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EDITOR:
HENRY O'BRIEN, K.C.

ASSISTANT EDITORS:
A. H. O'BRIEN, M.A., AND C. B. LABATT

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CHANGE OF PATRONYMIC.

A recent number of the CANADA LAW JOURNAL draws attention to the present epidemic of name-changing among persons in Ontario—chiefly of foreign birth; and notes the lack of statute law in that Province to govern the practice.

Throughout the various States comprising the American Union, there is no such complete lack of statute law. On the contrary, many States possess a simple statutory procedure whereby, upon petition to a court, a single judge may in his discretion permit such change; and whereas, before the war, no undue or noticeable use was perhaps made of this procedure, yet since that date, the greatly increased number of applications filed has drawn public attention to the subject and called forth not a little newspaper comment, voicing many expressions of disapproval of the existing state of the law.

The origin and history of patronymics in England are well known.* For a long time after the Conquest patronymics or surnames were few in number and were confined to persons of distinction. As the population increased, the necessity of distinguishing one Thomas from another led one to be called Thomas Baker, because, perhaps, he was a baker by trade, and the other to be called Thomas Underhill, because he resided under (or close beside) the hill. Occupations, residence, physical peculiarities or even mere whim—all contributed in the choice of these surnames. Once the name was adopted, for some such adventitious reason, it soon became a patronymic. But a strong, and perhaps even the strongest, factor in fixing the surname was ancestry. From the earliest times recorded in human history, it would appear

*See Bardsley's History of English Surnames; Dudgeon's Origin of Surnames; Baring-Gould's Famous Names and their Story; 8 Nelson's Encyc. 386.

that the first and natural inquiry of the human mind, upon learning of the existence of a man, is: "What is his origin—whose son is he?" As an evidence of this, in all Hebrew historical writings we find the laboured recitals of pedigrees, and note that the name of each individual carefully states his ancestry, sometimes giving the name of his father only, as "Solomon, the son of David;" "Joshua, the son of Nun;" but not infrequently going back through several generations. So, in Homeric times, "Pelides, the son of Pelous;" "Atrides, the son of Atreus." To the mind of the ancients, it is clear that individual identity was associated with sonship or indentification with a family and could not be separated from it; and this is as true today as in ancient times.

By the long-settled custom of ages, therefore, the patronymic became and was commonly relied on as a true indication of the family origin of the individual; and enabled one, upon learning a man's name, to form a correct conclusion as to the family or gens from which he sprang. Thus, a Roman of classical times could so conclude upon hearing the praenomen, nomen and cognomen of a Roman citizen; the first name directly indicating the individual, the second the gens, and the third the stirps or family. And in small communities where men and families were well known, this was necessarily a matter of importance and value.

The Common Law of England permitted a man to change his name at will.* In *Doe ex dem. Luscombe* v. *Yates*, C. J. Abbott holds that a man may at any time adopt a new name and that such new name is for all purposes as good as if he had obtained an

*The *King* v. *Inhabitants of Billingshurst*, 3 Maule & S. 250; *Doe ex demise Luscombe* v. *Yates*, 5 Barn. & Ald. 544; Coke Lit. (1st Amer. Ed.) 3 A.M.; *Button* v. *Wrighiman*, Popham's R. 56; Camden's Remains, 141.

See, also, the following American cases:

Smith v. *U.S. Casualty Co.*, 197 N.Y. 420; *In re Snook*, 2 Hilton (N.Y.) 566; *Laflin & Rand Co.* v. *Steyller*, 140 Penna. State, 434; *Gearing* v. *Carroll*, 151 Penna. State, 79; *England* v. *N. Y. Publishing Co.*, 8 Daly (N.Y.) 375; *Cooper* v. *Burr*, 45 Barb. (N.Y.) 9; *Bell* v. *Sun Printing Co.*, 42 N.Y. Superior 567; *City Council* v. *King*, 4 McCord (S.C.) 487; *Hommel* v. *DeVinney*, 39 Mich. R. 522; *Binfield* v. *State*, 15 Nebraska, 484; *Linton* v. *First Nat. Bank*, 10 Fed. Rep. 894; *Matter of Ludwig And*, 1 Law Bull. (N.Y.) 14; Cycl. of Law and Procedure, Vol. 29, p. 271; Am. & Eng. Encyc. Law (2nd Ed.) 311; 2 Fiero on Special Proc. (2nd Ed.) 847; *Matter of Burstein*, 69 Miscel. (N.Y.) 41.

Act of Parliament. The American authorities all, so far as known, confirm this principle, some, however, requiring that the change, to be valid, must be in pursuance of an honest purpose, and not patently fraudulent; and others holding that where a statute exists, it defines, limits and even supplants the common law right. In this view, it is apparent that a statute, drawn with a view to protect both public and private interests as these exist today among civilized communities, is essential to meet the case; since the free right granted by the Common Law is totally unfitted to conditions imposed by modern commercial life.

It is quite unnecessary to state that a right which could safely be permitted to be exercised by the subject in the time of Queen Elizabeth, might prove harmful or even disastrous to public interests if permitted today. The vast and complicated system of statute law, amending the common law in thousands of particulars, and being in turn itself almost daily subjected to amendment, proves how law changes and must always change to meet the requirements of each age and generation. The interests of society today demand that there shall be both certainty and, within certain clearly defined limits, permanency in the name of a citizen in order to fix his identity. To permit such change, as the ancient Common Law did, at the mere whim and fancy of the bearer—a change which could, if desired, be repeated once each month, and was entirely without written record—would disarrange the whole machinery of the modern business world. To the trader of today, an exact and permanent name is as essential as to a corporation. Without public confidence in its permanency commerce could not be carried on.

Police officials are well aware that gangs of criminals, known as confidence thieves, have operated for years throughout the United States, and generally successfully, by adopting the simple expedient of a complete new set of names together with a radical change of base for each new exploit. Among a population of one hundred millions, spread over a vast territory, this is not difficult. One favorite method is for a firm, calling themselves A., B. & C., to settle in a small town as newcomers, open, perhaps, a clothing store, and deposit a substantial sum in cash with the local bank.

They then buy extensively, carefully paying cash on each purchase. Thus a reputation for prompt payment is acquired. The next step is to order a large quantity of goods on short time. Immediately on receipt of these goods, they are re-boxed and shipped off. The store is then emptied, swept and garnished and the birds flown. The creditors are rarely able to find them. Perhaps three months later, parties of totally different names will be reported to the police for a similar fraud at a point 2,000 miles away. The complete change of name has deceived the trade. When found out, it is too late.

The criminal classes have always in the past adopted and will continue in the future to adopt changes of name as readily as they adopt black masks or other disguises. Laws or no laws, this is what they will do. They are referred to only to remind us of the enormous difficulty which they cause the police by this expedient. Finger printing and Bertillon measurements are beginning to cope with this evil. But the business world still loses and the fight between the law and the criminal still goes on, each fighter availing himself of every advantage science affords. Yet so important is identity in the detection of crime, that, during the past year, legislatures have debated and considered laws which would impose upon all citizens the necessity of having their finger prints and Bertillon measurements taken and publicly recorded; as well as to require all citizens, whether prospective criminals or not, to carry passports with photographs and minute descriptive personalia. From this it is apparent how far all such suggestions of useful and necessary laws are from the trend of the loose laws not uncommon throughout the United States, which have been said, somewhat flippantly, to permit a citizen to totally change his name by putting "a nickel in the slot."

Admitting, then, that it is clearly to the advantage of the criminal classes to change their patronymics as frequently as they change the location of their criminal operations, the question naturally obtrudes itself—what interest has the non-criminal public in assisting them; and are there no considerations of public policy involved in connection with the matter?

Why permit a man to change his name? Who benefits by it? True, it does enable the individual who effects the change to deceive the public. This is, indeed, its very object and purpose. But is it consistent with public policy that such change of name should be permitted; and should the State be asked to go even further and assist the individual to pass himself off as something he is not?

Modern law accentuates the importance of protecting commercial interests, as well as the general public in every way, by preventing deception from being practised upon it. The altogether modern doctrines of Unfair Trade now prohibit one merchant from dressing up his goods to resemble in shape and colour those of a rival, provided that his purpose is to deceive the public into the idea that they are really purchasing his rival's goods and not his; nor can, indeed, a man employ his own name in trade, if his purpose in doing so is clearly to deceive the public. In view of these absolutely established and necessary refinements and restrictions, it becomes evident that if a man can no longer be permitted to pass off his manufactured goods as the manufactured goods of another, how much less should he be permitted, by means of a falsely assumed name, to pass himself off as someone else.?

It is even doubtful whether any really good and valid reason can be advanced for a change of name. Where, under a will, family estates are to devolve upon one not of the name, blood and lineage of the testator, it is questionable whether the name of the donee should be permitted to be changed as a condition of receiving the gift. As in all cases of change of name, this is a deception, notwithstanding that it is permitted by law. The sole object can only be to convey the idea of ancestry that does not exist, or to gratify a pride, which a practical age has no time to waste over.

Two recent instances of change of name, occurring in England during the war, may be briefly adverted to: Sir Joseph Jonas and Charles Alfred Vernon were prosecuted some two years ago for aiding the enemy. Jonas was formerly Lord Mayor of Sheffield. Both were found guilty and sentenced—Jonas to pay a fine of £2,000 and Vernon to pay a fine of £1,000. At the trial of these persons, it was claimed that both were born in Germany but were

using English names. Jonas' birth name did not transpire, but the news reports stated that the so-called Vernon was born under the name of Hahn. Of course, where a reason exists for changing an undesirable patronymic, the individual in question will naturally pick out a good one. It costs no more. Thus, if the reports of the above case are true, the so-called Vernon or Hahn apparently wished it to be believed by the public that he was in some way connected by blood with the noble Staffordshire family of Vernon—a name borne honestly for centuries by true and loyal gentlemen with credit and renown. It had been borne by the gallant Admiral of the Blue who added Gibraltar to the Empire and won the great victory over the Spaniards at Porto Bello in 1739. Such was his fame that all London was publicly illuminated on his birthday. Was such a name one on which an alien should be allowed to wipe his dirty feet? If permitted by law, to allow such to use it was not only a deception attempted upon the public, but was an unwarranted indignity upon a noble English family. The dogs eat the children's bread.

