the appeal should be allowed with all costs to the defendant in any event of the cause.

Semble. If a proper case were made out, an order might go for the examination of some of the officers of the company at

Ottawa on some of the facts which the plaintiffs wished to prove, and that the books, or at all even all those that were not absolutely required all the time at the head office, might be brought to Winnipeg with the other officers to verify them so that the court might see the original books instead of certified copies of portions of them.

Foley, for plaintiffs. *O'Connor* and *Blackwood*, for defendant.

HIGH COURT OF JUSTICE.

Divisional Court, K.B.] [July 2.

RE STREET AND NELSON.

Will—Devise to wife for life with remainder to surviving children and to issue of children dying before testator and his wife.

A testator devised all his estate to his wife for her support for life, and for the maintenance and education of his children, and on her death to be equally divided amongst the children. By a codicil he directed that if M., a married daughter, should die before both her parents, leaving a child or children, they should receive her portion. On testator's death, he, having predeceased his wife and children, sold a portion of the lands, and joined in the conveyance to the purchaser. On a petition under the Vendors and Purchasers' Act.

Held, that the conveyance was effective to pass the fee.

Cavell, for purchaser. *Hasard*, for vendor.

Divisional Court, K.B.] [From Teetzel, J.

SAVEREUX *v.* TOURANGEAU.

Deed—Fraud—Conveyance of same land to two purchasers—Priorities—Option—Agreement—Registration—Action to remove cloud on title—Leave to amend—Parties—Grantor—Specific performance—Terms.

By a writing under seal, but without consideration, dated Jan. 2, 1907, M. covenanted and agreed with the plaintiff that if at any time he (M.) should be desirous of selling the land described in the document, he would give the plaintiff the option of first chance to purchase the same at $40 per acre, and to give the plaintiff 30 days' notice in writing of intention to sell

the property, etc. On Jan. 14, 1907, M. signed a written offer, binding for 3 months from the date, to sell the same land to the defendant at a larger price. On the following day, but after the defendant had express notice of the agreement with the plaintiff, M. executed a formal written agreement to sell the land to the defendant, and the defendant, two days later, paid part of the consideration named, and received from M. a conveyance of the land. The plaintiff's agreement or option and the defendant's agreement of Jan. 15, were both registered on Jan. 15, and the defendant's deed on Jan. 17. On April 22, 1907, M. conveyed the same land to the plaintiff, and received a payment on account from the plaintiff, this conveyance was registered on April 24, 1907. In an action to set aside the defendant's agreement of the Jan. 15, and the deed registered Jan. 17, as being void, and to remove the same as a cloud upon the plaintiff's title.

Held, that the writing of Jan. 2, was not a mere option but a contract with the plaintiff to give him a binding option for 30 days after notice of desire to sell, and, being under seal, there was no need for a consideration; that the defendant took his agreement and conveyance subject to the rights of the plaintiff; but that these instruments were not tainted with fraud, and could not be declared void, as the defendants had full notice of the agreement of Jan. 2, he was thereafter in the same position quoad the plaintiff as M. had previously been, and was bound to do the same acts as M. in respect of the land, and, while the plaintiff's action as framed failed, his remedy lay in a claim for specific performance against the defendant and M., and he was allowed to amend, upon terms, by adding M. as a party and seeking the remedy suggested.

Judgment of TEETZEL, J., reversed.

F. E. Hodgins, K.C., for defendant. *R. F. Sutherland*, K.C., for plaintiff.

Province of Nova Scotia.

SUPREME COURT.

Longley, J.] EVILLE v. SMITH. [July 24.

Will—Words "leave no issue him surviving"—Construction.

The last will and testament of B.S. devised all the rest and residue of his estate to be kept invested until the death of one

or other of his sons, J.M.S. and C.D.S., and directed that upon the decease of one of them who should first die one-half part of the residuary estate should be divided among the children of the one so dying in equal shares. It then proceeded, "And in the case the one so dying shall leave no issue him surviving, then the said share shall go to the surviving brother for his life and at his decease shall be divided among his children in equal shares. I desire and direct that upon the decease of the surviving son of my said two sons, the other half part of the said residuary estate shall be divided among the children in equal shares and in case he shall leave no issue him surviving the said half part shall be divided among the children of the other deceased brother."

