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RIGHTS OF VEHICLES ON HIGHWAYS.

The judgment of the Second Divisional Court, Supreme Court, Ontario, in *Sercombe* v. *Vaughan* comes as a surprise to the motor truck community, but will be a great comfort to the municipalities who have hitherto built bridges without regard to the traffic of the heavy motor cars which have recently come into use throughout the Dominion. This decision is so far-reaching and important as to demand more than passing notice.

This case came on appeal from the judgment of Coatsworth, J.J.C.C. York, who found in favour of the plaintiff for damages in respect of an accident to his motor truck by falling through a bridge on a public highway in the township of Vaughan. It is provided by the Act to Regulate the Load of Vehicles operated on Highways (6 Geo. V. c. 49) that no vehicle shall be operated upon wheels, etc., in excess of a total weight of 12 tons. It is also provided that the rate of speed shall not, as to vehicles of the description of the one in question exceed 8 miles an hour. The motor in question, with its load, was less than 12 tons, and the rate of speed was less than 8 miles an hour. It is provided by another section of the Act as follows: (Sec. 6) "No vehicle shall have a greater width than 90 inches, except traction engines, which may have a total width of 110 inches." Any person who contravenes any of the provisions of the Act is liable to a fine. The width of the motor in question was 96 inches.

It was found by the learned Judge of the County Court as a fact that the width of the motor had nothing to do with the cause of the accident, which simply and solely resulted from the bridge being too light in construction to carry the motor and its load, which were not in excess of the statutory requirements. It was held by the Divisional Court, as appears by the note of the

case in 15 O.W.N. page 410, "that the extra width had, or might have had, nothing to do with causing the accident, has no significance. The truck should not have been there at all. The plaintiff smashed the defendant's bridge unlawfully and should pay for it. It was of no importance that the same thing might have happened had the plaintiff used a lawful instrument—the fact was that he did not. The appeal should be allowed with costs, the action dismissed with costs, and the defendants should recover on the counterclaim the sum necessary to replace the bridge, to be agreed upon by the parties, or, in the absence of an agreement, on a reference. The defendants should have their costs throughout on the County Court scale."

It was clear and there was no attempt to deny the fact, that the bridge was not sufficiently strong to carry the weight allowed by the statute. The accident was due entirely to the defendant's insufficient highway, and if the motor had been 90 inches in width instead of 96 the plaintiff was admittedly entitled to damage, but as it was 96 inches in width he could not.

It is also clear from the whole tenor of the statute, which, by the way, is an Act "to regulate the load of vehicles operated on highways," that the intention of the Legislature was to have bridges of sufficient strength to carry the heavy vehicular traffic referred to throughout the Act. The statute gives no reason for the limited width in section 6. The extra width of a vehicle had nothing to do with the accident.

If the statute had required a certain style of lamp, would a breach of such a provision excuse the municipality from not having proper bridges? If not, it is difficult to see how this extra width, which had nothing to do with the accident, was so important in the mind of the learned Judge who delivered the judgment of the Divisional Court.

It may be remarked that section 6 is foreign to the subject matter of the statute. What it means, or what it is intended to provide for or against, is a mystery. The width of the truck has manifestly nothing to do with the safety of the bridges. It is not coupled with the previous section which refers to the weight of the load, nor has it anything to do with the rate of speed. These

provisions are clearly subjects which the statute was passed to provide for in respect to the safety of bridges. There is no express prohibition against the use of the highway by a truck 96 inches wide, but there is a fine imposed on anyone using a truck of that width. The learned Judge who delivered the judgment of the Divisional Court in effect lays down the broad proposition that no person, being a trespasser on a highway, has any right whatever, and that the presence of this truck on the highway was a trespass. Admitting for the moment that it was a trespass, was the truck subject to destruction by the defendants? Its destruction was the direct result of a breach of a statutory duty. The common law as well as the above statute imposes upon the municipality the obligation to provide bridges sufficient to carry loads not exceeding statutory prohibition. The plaintiff was a wrong doer, but does that make him a trespasser?