Another case was that of an Austrian Jew named Triebitsch, who, so far as known, without any warrant whatever, assumed the honored name of Lincoln. This man was prosecuted some two years ago in England for forgery and sentenced to three years penal servitude. A self-confessed spy, he narrowly escaped a firing squad in the Tower moat. He was properly deported from England. A character farther removed from that of the great Emancipator cannot be imagined.

These instances direct attention to the matter of public policy. Have the legitimate owners of a patronymic no right to protect it from theft by those who possess no natural claim upon it? Can no family nest throw out those foreign cuckoo eggs?

In England, America and Canada there exist family names which have been consecrated in the history of our race, and which are repeated with reverence whenever referred to. In most American States any one of these honored names can be assumed by any citizen who, perhaps, in his dealings with the police, judges it desirable to adopt a new alias; or by any unwashed immigrant from Central Europe who finds that his cognomen too

clearly reveals his ancestry and race to make living among loyal communities pleasant.

A Committee of the New York Genealogical and Biographical Society recently dealt with the subject and reported as follows:

"As regards the individual citizen who is the ultimate unit in the complex structure of modern Government, this land, as well as all others, has done much that is necessary to protect him or her in rights pertaining to distinctive designation. For, since the evolution of the family surname, such surname or patronymic has been handed down from parent to child, under the protective laws governing legitimacy, as the inherent right of the offspring; and it is necessary for the individual to have recourse to legislative or judicial intervention to legally change an inherited surname.

"We deplore the ease with which this change in patronymic is allowed to be made under the existing laws of the various States in this Union, for the reason that its operation permits many to change their surnames and by this change disguise their blood and nationality.

"The ease with which this change can be accomplished enables a large number of modern immigrants to change their unmistakably foreign patronymics for those more euphonious and familiar to the American ear. This change might not be objectionable if in exchange for their old surname they were compelled to assume a new one distinctly suggestive of their blood and ancestry. Such however is not by any means their custom. After a short sojourn in this land they experience the disadvantage of their own surnames, occasioned by the difficulty of spelling of, unpronouncability of and often business prejudice against their surnames; and at once proceed to change the same; and in so doing adopt surnames characteristically suggestive of blood and nationality entirely different from their own. Their choice generally results in the selection of Anglo-Saxon patronymics. This is a custom prevalent among the lower classes of Hebrew immigrants, and has resulted in many of the best known and respected Anglo-Saxon patronymics being now used by Hebrews (or others) whose inherited surnames they have for reasons of their own found to be of disadvantage to them in this land. If the laws of a State are to continue to permit this free change of name, the new name permitted to be chosen should be (unless some reason better than those noted above is set forth in the application) one distinctly suggestive of the blood and original nationality of the applicant.

"Under the operation of State laws, a great many in the past four years have availed themselves of this ease of change to disguise their German blood and nationality by the adoption of surnames less suggestive of their origin. While we can fully sympathize with their desire in the matter, we maintain that a surname or patronymic is an unavoidable blood inheritance, and unless, in the eyes of the law, some very strong reason is given for its change, it should remain a permanent possession of the inheritor.

"Adequate legislation should be passed to correct the above referred to imperfections in the laws governing the changes of surnames in the various states of the Union."

If Ontario has as yet no legislation upon this subject, some of the above considerations may well be weighed in adopting a statute, if a general statute is deemed advisable. While space does not permit a consideration of the character of legislation best fitted to deal with the existing facts, it is submitted that the common law should be amended to make the assumption by any individual of a new name a misdemeanour. To require a special Act of the Legislature in each case of proposed change of name, would perhaps in the end be the most prudent method of meeting what may, without it, become a serious evil.

NEW YORK. WM. SETON GORDON.

This subject has received attention in England in connection with the Alien Restriction Bill as amended.

It is there provided that the name by which an alien was ordinarily known on the 4th Aug., 1914, is to continue to be that by which he is to be known, and no alien may for any purpose assume or use or continue the use of any other name. Another clause deals with aliens being members of partnerships or firms carrying on trade under names other than those in use before that date. In special circumstances and on special grounds the Secretary of State may grant exemptions from this, but he is not to do so unless satisfied that the new name is in the circumstances of the case a suitable one. This is not to apply to women assuming a husband's name, or names assumed in pursuance of Royal license, nor the continued use of a name by any person who assumed it

under an exemption under the Defence of the Realm Regulations or the Aliens Restriction Order. These exemptions are to be paid for at the price of ten guineas, but in special cases the whole or part may be remitted, and the alien must advertise the exemption in a paper circulating in the area of his residence. Another restriction put upon aliens is to debar them from juries in judicial or other proceedings when either party challenges them."

A LEGISLATIVE EXPERIMENT.

We are glad to find that an attempt on the part of the Manitoba Legislature to initiate some foolish legislation of United States invention has proved abortive. One of the great safeguards of liberty is the fact that, according to the British system of legislation, laws cannot be passed without due deliberation and debate, in which all sides of a question may be brought forward and considered. The Act in question known as the *Initiative and Referendum Act* purported to enable the electorate to pass and repeal laws by popular vote without any debate or deliberation beyond what might take place in the course of an electoral contest or at public meetings. It purported to give to the electorate at large the legislative powers which by our constitution are vested in the Provincial Legislature. In short the Provincial Legislature attempted to divest itself of, and confer on some other body, the legislative powers which under the constitution are vested in itself. This the Judicial Committee of the Privy Council have found to be *ultra vires* of the Provincial Legislature; and the people of Manitoba are to be congratulated that the folly of its Legislature has been overruled.

This freak kind of legislation is one of the results of a single legislative chamber, which happens to be unduly weighted with demagogues seeking to curry favour with the populace and unmindful of their higher interests. Our close proximity to the neighbouring republic renders us liable to imitate their methods, but for the substantial good of the country we are disposed to think we had better seek for examples for our own constitutional and legislative methods in the Motherland.

POSSESSION UNDER FORCIBLE ENTRY.

Until quite recently it was a moot point in the law relating to possession of land whether a possession, which was in fact rightful as being held under a good title to the ownership and possession of the land, but which had been acquired by forcibly entering and turning out the person in occupation, was a lawful possession for all civil (as distinct from criminal) purposes. The reason for the doubt was that under the Statutes of Forcible Entry the acquisition of possession by force on the part of a person entitled to enter is an indictable offence. The weight of judicial authority was in favour of the position that a possession, gained by force and in such a way that the person so entering could be indicted and punished criminally, did not amount to lawful possession for all purposes so far as civil rights and liabilities were concerned. The leading case on the subject was *Newton* v. *Harland* (1 Man. & Gr. 644), in which, as long ago as 1840, the majority of the Court of Common Pleas held that an assault committed by a landlord on his tenant cannot be justified if the possession in defence of which the assault is committed has been obtained by means of a forcible entry. In the recent case of *Hemmings* v. *Stoke Poges Golf Club* (*ante*, page 197) the Court of Appeal definitely disapproved of this view and overruled cases decided on its authority, holding that the owner of a dwelling-house (entitled to re-enter) was not liable in civil damages for a technical assault committed in course of entering forcibly and turning out the person in occupation.

Of the Statutes of Forcible Entry and Detainer—5 Ric. 2, ch. 7; 15 Ric. 2, ch. 2; 8 Hen. 6, ch. 9; 31 Eliz. ch. 11; 21 Jac. 1, ch. 11—the most important is the first, enacted in 1381; the last three relate to restitution of premises forcibly entered and held. The 5 Ric. 2, ch. 7, enacts that "none from henceforth make any entry into any lands and tenements but in case where entry is given by the law, and in such case not with strong hand nor with multitude of people, but only in peaceable and easy manner; and if any man from henceforth do to the contrary and thereof be duly convict he shall be punished by imprisonment." Forcible entry, even by an owner entitled to enter, on any land or tenement is thus made a criminal

offence, but no civil remedy is given to the person turned out of possession. With civil remedies the statute has nothing to do. If the person turned out of possession is in fact entitled to the possession or ownership notwithstanding the forcible entry of another, he is able to enforce his rights without the aid of the statute of 1381. What this statute does is merely to forbid anyone entitled to enter on land having recourse to "self-help," and for indulging in this kind of "self-help" a penalty is imposed.

The statute of 1381 appears to contemplate the protection of all persons in peaceable possession of land or houses, but whose right to possession has come to an end, as well as the protection of owners and occupiers generally in the enjoyment of their rights of property. Exactly what interest over and above that of a mere trespasser is required in order to make dispossession by force an offence under the statute seems not to be settled. In some of the old cases it has been held that a tenant at will or a tenant by sufference do not come within the purview of the statute: see, for instance, *Rex* v. *Westly and Walker* (1670, 2 Keble, 495); *Rex* v. *Dorny* (1701, 1 Salk. 260). But in a more modern case it has been laid down that it is "immaterial what estate the prosecutor had in the premises, the question not being one of title": (*Rex* v. *Williams*, 1829, 4 Man. & Ry. 471). In 3 Bac. Abr. 719 (7th ed., 1832), "Forcible Entry and Detainer" (D), it is said: "A man who breaks open the doors of his own dwelling-house, or of a castle which is his own inheritance but forcibly detained from him by one who claims the bare custody of it, cannot be guilty of a forcible entry or detainer within the statutes," since in either case the possession in law is in the owner.

But the greatest difficulty about the statute of 1381 has been to determine how far the possession, once gained, is a lawful possession in view of the fact that it has been obtained in an unlawful manner. The circumstances in *Newton* v. *Harland* (*sup.*), where the landlord entered by force on the expiration of the occupier's tenancy, are typical of the kind of case in which questions of forcible entry usually arise. The plaintiff Newton was tenant for six months of some rooms with his wife and family. The rent was not paid, and was distrained for at the expiration of the six months. Mrs.