Held, that the words "shall leave no issue him surviving" must be interpreted "shall leave no children hi surviving," and consequently that no interest under the residuary clause extended beyond the children of J.M.S. and C.D.S., and that existing or unborn children who might have interests by the death of all the children of J.M.S. before his death or all the children of C.D.S. before his death had no interests which the court was bound to regard.

H. McInnes, K.C., for plaintiff. *R. E. Harris*, K.C., & *W. B. Ritchie*, K.C., *W. M. Christie*, K.C., and *T. W. Murphy*, for various parties.

Graham, E.J.] IN RE JAMES LING. [July 28.

Judgment recorded to bind land—No steps taken for upwards of 20 years—Expropriation—Parties entitled to money paid into court.

In April, 1858, the holders of a mortgage upon land of J. L. brought an action of ejectment against him and recovered judgment by default, he not having appeared. No step was taken upon this judgment except to register it; no execution was issued upon it, no possession taken under it and it was never revived.

J. L. continued in possession until 1879, more than 20 years after the recovery of the judgment, and then went to live with a son, the actual possession of the property being abandoned after he moved away.

In 1864 the mortgagees assigned their judgment in ejectment to T. L., a son of J. L.

The Dominion Coal Co. expropriated the land and paid the compensation money into court under provisions of the Mines Act and there was a contest as to who was entitled to the money.

Held, that the judgment in ejectment after the expiration of 20 years from its date could not be enforced.

Assuming after J. L. moved away that for many years there was no one in actual possession, the possession must be deemed to have been in those having the legal title, the heirs of J. L.

That acts of possession under a deed given subsequently to 1907 by T. L. were not sufficient to displace the legal title of the heirs of J. L. among whom, and their assignees, the fund should be distributed.

H. Mellish, K.C., *W. H. Covert*, *T. R. Robertson* and *Finlay McDonald*, for various parties.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] POLIQUIN *v.* ST. BONIFACE. [May 20.

Specific performance—Pleading—Estoppel by signing lease—New trial.

In answer to the plaintiff's demand for specific performance of an alleged agreement of sale of land to him, the defendant, among other defences, set up that, "if the plaintiff was at any time in possession of the land, he was in possession only as tenant of the defendant under a lease in writing made between the defendant and the plaintiff."

At the trial before CAMERON, J., on cross-examining the plaintiff defendant's counsel produced a lease from defendant to plaintiff of the lands in question. This lease was dated some years subsequent to the date of the alleged purchase and was for a term which had expired before the commencement of the action. The plaintiff admitted his signature to the lease, but said he could not read English and that he had been induced to sign the document by misrepresentation as to its nature.

The trial judge was of opinion that plaintiff, so far as this action was concerned, was effectually concluded by the lessee and dismissed the action with costs.

Held, on appeal, 1. That the defence above quoted did not amount to a plea of estoppel.

2. That in any event the lease having expired before the commencement of the action, there was no estoppel.

New trial ordered. Costs to be costs to plaintiff in any event of the cause. Defendant to have leave to amend.

A. B. Hudson and *Anderson*, for plaintiff. *Potts*, for defendant.

Full Court.] REX *v.* CLEGG. [June 8.

Money Lenders Act—Assignment of salary—Evidence of loan —Evidence that accused made a practice of lending at usurious rate—Oral testimony to explain written contract.

The accused was prosecuted under the Money Lenders Act, R.S.C. 1906, c. 122, for lending $35.00 to Hubert Weiss on a contract on agreement calling for the repayment of $56.00 by 20 weekly payments of $2.80 each, thereby exacting a rate of interest greater than that authorized by the said Act. The contract signed by Weiss was in the form of an assignment of his monthly salary for several months to commence at a later date which was not to be acted on or notified to his employer in case Weiss should make the stipulated payments of $2.80 per week, the first of which was to be made in four days after the advance was made. There was no covenant to make these payments. Oral evidence and the entries in the books kept by the accused were admitted to shew the true nature of the transaction. It was contended on behalf of the accused that the transaction was a purchase and not a loan, inasmuch as the assignee would be without remedy if the borrower should die or fail to earn any salary, and she objected to the admission of the oral and other testimony to contradict or explain the contract.