Newton then locked the doors and refused to give up the keys or leave the premises. Harland then broke open the doors and with several men entered the rooms and compelled Mrs. Newton to leave, Harland himself leading Mrs. Newton out by the arm. An action was then brought by Mr. and Mrs. Newton against Harland and others for the assault on Mrs. Newton. At the trial Mr. Baron Parke directed the jury to find a verdict for defendants. The facts not being clearly ascertained, a new trial was directed, and, being held before Mr. Baron Alderson, a verdict for defendants was again given. A new trial was again ordered, after two arguments, Chief Justice Tindal, Mr. Justice Bosanquet, and Mr. Justice Erskine being in favour of a new trial, and Mr. Justice Coltman dissenting. The view expressed by the majority was that, assuming the entry of the defendants to have been forcible, a landlord "cannot found a legal right to remove the tenant upon the illegal act of a forcible possession." Mr. Justice Coltman, however, held "that, although the defendant, if guilty of a forcible entry, is responsible for it in the way of a criminal prosecution, yet that, as against the plaintiffs who are wrongdoers and altogether without title, he has obtained by his entry a lawful possession, and may justify in a civil action the removing them, in like manner as in the case of any other trespasser." The third trial was held before Mr. Justice Coltman, who (in deference to the opinion of the majority in the Court of Common Pleas) directed a verdict for the plaintiffs to be entered. The reporter's note, after stating that the litigation was carried no further, goes on to say: "it has therefore not been decided by a Court of the last resort whether lawful possession necessarily implies possession lawfully acquired, and whether a party who possesses himself violently of his own property is for ever precluded from defending his possession against a wrongdoer."

Mr. Baron Parke and Mr. Baron Alderson, who had taken the same view as Mr. Justice Coltman, subsequently expressed their adherence to that view and their dissent from the opinion of the majority: (see *Harvey* v. *Brydges*, 1845, 14 M. & W. 437). On the other hand, Mr. Justice Fry in two cases followed with approval the opinion of the majority in *Newton* v. *Harland:* (see *Beddall* v. *Maitland*, 44 L.T. Rep. 248; 17 Ch. D. 174; *Edwick* v. *Hawkes*, 45 L.T. Rep. 168; 18 Ch. D. 199).

The Court of Appeal has now overruled the three last-mentioned cases and adopted the opinion expressed by Mr. Justice Coltman, Mr. Baron Parke, and Mr. Baron Alderson. In *Hemmings* v. *Stoke Poges Golf Club* (*sup.*) the plaintiff was not, like the plaintiff in *Newton* v. *Harland*, a tenant, but a servant of the defendants, and he declined to give up possession. As in *Newton* v. *Harland*, the plaintiffs (husband and wife) sued for the assault, and also for the removal of their furniture, on the occasion of the defendants' forcible entry. On the facts, the plaintiffs were rather in the position of claiming "the bare custody" of the cottage, as mentioned in Bacon's Abridgment (*sup.*), but the defendants were willing, and the Court of Appeal agreed, that the case should be decided on the footing of a forcible entry within the statute of 1381 having taken place. On that footing accordingly the Court of Appeal held that the plaintiffs were not entitled to damages, and that the assault and removal of furniture complained of were justified by the fact that the defendants had obtained, and were in, lawful possession—albeit by a forcible entry punishable under the statute of 1381.

The importance of the recent decision is very great. It involves the assertion of the principle so often acted on with success in the sphere of international law—that of the *fait accompli*. Possession is forbidden to be taken by force, but, when taken in face of the prohibition, is as lawful for all purposes of property and contract as if acquired in a lawful manner. Could this be applied in the case of the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915? By sec. 1 (3): "*No order* for the recovery of a dwelling-house . . . *shall be made*," etc. How if the owner or landlord did take possession by a forcible entry? Would the risk of a prosecution under 5 Ric. 2 be the only risk run, and would the possession be in all other respects lawful and unimpeachable? Such a "right of re-entry" could only be regarded as unlawfully exercised under the Courts (Emergency Powers) Act 1914 if it were exercised "for the purpose of enforcing the payment" of money. It is, of course, easier to ask these questions than to answer them. But the principle involved in *Hemmings* v. *Stoke Poges Golf Club* is one capable of the wide application and in unexpected directions. —*Law Times.*

PRECEDENTS FOR PUNISHMENT OF THE KAISER.

In connection with the decision of the Council of Versailles to try the late Kaiser before an international tribunal, the criticism has been made by lawyers, including, it is reported, some in high official station, that the proposed course is wholly without precedent. If this is true it is of little weight. A great many unprecedented things both good and bad have been done in the last few years. But the absence of a precedent is as a matter of fact due purely to the peculiar humanity with which the allied nations are proceeding. Precedent could be found readily enough if it was proposed to lead William Hohenzollern through Paris chained to the automobile of Marshal Foch, to sell him into slavery, to cast him into a den of wild beasts, or to impose on him any one of a dozen or more of the fates which once awaited conquered kings. It is the fact that it is proposed to give him a trial and an opportunity of defence which creates all the furor about lack of precedent. If it is objected that the precedents referred to were of barbaric times (though their barbarism pales into insignificance beside that for which the Kaiser was sponsor) the Council of Vienna by a mere resolution sent Napoleon into life-long exile on a guarded island. But the obvious truth is that the situation is one in which precedent plays no part at all. In the continuous execution of a fixed system of laws by persons having delegated powers, precedent is essential to the security of the citizen. But when delegated government for any reason fails and the people take over the security of their own rights, precedent is outside the question. Did the framers of the American Constitution cavil at the absence of precedent for the government they were creating? So, when, perhaps once in a century, a world war occurs and the civilized nations of the earth unite to lay anew the foundations of peace and international law, what precedents are there which can or should bind them? The Council of Versailles represents the power and the civilization of the whole world, and that it should trouble itself to find precedent in what was done by some petty kingdom at the close of a tiny war in some past day is altogether absurd. What the world wants is action which is right and just, and it is more apt to find it in the decision of that council than in any precedent which can be produced.—*Law Notes.*

LAWYER'S LYRICS.

In our last issue for 1919, we gave our readers a graceful tribute to one of the great lawyers of Canada, beloved by all, Christopher Robinson. We have recently been given a small volume, published for private circulation only, containing "Poems by the late Hon. Sir John Hawkins Hagarty, formerly Chief Justice of Ontario, 1902."

The memory of this brilliant advocate, keen lawyer and eminent judge, with his genial courtesy and ready wit, is still fresh in the minds of the older members of the Ontario Bar. He was a charming and accomplished gentleman of the old school, with a highly trained mind, a classic and a poet, with literary attainments of high order, as evidenced by his writings. It is a loss to us that more of his writings have not been collected and preserved.

The longest of those in the volume before us is "Legend of Marathon." The "Memorandum" which introduces it was evidently written by the author himself. It reads as follows:—

"A septuagenarian, afflicted in his youth with a verse making malady in an acute form, finds among his ancient rhyming diversions the following 'Legend,' which seemed to his partial judgment less worthy of cremation than the residue. It is to him a memory of the thoughts and dreams of 'sweet three-and-twenty' and it is offered to the perusal of a few private friends. The 'Legend' is that of Eucles the soldier who, after being wounded in the battle, ran from Marathon to Athens (22 miles) and fell dead as he spake the words 'Rejoice! we triumph!'

Want of space forbids our reproducing more than the conclusion of this beautiful, heart stirring poem, which we venture to think compares favourably with the best efforts of poets more widely known:—

> Gloom on Athenæ! as the eve sinks down
> Like earth's last sunset o'er the mourning town,
> And tear-dimm'd eyes pursue the failing light,
> With glance prophetic of a fearful night.

A last faint radiance lights the distant surge
That moans around Ægina's holy verge,
And eastward, o'er Hymettus' crest afar
Melts the soft splendour of the earliest star.
Daughter of Jove—look down—earth's fairest hour
Robes thy white fane with beauty's holiest power.
Look on thy Attic home! to greet thee there
Wait gift and vow, and agony of prayer.
Now on Hope's waxen wings, the accents rise,
Now, in a wail the strain despairing dies!

A sound upon the torpid street!
A hurried sound of coming feet
By Diomea's gate the scout
Breaks the long silence with a shout
That echoes round with startling might.
"He comes! a Herald from the fight!"
He comes—He comes. Now Life and Death
Hang on the Herald's earliest breath!
He comes—he comes—his weary feet
Slow bear him up the sacred street
Toward the crown'd Virgin's altar place
He staggers on with faltering pace—
"'Tis Eucles! Eucles!" onward flies
The glance of recognizing eyes.
No voice the dreadful silence breaks
No eager lip the question speaks—
They mark the blood upon his breast—
The wounded feet—the sullied vest,
The flowing locks all bare—
The wildness of the blood-shot eye—
Gods! Doth it fire with victory
Or burns it with despair?
See! from the distant battle field
He carries home his dinted shield.
Soft—now his path is stay'd;
By the white shrine the Herald stands,

To Heaven are rais'd his weary hands
  As asking strength and aid—
Listen! He speaks! The crowd around
Watch, as with madness for the sound
He gasps, the pallid lips have stirred,
No ear hath caught the faltering word—
The red blood to his ghastly brow
Rushes with sudden fierceness now;
  Up from the faint heart roll'd.
Now, to the violet heaven's expanse
Turns wild his eye's despairing glance,
As to reproach the cruel Power
That bids him die this awful hour—
  His glorious tale untold!
Hark! From the throng a low, deep moan
Spreads o'er the hush its thrilling tone—
Yon white form, cold and trembling there
Hath waked that whisper of despair,
And see—the Herald's straining eye
Fires at the sound half maddeningly—
  And then, a new found voice
From the tired life's last effort wakes—
Though in the strife the brave heart breaks,
  "Victory! Rejoice! Rejoice!"

Peace joyous crowds!
  There is a death-bed here—
Let softer voices sooth the dying ear—
Come gently round with light and solemn tread,
There the boy-soldier droops his graceful head—
Mark the white lip—the dark eye glazed and dim;
Youth, valour, hope are passing there with him—
Not in the storm of fight whose shouts rang high,
And banners gleam'd and charging spears swept by,
Fails that bright spirit—
  Yet his fight is won.
His country saved—his task of love is done,

And loving hands his early death-bed tend,
And home's kind eyes above his pillow bend;
Strike light, O, Death!
There is a white form now
Kissing the death-damp from the pallid brow,
Propping with tender arm the drooping head,
Wooing the last sweet light the dim eyes shed,
Whispering sweet words—such as Ilissus' tide
Heard nightly by the flower-crowned altar's side.
Earnest to wake with love's impassion'd breath,
Some lingering echo in the ear of death.
A chord is touched—and with some transient might
The eye's last warmth of evenescent light
Shines forth, and fades,—and as the eternal trance
Chills the faint heart and clouds the adoring glance
Slow on the white arm droops the youthful head,
The soldier sleeps—the living clasps the dead!

The right has been conferred by Royal warrant on Judges of the County Courts in England and Wales to retain the style and title of "His Honour" before their names on their retirement from the Bench; it being deemed a fitting recognition of the importance of the office which they hold. In former days County Court Judges in England do not seem to have occupied as important a position as they now hold, the jurisdiction of the Court having been greatly increased of late years No such right exists in this country.