Held, that the oral testimony and book entries were admissible, and they together with the assignment were sufficient evidence of a loan within the meaning of the Act; but that, as no evidence had been given to shew that the accused had made a practice of lending money at a higher rate than ten per cent. per annum, the prosecution had failed and the conviction must be quashed.

Patterson, D.A.-G., for the Crown. *McMurray*, for the prisoner.

Full Court.] ANCHOR ELEVATOR CO. *v.* HENEY. [July 6.

Jurisdiction—Service of statement of claim out of the jurisdiction—King's Bench Act—Tort—Fraudulent preference—Chattel mortgage given within the jurisdiction to non-resident.

This was an action to set aside a chattel mortgage given within the jurisdiction to the defendant, whose domicile was in the Province of Quebec, by the debtors, resident in Manitoba, against whom the plaintiffs had recovered a judgment, on the ground that the same was a fraudulent preference under the Assignments Act. The defendant had taken no steps to get possession of the mortgaged goods which were within the jurisdiction.

On defendant's motion to set aside the service of the statement of claim the referee had made an order requiring the plaintiffs to prove at the trial of the action a tort committed in Manitoba within the provisions of Rule 201(*e*) of R.S.M. 1902, c. 40, or a transfer or conveyance by way of chattel mortgage made in Manitoba fraudulent at common law or under any statute, and that, in default of such proof, there should be a nonsuit and allowing the service to stand.

Held, on appeal from that order, that the mere taking of the chattel mortgage was not a tort, that there was no jurisdiction to proceed in the action against the defendant, and that the order should be set aside with costs.

Emperor of Russia v. *Proskomiakaff*, ante, pp. 359, 506 followed. *Clarkson* v. *Dupré*, 16 P.R. 521, distinguished.

McClure, for plaintiffs. *Coyne*, for defendant.

Full Court.] HAFFNER *v.* COLDINGLEY. [July 6.

Commission on sale of land—Meaning of words "completion of the sale."

Appeal from judgment of MATHERS, J., noted ante, p. 323, dismissed with costs.

A. J. Andrews and *Macneill*, for appellants. *Munson*, K.C., and *Haffner*, for respondents.

KING'S BENCH.

Mathers, J.] NICHOLSON *v.* PETERSON. [July 7.

Fraudulent representation—Sale of land—Rescission of contract.

Action to set aside a sale and transfer of land from the plaintiff to the defendant Roger and by him to the defendants Peterson on the ground of fraud. The defendant Peterson wished to acquire the land in question, which adjoined their foundry and machine shops, and, knowing that the plaintiff would not sell to them, because they would be likely to make such use of the land as would be detrimental to the remaining adjoining property of the plaintiff, employed the defendant Roger to buy, if possible. Roger then entered into negotiations with the plaintiff for the purchase in his own name. When the plaintiff inquired if he was buying for the Petersons, Roger denied it and declared he would not sell to them in any event. Plaintiff asked Roger to formally restrict himself from selling to the Petersons, but Roger refused to buy subject to any restrictions. Plaintiff believed Roger's statement that he wanted the land to build houses on for himself, and closed the sale to Roger, who immediately conveyed the land to the Petersons.

Held, that, if Roger's statements had been true, there was nothing to prevent him from changing his mind the next day and selling to the Petersons, and therefore the false representations he made were not material to the contract, nor did any damage result to the plaintiff as the immediate and direct consequence of the representations, and that the action must be dismissed, but without costs. *Bell* v. *Macklin,* 15 S.C.R. 576, followed.