Notwithstanding some impression to the contrary, the Judges of our Superior Courts have no right to retain the style of "Honourable" on their retirement; though, as a matter of courtesy, they are often thus styled. There is one exception, and so far as we know only one, and that is Hon. Featherston Osler, on whom this complimentary title was conferred by special warrant, and a very fitting recognition it was of his invaluable services to the country, as one of the best of our Judges.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

ACTION FOR FALSE WORDS OCCASIONING SHOCK—THREATS—NERVOUS SHOCK—SPECIAL DAMAGE—REMOTENESS—PRINCIPAL AND AGENT—SCOPE OF AGENT'S EMPLOYMENT.

Janvier v. *Sweeney* (1919) 2 K.B. 316. This was an action brought by the plaintiff to recover damages for a nervous shock caused by false statements made to the plaintiff by the defendants who were two detectives. The plaintiff alleged special damage to the amount of £57.15s. The plaintiff was a French woman who had been for some five years engaged to be married to a German named Neumann. In 1915 Neumann was interned in the Isle of Man; the plaintiff had been twice to see him, and was in the habit of corresponding with him there. She was a companion to a Mrs. Rowton, with whom a Miss Marsh came to reside. This latter lady had in her possession certain letters which she claimed to have been written by a Major X., but which Major X. declared to be forgeries. He employed the defendants to get him inspection of the letters—Sweeney told his co-defendant Barker to go to Mrs. Rowton's house and see the plaintiff and ask her if she had seen any letters from Major X. in any of the rooms Miss Marsh used, and to request to be allowed to compare the handwriting of any such letters with the genuine writing of Major X., and he told Barker that the plaintiff would be remunerated if she produced the letters for inspection. Barker went to the house and though there was a conflict of evidence as to what he said, the jury found that he used words to the effect that he was a detective inspector from Scotland Yard and represented the military authorities and 'you are the woman we want, as you have been corresponding with a German spy', and that Barker was acting within the scope of his authority as agent of Sweeney in making such statements; that the statements caused physical injury to the plaintiff, and awarded her £250 damages; and on these findings the Judge at the trial gave judgment in her favour. On appeal this judgment was affirmed by the Court of Appeal (Bankes and Duke, L.JJ. and Lawrence, J.). The Court was of the opinion that Barker went to the house to try and get the plaintiff to commit a gross breach of duty either by bribery or threats, and that, in the circumstances, in the threats he used he was acting within the scope of his employment and that notwithstanding what was said in *Victorian Railways Commissioners* v. *Coultas*, 13 App. Cas. 222, the nervous shock caused by the defendant's action was an actionable wrong, and the damages were not too remote.

PRACTICE—PARTIES—COUNTERCLAIM—JOINDER OF THIRD PARTY AS DEFENDANT TO COUNTERCLAIM—RELIEF CLAIMED AGAINST DEFENDANTS TO COUNTERCLIAM IN ALTERNATIVE—JOINDER OF DIFFERENT CAUSES OF ACTION IN COUNTERCLAIM.

Smith v. *Buskell* (1919) 2 K.B. 362. This was an action for the price of goods sold and delivered. The defendant by his defence pleaded that the goods were not delivered in good condition, and that the plaintiff committed a breach of an implied term of the contract to pack the goods properly. He also raised the same points by way of counterclaim against the plaintiff and to the counterclaim he added as defendants a railway company to whom the goods had been delivered for transmission to the defendant; claiming alternatively against them damages, in case the goods had been delivered in good condition, for negligence. The plaintiff moved to strike out the railway company, as defendants in the counterclaim but Roche, J., refused the motion and the Court of Appeal (Warrington and Duke, L.JJ.) affirmed his decision, being of the opinion that although the claims were not strictly alternative, so as to be mutually exclusive, yet that the relief claimed against the railway was sufficiently "connected with the original subject of the cause or matter" within sec. 24(3) of the Judicature Act (Ont. Jud. Act, sec. 16 (d)), to enable the claim against the railway company to be joined with the claim against the plaintiff.

SOLDIER'S WILL—TESTAMENTARY INTENTION—CODICIL—LETTER CONTAINING INSTRUCTIONS TO ALTER WILL—INSTRUCTIONS RELATING ALSO TO REAL ESTATE—WILLS ACT (1 VICT., C. 26, S. 11)—(R.S.O. c. 120, s. 14).

Godman v. *Godman* (1914) P. 229. In this case a testator, having made a will in 1915 dealing with his real and personal estate in due form, subsequently enlisted as a soldier, and in 1917 wrote a letter directing certain changes in his will which purported to affect both the disposition of his real and personal estates. The question at issue was whether this letter was sufficient as a soldier's will, so as to be entitled to probate as a codicil. Horridge, J., held that the letter would, if it had been confined to the personal estate, have been a good soldier's will, and as such, entitled to probate as a codicil; but he held that the fact that it also dealt with realty, and the disposition thereby purported to be made of it, was so mixed up with the personal estate it was impossible to disentangle it, therefore the letter was not valid even as to the personalty.

WAR—CROWN—ROYAL PREROGATIVE—DEFENCE OF REALM—RIGHT OF CROWN TO TAKE POSSESSION OF LAND AND BUILDINGS WITHOUT COMPENSATION.

De Keyser's Royal Hotel v. *The King* (1919) 2 Ch. 197. This was a petition of right claiming compensation for land and buildings taken possession of by the Crown under the Defence of the Realm Act. Peterson, J., dismissed the petition, but the Court of Appeal (Eady, M.R., and Warrington and Duke, L.JJ.) have reversed his decision (Duke, L.J., dissenting). The case is very elaborately dealt with by all the Judges, the majority of the Court drawing a distinction between lands and buildings taken by the Crown for administrative purposes as was the case in this matter, and lands entered upon for the purpose of raising bulwarks or other defences against an expected invasion.

JUDICIAL INQUIRY—DOMESTIC FORUM—ACCUSER ACTING AS JUDGE—JUDGE—BIAS.

Law v. *Chartered Institute of Patent Agents* (1919) 2 Ch. 276. This was an action to restrain the defendants from carrying out a resolution expelling the plaintiff as a member of the defendants' Institute. The plaintiff had been accused by officers of the Admiralty of the alleged disclosure to the plaintiff of a secret naval invention. This was referred to the defendants' discipline committee to ascertain if the plaintiff, who was a member of the Institute, to ascertain if he had been guilty of "disgraceful professional conduct" under Rule 31 of their charter. The committee formulated a charge against the plaintiff and then applied, under Rule 19 of the Register of Patent Agents Rules, to the Board of Trade to strike the plaintiff's name off the Register of Patent Agents. This application ultimately failed. The Council of the defendants then proceeded under Rule 32 of their Charter to expel him from membership in the defendants' Institute. At the meeting when his conduct was to be investigated, the plaintiff by his counsel objected to the jurisdiction of the Council in so far as it was composed of members who had taken part in the previous application to the Board of Trade. This objection was overruled by the President and the plaintiff and his counsel then retired from the meeting. The Council then passed resolutions finding the plaintiff guilty of disgraceful conduct as a patent agent and expelling him from membership. The plaintiff claimed that in these circumstances the resolution was *ultra vires*. Eve, J., who tried the action, held that the Council in the investigation under Rule 32 had acted in the performance of a judicial duty, as

both accusers and judges, contrary to the principles of natural justice and therefore that their action was invalid and *ultra vires*. The case is of importance and deserves the very careful consideration of all professional advisers of bodies empowered by their rules, or otherwise, to exercise judicial functions. The learned Judge intimates that it is the duty of all such persons to refrain from the position of accusers; and that in cases of charges against members of societies or corporations it is the duty rather of the judicial body to assist the accused in establishing his innocence, rather than act as his accuser. The learned Judge decided that the application to the Board of Trade was no bar to subsequent proceedings against the plaintiff as a member of the defendants' Institute, which could not be considered as a second trial for the same offence as the plaintiff contended.

ADULTERATION—SALE OF MILK—UNAUTHORISED SALE—AUTHORITY OF AGENT.

Whittaker v. *Forshaw* (1919) 2 K.B. 419. In this case Forshaw was charged with selling milk adulterated with water to the extent of 24 per cent., in the following circumstances: his daughter aged thirteen was instructed by him to carry a pint of milk from his farm to the dwelling house of a customer, in fulfilment of an order previously given by the customer; on her way she met an inspector under the Food & Drugs Act, who demanded to purchase from her a pint of milk which she delivered to him out of the can containing the milk intended for the customer. She delivered it because the inspector demanded it, and because, as she said, some people are fined for not doing as the policemen tell them. The milk so sold proved to be adulterated as above mentioned; but on a case stated by the Justices who heard the complaint it was held by a Divisional Court (Darling and Salter, JJ., Avory, J., dissenting) that the Justices were justified in finding that the daughter had no authority to make any contract of sale, inasmuch as her duty was limited to carrying the milk. The decision of the Justices dismissing the complaint was therefore affirmed.

ARBITRATION—REFUSAL OF ARBITRATOR TO STATE A CASE—REQUEST OF PARTY FOR STATEMENT OF A CASE—MISCONDUCT—SETTING ASIDE AWARD.

In re Fischel & Co. v. *Mann* (1919) 2 K.B. 431. This was a motion to set aside an award. On the appointment of arbitrators and an umpire for the purpose of an arbitration one of the parties stated that he required them to state a case on questions of law

which were *primâ facie* substantial; and subsequently when the matter was before the umpire a like request was made; but the umpire refused so to do and made his award not in the form of a special case. This a Divisional Court (Avory and Salter, JJ.), held to be misconduct, and the award was set aside.

CONTRACT—JOINT PURCHASE OF PREMISES—REASONABLE CONDUCT OF JOINT OWNERS—ISOLATED QUARREL—CONDUCT OR THREAT RENDERING JOINT OCCUPATION UNSAFE, OR PRACTICALLY IMPOSSIBLE—BREACH OF CONTRACT—DECLARATORY JUDGMENT.

Harrison v. *Walker* (1919) 2 K.B. 453. This was a somewhat peculiar action. The plaintiff had jointly with the defendant purchased a bungalow as a joint residence, and entered into occupation, but, as the plaintiff claimed, the defendant by his threats violence and quarrelsome conduct made it impossible to the plaintiff to continue to reside with him and he was consequently obliged to quit. The plaintiff claimed damages for breach of an implied contract that the defendant would conduct himself reasonably, and for a declaration that he was entitled to an undivided one-half share in the bungalow. It appeared by the evidence that a dispute had arisen between the parties as to some business matters in which they were concerned which was accompanied by considerable asperity on the part of the defendant; but there was no evidence that the defendant had excluded, or in any other way interfered with the plaintiff's enjoyment of the bungalow. McCardie, J., who tried the action, was of the opinion that, in the circumstances, no case had been made out by the plaintiff and dismissed the action, and as no dispute as to the plaintiff's rights existed even the declaration asked could not be made.

CONTRACT—FUNERAL UNDERTAKER—ENTIRE CONTRACT—ESSENTIAL TERM NOT PERFORMED—RIGHT OF UNDERTAKER TO RECOVER ON QUANTUM MERUIT.

Vigers v. *Cook* (1919) 2 K.B. 475, is a case somewhat out of the ordinary. The action was brought by an undertaker to recover costs of a funeral. By the terms of the contract the coffin was to be taken into a church where part of the funeral service was to be read. The body of the deceased was in an advanced stage of decomposition. The plaintiff supplied a lead coffin in which he left a vent for the escape of gas, and the coffin with the body in it was taken to a mortuary. Owing to a complaint of the mortuary

authorities of an offensive smell from the coffin the plaintiff had the vent closed, in consequence, when the coffin reached the church the coffin had burst and was leaking and the smell was so offensive that it could not be taken into the church, and the service had to be read outside. The Judge of the County Court who tried the action held that the plaintiff could not recover on the contract, but gave judgment in his favour on a quantum meruit for £42. A Divisional Court (Lawrence and Lush, JJ.) held that the contract was an entire contract for one consideration and not having been fully performed nothing was recoverable, and with this conclusion the Court of Appeal (Bankes, Scrutton and Atkin, L. JJ.) agreed.

INSURANCE (LIFE)—PREMIUMS PAYABLE QUARTERLY ON SPECIFIED DAYS—30 DAYS GRACE ALLOWED—WHETHER PREMIUMS DUE ON SPECIFIED DAYS, OR LAST OF DAYS OF GRACE.

McKenna v. *City Life Assce. Co.* (1919) 2 K.B. 491. By a policy of life insurance it was provided that the premiums were to be payable "on or before the last day of January, April, July and October" in each year. By the conditions 30 days grace were allowed for payment of each renewal premium. It was also provided that if the policy should have acquired a surrender value it should not immediately lapse, but would be kept in force for twelve calendar months from the date on which the last premium became due subject to payment of the arrear premiums and interest thereon within that period. The policy in question had obtained a surrender value. The premium payable on July 31, 1915, and all subsequent premiums were unpaid. On August 7, 1916, the owner of the policy tendered the premiums in arrear and interest thereon which the company refused to accept. The action was brought to compel them to accept payment. On behalf of the plaintiff it was contended that the payment in July, 1915, was not due until the days of grace had expired, consequently that his tender was within time; but the defendants claimed that the premium was due within the meaning of the condition on the 31st July, 1915, and therefor the tender was too late, and with this contention Scrutton, L.J., who tried the action, agreed.

PRIZE COURT—NEUTRAL SHIPOWNERS—CARRIAGE OF ENEMY PROPERTY—SALE OF CARGO—FREIGHT—DAMAGES FOR DETENTION AND DEMURRAGE.

The Heim (1919) P. 237. In this case a neutral vessel had been brought into a British port and her cargo being found to be enemy property had been seized and sold, the proceeds being in

Court: the shipowners claimed to be paid out of the proceeds freight and damages for detention, or demurrage for detention of the vessel, Lord Sterndale, P.P.D., held that they were entitled to freight, but he disallowed the claim for damages or demurrage.

PRIZE COURT—CAPTURE IN NEUTRAL WATERS—THREE MILE LIMIT—MISTAKE OF CAPTORS—DAMAGES AND COSTS.

The Düsseldorf (1919) P. 245. The vessel in question in this case was a German vessel which had been seized while within the territorial limits of a neutral country, owing to a mistake of the officer who effected the capture as to the location of the three mile limit. On an application to condemn the vessel and cargo as prize, Lord Sterndale, P.P.D., ordered the vessel and cargo to be released; but as the officer of the King's vessel had merely miscalculated the distance and had no intention of violating neutral waters he refused to award the claimants either damages or costs.

PRIZE COURT—DOCTRINE OF INFECTION—CONTRABAND AND INNOCENT CARGO SHIPPED ON SAME VESSEL—PASSING OF PROPERTY—NEUTRAL SHIPPERS AND CONSIGNEES.

The Parana (1919) P. 249. On the vessel in question in this case a neutral shipper had shipped contraband goods and also "innocent" goods which he had contracted to sell to a neutral consignee. The question to be decided was whether the innocent goods were liable to condemnation, which depended on whether they were the property of the shippers; this question Lord Sterndale, P.P.D., held must be determined according to prize law and according to that law he found that the "innocent" goods still remained the property of the shipper notwithstanding that under municipal law the property had passed to the consignees upon the date of the seizure. The whole cargo was therefore condemned.

PRIZE COURT—SEIZURE OF BONDS ETC., FROM LETTER MAIL—GOODS OF ENEMY ORIGIN—SALE BY ENEMY TO NEUTRAL—RE-SALE BY NEUTRAL TO NEUTRAL—CONTINUOUS VOYAGE.

The Noordam (1919) P. 255. Two or three points of interest are decided in this case. First, that goods *bonâ fide* bought from their German owners by a neutral and delivered in the neutral's country and from there resold to a neutral in another country are not liable to seizure as prize, and the doctrine of continuous voyage does not apply in such a case. Secondly, that where securities for money belonging to an enemy are transmitted by letter mail, such securities are not exempt from capture under the Hague Conven-

tion, Art XI., which provides "that the postal correspondence of neutrals or belligerents . . . which may be found on board a neutral or enemy ship at sea is inviolable," because such a contention cannot deprive a belligerent of a right of reprisal, and if a reprisal order is not attended with unreasonable inconvenience or loss to neutrals, it is not invalid merely because it is contrary to the convention. The seizure of the securities in question under the Reprisal Order in Council of March 11, 1915, was therefore held to be valid.

Correspondence.

RE CHANGING NAMES.

Editor, CANADA LAW JOURNAL,
Toronto, Ont.

DEAR SIR:—

With reference to your article "Changing Names" appearing in your November issue, there is a Change of Name Act in this Province, which was enacted in the year 1916.

According to this Act, any person of the full age of twenty-one years and a British subject by birth or naturalization, may change his or her name, and if such person is a married man, he may change the given name or names of his wife and all unmarried infant children; and if such person is a widower, or widow, he or she may likewise change the given names of all unmarried infant children.

Publication is required in the Alberta *Gazette* and also in a newspaper circulating in the district of applicant's domicile. All applications are registered with the Provincial Secretary in a register known as the "Change of Name Register," and a duplicate certificate is issued and filed with the Registrar-General of Vital Statistics, who must change his records in conformity with the certificate. A duplicate certificate will also be issued to anyone making application therefor.

Provision is made to annul any change of name where it is obtained by fraud or misrepresentation.

Forms for use in connection with the Act are appended in schedules. No doubt you would be interested in procuring a copy from the King's Printer, Edmonton.

Trusting this information will be of interest to you, I am

Yours truly,

MEDICINE HAT, ALBERTA. JOHN H. DEY.

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Logie, J.] BELL v. CHARTERED TRUST CO. [49 D.L.R. 116.

Specific performance—Part performance—Lease required to be made by deed—Equities—Decree.

Although an agreement for a 5 year lease is not in writing if there has been a sufficient part performance unequivocally referable to the agreement, and equities have arisen from the acts of part performance which render it unjust not to decree specific performance, such specific performance will be decreed.

J. P. Walsh, S. King and *W. Lawr*, for various parties.

ANNOTATION FROM 49 D.L.R.

Leases required by Law to be made by Deed.

By A. D. ARMOUR, ESQ., of the Ontario Bar.

In considering the effect of a lease required by law to be made by deed, but which is made by parol it is necessary in the first place to bear in mind that a lease itself does not convey any interest in the land. *Lewis* v. *Baker*, [1905] 1 C. 46, 74 L.J. Ch. 39; *Lord Llangattock* v. *Watney Combe, Reid & Co., Ltd.*, [1910] 1 K.B. 236. The lessee obtains only an *interesse termini* from the lease, until he has perfected his title by entry. It is the lease combined with his entry into possession which conveys to him his interest in the term granted, and it is only when a lessee has entered under the particular lease in question that he acquires any interest in the land.

Under Statute of Frauds, 29 Car. II. c. 3, s. 2 (now R.S.O. 1914, c. 102, s. 4), a lease or an agreement for a lease, not exceeding the term of three years from the making thereof, the rent upon which, reserved to the landlord during such term, amounts unto two-thirds at the least of the full improved value of the thing demised, is not required to be in writing or under seal. As leases of this description do not present much difficulty, and are not often the subject of litigation, they are not further considered at the present time, and when the word "lease" is hereafter used, it refers only to leases of the kind which would have been required by 29 Car. II., c. 3, to be in writing; that is, leases not exceeding the term of three years upon which the rent reserved does not amount in the whole term to two-thirds of the value of the subject of the lease, and all leases for a term exceeding three years.

By s. 1 of the Statute of Frauds, 29 Car. II. c. 3, (which appeared in R.S.O. 1897, as c. 338, s. 2), it was enacted that:—

"All leases, estates, . . . or terms of years, . . . made or created by . . . parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding."

The purpose of the Statute of Frauds is stated to be for prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury, and subornation of perjury. The intention of Parliament therefore was to render such fraudulent practices impossible by making it unlawful to give any evidence of a lease or term of years otherwise than by a written document. It was not open to any witness to explain the nature of the possession of a tenant, because as soon as oral testimony was admitted, the chance of perjury being committed arose; or in other words, it was intended "to prevent matters of importance from resting on the frail testimony of memory alone." Having forbidden the explanation of a tenant's interest by means of oral evidence, Parliament then definitely enacted what that interest should amount to either in law or equity, when the lease was not in writing, namely, a lease or estate at will; and lest the doctrine of consideration should still be held to support a parol lease, it was further enacted that consideration should not have that effect.