A. J. Andrews and *Burbidge,* for plaintiff. *Anderson,* for Roger. *Pitblado,* for Petersons.

Book Reviews.

Real Property. An introductory explanation of the law relating to land, by ALFRED F. TOPHAM, LL.B., with test questions for the use of students by F. PORTER FAUCETT, B.A. London: Butterworth & Co., Bell Yard, Law Publishers.

This is a book for students, covering in outline the whole ground of real property law. It will be exceedingly helpful to

those desiring a bird's eye view of this most difficult subject. As the author truly says: "A student who approaches the study of the law of land by reading at the outset such a standard work as Williams on Real Property is apt to get confused by the wealth of detail and the extraordinary complication and formality of the early law." Students will re-echo this statement and agree with the writer in the *Law Quarterly Review*, who says: "The law of real property has always been an unpalatable dish for beginners owing to its strange mixture of mediaeval theory and modern practice." Students will appreciate the efforts of Mr. Topham in their behalf.

Leading cases in Constitutional Law, briefly stated with introduction and notes by ERNEST C. THOMAS. 4th edition by Chas. L. Attenborough. London: Stevens & Haynes, Temple Bar, 1908.

Only one case of special interest referring to the South African War has been noted since the previous edition.

Two Studies in International Law, by COLEMAN PHILLIPSON, M.A. London: Stevens & Haynes, Law Publishers, Temple Bar, 1908.

This consists of two essays on the subject of International Law: (1) The influence of international arbitration on the development of international law; (2) The rights of neutrals and belligerents as to submarine cables, wireless telegraphy and intercepting of information in time of war. The author publishes also the proceedings of the Second Hague Conference in reference to the above subjects.

As will be seen from these titles the discussion is on subjects which have largely come into existence within a comparatively short period of years and the information collected is therefore largely new, and is collected from many sources and is now easily accessible.

An Analysis of Williams on the Law of Real Property, for the use of students, by A. M. WILSHERE, LL.D. London: Sweet & Maxwell, Limited, 3 Chancery Lane, 1908.

This does not pretend to be more than an assistance to the memory of the student who has read the parent work, being a note book and nothing more. But it is a refresher which lawyers as well as students may usefully turn to when the occasion offers.

Bench and Bar.

Sir Louis Amable Jette, K.C.M.G., of Quebec, to be puisne judge of the Superior Court of the Province of Quebec in the room and stead of Sir C. A. P. Pelletier, K.C.M.G., resigned.

Dominique Monet, of the City of Montreal, barrister-at-law, to be puisne judge of the Superior Court of Quebec, in the room and stead of the Hon. E. Z. Paradis, deceased.

United States Decisions.

CHATTEL MORTGAGE.—On the much-disputed question whether a chattel mortgage fraudulent as to a portion of the property may be upheld as to the remainder, it is held, in *Eastman* v. *Parkinson* (Wis.) 113 N.W. 649, 13 L.R.A. (N.S.) 921, that a chattel mortgage of stock in trade and other property, not characterised by actual fraud as to creditors of a mortgagor, may be constructively fraudulent as to them respecting the stock, and valid as to the other property.

CONTRACT.—To render a transaction voidable on account of the drunkenness of a party to it, it is held, in *Martin* v. *Harsh*, 231, Ill. 384, 83 N.E. 164, 13 L.R.A.(N.S.)1000, that the drunkenness must have been such as to drown reason, memory, and judgment, and to impair the mental faculties to such an extent as to render the party non compos mentis for the time being.

Flotsam and Jetsam.

For the first time since the days of Pitt, it is said, an English lawyer has now become Prime Minister of England. The new Premier, Herbert H. Asquith, is recognized as a man of unusual ability and force. Other eminent lawyers hold some of the most important positions in the new ministry. David Lloyd-George is Chancellor of Exchequer; Augustine Birrell, K.C., is Secretary for Ireland; Lord Loreburn is High Chancellor; Sir Henry H. Fowler is Chancellor of the Duchy of Lancaster; Reginald McKenna, First Lord of Admiralty, and Richard B. Haldane, Secretary of State for War.