By 8-9 Vict. c. 106, s. 3, it was enacted that:—

"A lease required by law to be in writing, of any tenements or hereditaments . . . made after the said 1st day of October, 1845, shall also be void at law unless made by deed."

This was re-enacted in substantially the same words in Ontario by R.S.O. 1897, c. 119, s. 7 (an Act respecting the law and transfer of property).

The combined effect of the statutes was that a lease must be by deed to be sufficient in law to create the term intended to be granted. But if the lease was not in writing, or was without a seal, the lease was void as to the term, but it was nevertheless to operate so far as to create a tenancy at will. The result was expressed in our own Courts as follows:—

"There is nothing in the subsequent statute enacting that when the Statute of Frauds required a writing signed by the lessor a deed should be requisite, and that the lease should be void if not made by deed, which repeals the words of the Statute of Frauds making the lease in such a case so far effectual as to create a tenancy at will. The later statute is to be read and construed merely as substituting a deed for the signed writing required by the earlier enactment, and the avoidance of the lease has reference only to its nullity as a lease of a term, the tenancy at will arising in such a case is not created by nor is it dependent on the lease, but is a creation of the statute, a statutory consequence of the attempt to create a lease by parol for more than three years, and of the nullity of such a proceeding declared by the statute." *Hobbs* v. *The Ontario Loan & Debenture Co.* (1890), 18 Can. S.C.R. 483, at p. 498.

But estates at will are not regarded with favour by the Courts, and the effect of the statutes has been greatly modified by decisions. It has been held that though a parol lease be for a longer term than three years and so void within the Statute of Frauds, yet if the tenant enters and pays rent, a tenancy from year to year is created, regulated by the provisions of the parol agreement in every respect except the length of the term. *The People* v. *Rickert* (1828), 8 Cow. (N.Y.) 226. The tenant has not a lease, nor a tenancy for the term provided for in the void lease; but a tenancy from year to year, which during that time is determinable by half a year's notice. If he stays to the end of the time, then, by the agreement of both parties, he goes out without notice. Nothing in the terms of stats. 8-9 Vict. c. 106, s. 3, is inconsistent with this. *Cooper Tress* v. *John Savage* (1854), 4 El. & Bl. 36, 119 E.R. 15; *Martin* v. *Smith* (1874), L.R. 9 Exch. 50; 43 L.J. (Ex.) 42.

The equitable rule adopted by the Courts still further neutralized the effect of the later Act. In spite of the provision requiring a lease to be by deed, yet in equity, if there is a document which on its face appears to be an agreement to grant a lease or to be a present demise which fails through not being under seal, unless there is something to be found in the document itself which renders it impossible that specific performance should be granted, the tenant is entitled to ask for specific performance whichever of the alternative views mentioned is applicable to the document. *Parker* v. *Taswell* (1858), 2 DeG. & J. 559, 44 E.R. 1106; 27 L.J. Ch. 312; *Zimbler* v. *Abrahams*, [1903] 1 K.B. 577; and this principle applies to corporations as well as individuals. *Wilson* v. *The West Hartlepool R. Co.* (1865), 2 DeG. J. & S. 475, 46 E.R. 459. It is to be noted that in all these cases the tenant had actually taken possession, and his possession was referable only to the document in dispute. There were also signed documents setting forth the terms of the bargain, from which could be gathered the agreement between the parties, and specific performance granted. The result of the statutes and the equitable rule was that there might be two interests in the land under an agreement for a lease or a lease void at law for want of a seal (1) the legal tenancy at will, or from year to year, and (2) the equitable right to a lease under the agreement. But the passing of the Judicature Act in England settled this difficulty, and an agreement for a lease under which possession was taken was held to constitute a lease, in so far, at any rate, as to give the landlord a right of distress. *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9. Jessel, M.R., at p. 14, said:—

"Now since the Judicature Act the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted."

The effect of this case was considered in *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608, at p. 617, where the doctrine set up in *Walsh* v. *Lonsdale*, *supra*, was said to apply only to a legal right which would have been exercisable had the tenant been possessed of a legal title.

"It applies only to cases where there is a contract to transfer a legal title, and an act has to be justified or an action maintained by force of the legal title to which such contract relates."

The rule laid down in *Walsh* v. *Lonsdale*, *supra*, was not accepted in *Hobbs* v. *The Ontario Loan & Debenture Co.*, 18 Can. S.C.R. 483. But in 1911, the case of *Rogers* v. *National Drug & Chemical Co.* (1911), 23 O.L.R. 234, was decided, and adopted the rule in *Walsh* v. *Lonsdale*, and granted specific performance of an agreement for a renewal of a five year lease contained in an agreement for the first term of five years to a tenant in possession and paying rent under the agreement. Riddell, J., at p. 237, said:—

"The tenant under an agreement for a lease can be compelled to take on himself the legal estate; and he likewise can compel the landlord to vest him with the legal estate—that is done by an instrument under seal: R.S.O. 1897, c. 119, s. 7. The defendants, then, being before a Court with equitable jurisdiction, must, I think, be considered as though the lease had actually been made."

This judgment was confirmed on appeal by the Court of Appeal (1911), 24 O.L.R. 486. At p. 488, Garrow, J.A., sums up the law as follows:—

"If, however, at law, possession had been taken under the parol demise, and rent paid, the tenant was regarded as a tenant, not at will merely, as described in the Statute of Frauds, but as a tenant from year to year, upon the terms contained in the writing so far as appropriate to such a tenancy; while in equity his rights were much larger, for there the Courts would in a proper case decree specific performance, treating the parol demise, if otherwise sufficient, as an agreement for a lease, with the result that the parties were regarded in equity as landlord and tenant from the time possession was taken: see *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9. And now, under the provisions of s. 58 of the Judicature Act, the equitable rule prevails."

Section 7 of R.S.O. 1897, c. 119, was repealed in 1911 by 1 Geo. V. c. 25, s. 53, but re-enacted in substantially the same words. Since the decision by *Rogers* v. *National Drug Co.*, 23 O.L.R. 234, the Statute of Frauds has been repealed by 3-4 Geo. V. Ont., c. 27 and a new Statute of Frauds had been passed. The recital of the purpose of the statute was omitted, and the provision as to the consequence of an attempt to create a lease by parol was not re-enacted. The enactment in its new form is found in 3-4 Geo. V., c. 27, s. 3:—

"Subject to s. 9 of the Conveyancing and Law of Property Act, no lease, estate or interest, . . . or term of years . . . shall . . . be granted . . . unless it be by deed, or note in writing, signed by the party so . . . granting . . . the same, or his agent thereunto lawfully authorised by writing or by act or operation of law."

Section 9 of the Conveyancing and Law of Property Act was a re-enactment of R.S.O. (1897), c. 119, s. 7, to be found in 1 Geo. V. c. 25, but this section was amended by 3-4 Geo. V. c. 18, s. 22, by striking out the words "a lease of land required by law to be in writing," and a new subsection (s. 2(2)) was inserted in the Statute of Frauds enacted in the same year, 3-4 Geo. V. 1913, c. 27: "All leases and terms of years of any messuages, lands, tenements or hereditaments shall be void at law unless made by deed." The Statute of Frauds in the present Revised Statutes, c. 102, ss. 2 (2) and 3, is in the same form as the Act of 1913. The reference in s. 3 to the Conveyancing and Law of Property Act does not, of course, refer to the granting of leases. What effect the amendment has upon the decision in *Rogers* v. *National Drug Co.*,

supra, is not altogether free from doubt. The Act no longer creates a tenancy at will, and as was pointed out in *Hobbs* v. *The Ontario Loan & Debenture Co.*, *supra*, the avoidance of the lease by the statute as it then stood had reference only to its nullity as a lease of the term; the tenancy at will arising in such a case was not created, nor was it dependent on the lease, but was a creation of the statute. There being no longer any such creature of the statute, and the Courts having uniformly treated that creature as the only modification of a parol lease, it is now arguable that the effect of the statute has been swept away, and a parol lease is good at law. The only alternative seems to be that the lease is void altogether, which would be a reversal of cases like *The People* v. *Rickert*, 8 Cow. (N.Y.) 226, and *Cooper Tress* v. *John Savage*, 4 El. & Bl. 119 E.R. 15. Where, however, the tenant has taken possession on the faith of the parol lease, and has been paid rent, and the circumstances are such as to justify the ordering of specific performance, it is probably safe to say that the Courts will follow the equitable rule and support the lease. There is no greater inconsistency in ordering specific performance of a lease which is declared void by a statute than in ordering specific performance of a lease which another statute declares shall create only a tenancy at will. The effect at law of a parol lease is probably not of importance, because if there were no possession, and no acts done by the tenant on the faith of the lease, he would have no interest in the land for lack of entry, and there would be no equitable grounds for supporting the lease. If entry had been made with the consent or acquiescence of the owner, the equitable rule would prevail. It is just possible that if entry were made without the consent or acquiescence of the owner, there being no equity between the parties, there might be a tenancy from year to year. But possession not being given by the owner, *The People* v. *Rickert*, *supra*, and *Cooper Tress* v. *John Savage*, *supra*, might not apply, and the lease might be void for all purposes. As has been pointed out, the recital as to the intention of the Act has not been included in the present statute. Possibly the inroads made upon the statute by decisions in equity may have led the Legislature to the conclusion that the recital was obsolete. So far, only cases in which signed documents were involved have been dealt with. But the Courts have often granted specific performance of oral agreements for leases, both here and in England. The principle is, that where the tenant has taken possession with the knowledge of the owner, and his possession is referable only to the agreement and it would be a fraud or injustice for either party to the agreement to set up the invalidity of it, then the Court will treat part-performance of the agreement as sufficient to support it. Rawlins, in his book on Specific Performance, points out that the doctrine concerning part-performance, although inconsistent with the Statute of Frauds, appears to be almost, if not quite, coeval with it, and cites *Hollis* v. *Edwards* (1683), 1 Vern. 159, 23 E.R. 385, and *Butcher* v. *Stapely* (1685), 1 Vern. 363, 23 E.R. 524. The essentials for withdrawing a contract from the Statute of Frauds by part-performance are given in Fry's Specific Performance (5th ed.) at p. 291, par. 580:—

"1. The acts of part-performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title; 2. they must be such as to render it a fraud in the defendant to take advantage of the

contract not being in writing; 3. the contract to which they refer must be such as in its own nature is enforceable by the Court; and 4. there must be proper parol evidence of the contract which is let in by the acts of part-performance."

Lester v. *Foxcroft* (1700), Colles 108, 1.E.R. 205, is a case where the plaintiff took possession of certain lands under an oral agreement for a building lease, tore down buildings on the land, erected others and leased them in his own name. Before a lease was executed, the reversioner died, and his executors denied the contract and any knowledge of it, and pleaded the Statute of Frauds. Upon appeal, their Lordships directed the execution of a lease in the terms agreed upon, and that the tenant and his assigns should in the meantime hold and enjoy the same under the covenants and agreements in the said intended lease contained. In *Morphett* v. *Jones* (1818), 1 Swan. 172, 36 E.R. 344, there was an oral agreement for a lease for 21 years. After the agreement had been made the owner wrote a letter to the tenant "I hereby authorise you to enter the undermentioned lands as tenant, on Wednesday the 11th instant, being Old Michaelmas Day." The tenant entered into possession and paid rent, on the faith of having a lease, expending large sums in repairs and improvements. The landlord subsequently desiring to sell the lands demanded possession, denied a lease, and claimed the benefit of the Statute of Frauds. Specific performance was decreed. Sir Thomas Plumer, M.R., at p. 181, stated the law to be:—

"In order to amount to part-performance, an act must be unequivocally referable to the agreement; and the ground on which Courts of equity have allowed such acts to exclude the application of the statute, is fraud. A party who has permitted another to perform acts on the faith of an agreement, shall not insist that the agreement is bad, and that he is entitled to treat those acts as if it never existed. That is the principle, but the acts must be referable to the contract. Between landlord and tenant, when the tenant is in possession at the date of the agreement, and only continues in possession, it is properly observed that in many cases that continuance amounts to nothing; but admission into possession having unequivocal reference to contract, has always been considered an act of part performance. The acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorise an inquiry into the terms."

And see *Pain* v. *Coombs* (1857), 1 DeG. & J. 34, 44 E.R. 634, *Miller* v. *Finlay* (1862), 5 L.T. (N.S.) 510. Even though the tenant takes possession without the consent of the owner, yet if the owner afterwards acquiesce, the possession may amount to sufficient part-performance to take the case out of the statute. *Gregory* v. *Mighell* (1811), 18 Ves. 328, 34 E.R. 341. The following is an extract from the judgment, 18 Ves., at p. 333, and 34 E.R., at p. 343:—

"It is said, however, that the possession was taken without the defendant's consent; and consequently is not to be considered as a possession under the agreement. The plaintiff had no other title to possess the land; and therefore his possession is *primâ facie* to be referred to the agreement As to the defendant's allegation that it was without consent, besides that it seems to be disproved by Gregory and Philcox, I do not conceive that the defendant is now at liberty to say, it was a possession, that had no reference to the

agreement; as he has permitted the plaintiff to remain in possession, and to make expenditure upon the land for 8 years, before he brought an ejectment. He must have known that the expenditure was made upon the faith of the agreement; and I cannot now permit him to turn round, and say, the plaintiff has been possessing merely as a trespasser; as he must be, if his possession is not to be referred to the agreement."

Furthermore, possession is part-performance both by and against the stranger and the owner. *Wilson* v. *The West Hartlepool R. Co.*, 2 DeG. J. & S. 475, 485, 46 E.R. 459, 463, Russell, J., refers to *Nunn* v. *Fabian* (1865), 1 Ch. App. 35, in his Canadian notes to Fry's Specific Performance (5th ed., p. 318*f*) as probably the case that goes farthest in the direction of recognising acts of part-performance as sufficient to let in parol evidence of the contract. In that case the tenant was in possession under a lease from year to year, and remained in under an oral agreement for a lease for 21 years, at an increased rental, and the part-performance relied on was the payment of the increased rent. The plaintiff was in possession and paid his rent from May, 1862, and the defendants did nothing to disturb his possession until October, 1863. Specific performance was ordered. *Nunn* v. *Fabian* was followed in Ontario in *Butler* v. *Church* (1869), 16 Gr. 205. In that case a tenant remained in possession after the termination of his lease under a parol agreement to purchase the land. He ceased to work the farm on shares, and to deliver produce of the farm as he had theretofore done by way of rent; and thenceforth made payments on account of the agreed purchase money partly in cash, partly in work, and partly in farm produce, and thenceforth also dealt with the land as his own; using it and making improvements upon it as an owner would do. He was held entitled to specific performance of the contract for sale. The reasoning in this case would apply equally well to a contract for a lease. The tenant's continued possession, coupled with acts inconsistent with the former tenancy, was held sufficient part-performance to let in parol evidence of a contract of sale. Spragge, V.-C., at p. 210, says:—

"The occupier was in possession in a different character; it was in substance a new possession though without the formality of giving up the one possession and being put into possession in a new character: but, being in possession in a character not referable to his former tenancy, it was open to him, I apprehend, to shew how and in what character he was in possession."

Township of King v. *Beamish* (1916), 30 D.L.R. 116, 36 O.L.R. 325, was a case of an oral agreement between a municipality and the owner of land, by which the latter agreed to lease the land to the former for the term of 8 years, with the right during the term to remove the gravel in the land. The engineer of the municipality entered and removed gravel from the land, continuing to do so until the then requirements of the municipality were satisfied. Rent does not appear from the report to have been paid. A lease was prepared and tendered to the owner for execution but he refused to execute it. The municipality thereupon brought an action for specific performance and succeeded. This case also followed *Wilson* v. *West Hartlepool R. Co.*, *supra*, and decided that possession taken by a corporation was sufficient part-performance in spite of the fact that there is no assent to the terms of the agreement under the seal of the corporation; at p. 121, 30 D.L.R. and p. 331, 36 D.L.R.,

Meredith, C.J.O., distinguishes between the pedal possession required to oust the title of the true owner under the Statute of Limitations, and the possession sufficient to exclude the operation of the Statute of Frauds. In the latter case:

"Such a possession as the subject matter of the contract admits of is sufficient, *e.g.*, in the case of vacant land, entry upon it for the purpose of taking possession with the consent of the vendor is sufficient, although the purchaser does not remain upon the land but goes upon it only when he has occasion to do so."

The most recent case in this connection is *Bell* v. *Chartered Trust Co.*, and *Chartered Trust Co.* v. *Bell and Buissey* (1919), 17 O.W.N. 24, reversed by 17 O.W.N. 88 (and reported above). A. agreed orally to lease land to B. for 5 years, the rent being agreed upon. A lease in duplicate was prepared in accordance with this agreement, and one part was handed to B., but it was never signed by either party. B. went into possession and paid rent by the month for nearly a year, and then made an assignment for the benefit of his creditors, and signed a surrender of the lease. The assignee went into possession, and upon the landlord bringing an action for recovery of the land, brought an action for a declaration that the lease was valid and subsisting, and for specific performance. Specific performance was ordered in the terms of the unexecuted instrument, upon the assignee entering into personal covenants, *Powell* v. *Lloyd* (1827), 1 Y. & J. 427, and giving the notice required by R.S.O., c. 155, s. 38 (2). As to the alleged surrender, if it was signed before the assignment it was void against creditors under s. 5 of the Assignments and Preferences Act, R.S.O. 1914, c. 134; if afterwards it was a nullity.

To recapitulate, in England a parol lease or an agreement for a lease, in writing, results in a tenancy at will, unless there has been entry and payment of rent, and there are equitable grounds for ordering specific performance, when the lease or agreement will be enforced as if it were a valid lease. If there are no such equitable grounds it will operate as a lease from year to year. The same result follows in Ontario, except perhaps in the case of entry without the consent or acquiescence of the owner, when it is equally arguable that the lease is either good or totally void, or a lease from year to year. An oral lease or agreement for a lease will be specifically enforced both in England and Ontario where entry has been made with reference only to the lease or agreement, and it would be sanctioning a fraud to permit the Statute of Frauds to be pleaded.

Since the above annotation was written, the judgment in *Bell* v. *Chartered Trust Co.* and *Chartered Trust Co.* v. *Bell and Buissey* has been reversed, but on the sole ground that the surrender of the lease was valid. The surrender being good, it was considered unnecessary to deal with the other points involved. Consequently the case is still an authority for the proposition that part-performance is sometimes sufficient to take a parol lease out of the Statute of Frauds.

Province of Ontario

FIRST DIVISION COURT, COUNTY OF ELGIN.

HOPKINS v. CARNATION MILK PRODUCE COMPANY.

Lord's Day Act—Labour of ordinary calling—Works of necessity—Business or process of a continuous nature—Perishable articles—Domestic requirements.

Held 1. That collecting and transporting milk from farms to factory and there heating and condensing same on Sunday to preserve it till Monday was a "work of necessity" within Sec. 12 of the Lord's Day Act.

2. That such work fell within the exceptions mentioned in sub-secs. (d) and (m) but not sub-sec. (r) of sec. 12.

[Ermatinger Co. J.—St. Thomas. Dec. 12, 1919.]

The charge against the defendants was that the aforesaid company "on the first day of June, 1919, at the town of Aylmer, County of Elgin, did unlawfully carry on its ordinary calling as manufacturers of Carnation sterilized milk and in connection with the said ordinary calling for gain employ, then and there, among other people, John C. Koyle and others in contravention of the Lord's Day Act, ch. 153, sec. 5, of the Revised Statutes of Canada."

On the 18th of August the charge was dismissed by the Police Magistrate. The complainant appealed to the Division Court.

McCrimmon, County Attorney, for complainant.

Hobson, K.C., and *W. H. Barnum*, for defendants.

ERMATINGER, Co. J.:—The Lord's Day Act prohibits on the Lord's Day all work, business or labour of one's ordinary calling or for gain, except works of necessity or mercy, which latter are to include (though not restrictively as to the meaning of those words) among a considerable list of exceptions:—

(d) Starting or maintaining fires, making repairs to furnaces and repairs in cases of emergency and doing *any other work* when such fires, repairs or work are essential to any industry or industrial process of such a continuous nature that it cannot be stopped without serious injury to such industry or its product or to the plant or property used in such process.

(m) The caring for milk, cheese and live animals and the unloading of and caring for perishable products and live animals arriving at any point during the Lord's Day.

(r) The delivery of milk for domestic use and the work of domestic servants and watchmen.

It is admitted that work was done on the Lord's Day in question at the defendant company's factory, but such work, it is claimed by the defence, was "work of necessity" under the general exemption of sec. 12 as well as under the above specified sub-sections.

The work done in collecting and transporting the milk from the various farms to the factory was, it was claimed, done by certain of the defendants' patrons, at the expense of the whole of the patrons who sent in their products, though paid by the company and deducted from each patron's cheque. Some of the patrons haul their own milk. Presumably the trucks used by those who hauled the cans of the others were the company's trucks, though I do not find any evidence as to this. It was argued by the defence that the work done by these haulers was not work done by the company nor by their employees as specified in sec. 15 of the Act.

Counsel for the prosecution claimed that:—

(1) The clauses and sections of the Act cited by the defence were not intended to relieve manufacturers of milk products, but to relieve the producer, the farmer, only.

(2) That there is a distinction between milk delivery for manufacture and delivery for consumption, the latter only being a work of necessity, as defined by the Act.

(3) That there is a distinction between avoidable and absolute necessity, and that this was a case of avoidable necessity according to the evidence.

The evidence of a considerable number of responsible farmers who milked large numbers of cows was to the effect that no necessity existed for milk being received at the factory on Sunday, as they themselves had had little or no loss and little or no trouble in caring for their milk at home over Sunday and disposing of it on Monday, either at defendants' factory or some other or by churning into butter or sending to a creamery, feeding refuse in some cases to the hogs, etc. These farmers were, I am satisfied, perfectly honest in their statements and conclusions. Some took every precaution to keep their cattle and those who milked them clean and healthy and the milk uncontaminated, covered, in exceptionally cool water and unshaken. Some who lived farther from the condenser, who had not such cool water wells, and some who were possibly less careful as to cleanliness of the cattle and their vessels, had their Sunday's milk sometimes returned to them, while some of the more careful class, who were not too far from the condenser and had good cool water, suffered little or no loss in this way.

The evidence of the analytical chemists is to the effect that milk is one of the most perishable, if not *the* most perishable of foods, that acidity begins and continues to increase from the time the milk is taken from the cow. Mr. McLaughlin, public analyst of St. Thomas, testified that fresh milk procured in weather at a temperature of sixty degrees and kept under favourable conditions at that temperature for twenty-four hours shewed more than twenty-two degrees of acidity. When it reaches more than

twenty one-hundredths of acidity it is unfit for the food product made by defendants, according to their manager's evidence. According to their chemist, it might be useful at twenty one-hundredths, but not at twenty-two, that milk twenty-four hours old would be no good for their product unless freed from bacteria and cooled down to a temperature of forty degrees by ice or refrigeration, unless pasteurized. The reason, the manager states, they began taking milk on Sunday was that it reaches more than twenty-one hundredths of acidity, if taken in on Monday. He produced cans shewing the company's pure product and also the product of Sunday milk taken in on Monday, which, as contrasted with the former, was much coagulated and unfit, he in effect states, for human consumption. He also described the process of condensation by heating which is performed on Sunday at the factory and takes about one and a half hours. He testified that quantities of Sunday milk had to be returned to farmers when delivered on Monday, from twenty to two hundred and twenty cans, eighty pounds to the can, also that 8,500 lbs. were manufactured in one June day in 1917, which had to go for hog feed and to the dump. Thirteen men were employed on the Sunday in question and other Sundays I presume during the hot weather, five in caring for machinery and fires, who, I understand, would be so employed (necessarily) on Sundays whether milk was being received on that day or not. Eight other men were employed, six in receiving and two in condensing and cooling, as compared with fifty-nine on week days of the same week. There were four hundred and nine patrons on June 1st, whose milk had to be cared for, to the extent of 76,086 pounds or about 34,000 quarts. Eighteen haulers brought the milk of these four hundred and nine patrons, or those of them who did not haul their own milk, to the condenser, the haulers themselves, as I understand, included.

Assuming, for the moment, that the defendant company are not bound to change their product by installing a new plant to turn the Sunday milk into sweetened milk, or powdered milk or cheese, butter or something else to the making of which bacteria and acidity are not so fatal—conceding this, I am forced to the conclusion that Sunday work on the part of farmers, and early Sunday morning employees at the receiving stations and condensers, when no Sunday delivery is allowed, would exceed in numbers employed, and probably in total number of hours of work of those employed, in hauling, receiving and condensing at the factory while Sunday delivery was permitted.

The conscientious and good farmers and cattle men who object to Sunday labour at the factory and are fortunately able to care for their own milk, with little or no trouble or inconvenience, are

free to send it to the condenser or not as they may choose on Sunday in summer. Unfortunately all are not equally fortunate in respect to cool wells of water, nearness to other markets or plants, intelligent and cleanly families and employees and other advantages. In the days when Sabbath observance was instituted in the wilderness there was direct Divine provision made not only to insure food in plenty but rest on the Sabbath as well. A double portion had to be collected on the previous day, for no manna was found on the Sabbath, but that gathered the previous day "did not stink, neither was there any worm therein" (Exodus: 16-24), as at other times. Under the Christian dispensation we are left to make our own rules for observance of the Lord's Day. The cows must be milked and bacteria and acidity attack the milk, on that as on other days and we must meet these conditions as best we can. The Lord's Day Act is intended to provide for them.

Have the defendants shewn themselves to have come within the exceptions in the Act in doing what they did on June 1st last? Could not the Sunday milk be cared for on Monday otherwise than on other days of the week by making sweetened milk, cheese or some other product of it? To do this the defendants would have to establish an additional plant at a large expense and engage in what would practically be another industry. I do not think they should be called upon to do so. (See *Rex* v. *News Pulp and Paper Co.*, 28 Can. Cr. Cas. 77.) Their product seems to be a pure and nutritious one, being milk unalloyed with other ingredients. It affords food suitable alike for adults and infants, for army and navy, workers at home and abroad in forest or mine. It is *milk*, which the Act allows of being cared for on Sunday, even though it be condensed.

To sum up, I find that the work done by defendants at their factory on June 1st was a "work of necessity" within the meaning of sec. 12 of the Lord's Day Act.

Also that such work fell within sub-sec. (d) of said sec. 12 as being work essential to an industry of such a continuous nature that it could not be stopped without serious injury to such industry.

Also that such work was a "caring for milk" within sub-sec. (m) of said sec. 12, and that said sub-section covers work by manufacture of this character and not exclusively work by the producer on farm or in dairy. The caring for cheese, a manufactured article, is provided for in the same sub-section.

Sub-section (r) referring to the delivery of milk for domestic use, etc., had, I think, no application here.

It has been suggested that defendants contemplate more extensive Sunday work. Though there is no actual evidence of

such intention before me, I may say that it would be well for the defendants to confine their operations to such "work of necessity" as that done by them the past summer, and that only when warm weather renders it necessary.

Our Lord's Day Act is not only intended to preserve the sanctity of the Lord's Day, but to promote the general welfare in an industrial and economic, as well as a religious and humanitarian sense. The appeal is dismissed.

Bench and Bar.

RETIREMENT:—The Hon. Mr. Justice Britton, has recently retired from the Ontario Supreme Court Bench. This had long been expected, as he is now in his 87th year and has for several years been in failing health and unequal to the occasionally, strenuous duties of a judge. His successor has not yet been named.

Subsequently to the publication of our Sheet Almanac the names of the Judges composing the Second Divisional Court of the Supreme Court of Ontario have been announced. They are as follows: Chief Justice Mulock and Justices Clute, Riddell, Sutherland and Masten.

Obituary

N. F. DAVIDSON, M.A., K.C.

We regret to record the death of Mr. Davidson, a well-known and highly respected practitioner in Toronto, on the 16th instant. Mr. Davidson was born at Woodbridge, Ontario, in 1864. He was educated at Trinity College School, Port Hope, where he distinguished himself and carried off many prizes. He took his degree at Trinity University, winning the Wellington Scholarship, and graduating as Prince of Wales Prizeman with first-class honours. Mr. Davidson was called to the Bar in 1888, receiving silk in 1901. He was for some time a partner of Mr. Elmes Henderson. An able advocate, he was frequently retained by the Crown in criminal cases. Much of his time was devoted to the ecclesiastic matters of the Church of England, to which he belonged. He had also a large sphere of usefulness in connection with Toronto University, to the Senate of which he was elected when Trinity joined it. His war services were unremitting, and these activities, with other work, so impared his constitution that he could not recover from a nervous breakdown. He married a daughter of Hon. Mr. Justice Osler, who predeceased him.

Flotsam and Jetsam.

Last week's opening of the French Chamber of Deputies has become an event in history from the fact that the new members for Alsace and Lorraine took their places. The inaugural meeting of the Chamber of Deputies is not marked by any pomp, but it is impressive in its solemnity. The president for the occasion is always the oldest member of the assembly who can be present, and he chooses as his secretaries the six youngest members of the assembly, so before the reflective mind is metaphorically the warning on the scroll of the mummy at the feast: "What you are I was; what I am you will be." The position of *président d'age* fell to M. Jules Siegfried, who was born in 1837, and, by an auspicious coincidence, he is a native of Mulhouse (Mulhausen of the Germans) in Alsace. The *doyen* of M. Seigfried's secretaries has not attained his thirtieth year, thus emphasising the contrast in age. Among the secretaries were MM. Heurteaux (Seine-et Oise) and Fonck (Vosges), the well-known aviators.—*Law Times.*

The fact that a man marries a second wife during the lifetime of the first is not sufficient to convict him of insanity.—*Smith's* case, 22 Pa., Co. Ct. 487, affirmed 12 Pa., Super. Ct. 640.

For a man to swear while trying to button his shirt-collar is not to be regarded as a symptom of softening of the brain.—*Keithley* v. *Keithley*, 85 Mo.

It is not an error to instruct the jury to use common sense.—*People* v. *Kelly*, 132 Cal.

The sale of intoxicating liquor to a minor is unlawful, even though he is over six feet in height.—*State* v. *Hartfeil*, 24 Wis.

A policeman is an excellent judge of whiskey and when he has tasted a liquor is able to say whether it is whiskey or not.—*Hollingsworth* v. *Atlanta*, 79 Ga.

The word "thousand" as applied to rabbits means "twelve hundred."—*Smith* v. *Wilson*, 3 B. & Ad., 728, 23 E.C.L. 169.

A wife cannot keep a dog without her husband's consent and participation.—*Strouse* v. *Leipf*, 101 Ala.