There is authority for the proposition that even to a trespasser there is a certain duty of protection: *Diplock* v. *Canadian Northern R. Co.*, 30 D.L.R. 240, 53 Can. S.C.R. 376, affirming, 26 D.L.R. 544. In the U.S. case of *Bourne* v. *Whitman*, 209 Mass. 155, 35 L.R.A. (N.S.) 701, the Supreme Court of Massachusetts, held that the breach of a statutory duty by a person using the highway does not make him a trespasser, nor liable for injuries not due to his breach of the statutory duty.

There are numerous cases in reference to rights and liabilities in connection with the breach of statutory duties. Some of these throw light on the case before us. We would refer to the following: *Davey* v. *London and S.W. Ry. Co.*, 12 Q.B.D. 70; *G.T.R.* v. *McAlpine*, 13 D.L.R. 618, 49 C.L.J. 665; *Turgeen* v. *King*, 51 S.C.R. 588; *C.P.R.* v. *Frechette*, 22 D.L.R. 356; *Watkins* v. *Naval Coll.* (1912), A.C. 693; *Smith* v. *G.T.R.*, 32 O.L.R. 380.

The result of these decisions may be summed up as follows: Where a plaintiff is suing for damages occasioned by negligence of a defendant, the breach of a statutory enactment, unless it directly promotes or causes the danger of which the plaintiff complains, does not constitute a defence to the plaintiff's claim. One is rather relieved by the presence of authorities which go to support what may be called the common sense view of the

County Court, and not be compelled to accept as the law the somewhat technical view taken by the Divisional Court.

The cases relied on in the judgment of the Divisional Court do not appear to support the conclusion arrived at, and apart from being distinguishable from the case to which they were applied, are hardly in accord with the modern trend of decisions dealing with the law of negligence. These cases are *Goodison Thresher Co.* v. *McNab*, 44 Can. S.C.R. 187, affirming the majority of the Court of Appeal of Ontario, 19 O.L.R. 188; *Roe* v. *Wellesley*, 43 O.L.R. 214—a single Judge decision; and the Saskatchewan case of *Etter* v. *Saskatoon*, 10 Sask. L.R. 415, 39 D.L.R. 1.

In *Linstead* v. *Whitchurch*, 36 O.L.R. 462, 30 D.L.R. 432, the *Goodison* case was virtually repudiated and a diametrically opposite view reached by the Court. It must be remembered that in the *Goodison* case both Chief Justices of Ontario (Sir Charles Moss, concurring with the trial Judge, Anglin, J.) and of Canada (Sir Charles Fitzpatrick), together with Girouard J. and the present Chief Justice of the Common Pleas (R. M. Meredith,) dissented. Meredith, C.J.O., in the *Linstead* case, after carefully weighing the reasoning in the *Goodison* case and its weight as a precedent, came to the conclusion that "owing to the conflict of judicial opinion in the (*Goodison*) case, the question presented in this (*Linstead*) case should be treated as *res integra*."

In view of the *Linstead* case, the Saskatchewan case of *Etter* v. *Saskatoon* should hardly have any weight as a precedent, at least so far as Ontario is concerned, apart from the fact that it is distinguishable, in that that case dealt with a statute which expressly prohibited the vehicle "to be used or operated upon a highway" unless it complied with the statutory requirements.

In *Roe* v. *Wellesley* the automobile, driven by an infant at a great speed, dropped into a hole at the edge of a bridge forming part of a highway. Latchford, J., said (and he might have made it the basis of his decision, on the principle of *causa causans*, or proximate cause, or ultimate negligence): "I desire to add that, in my opinion, no duty is cast upon a municipality to maintain its roads in such repair that they shall be safe for automobiles driven at the speed at which the plaintiffs were proceeding."

"The whole law of negligence in accident cases," says Lord Sumner, in delivering judgment in the *B.C. Electric Ry. Co.* v. *Loach* (1916), 1 A.C. 719, 23 D.L.R. 4, "is now very well settled . . . and its application is plain enough. Many persons are apt to think that, in a case of contributory negligence, the injured man deserved to be hurt, but the question is not one of desert, but of the *cause* legally responsible for the injury. The inquiry is a judicial inquiry. It does not always follow the historical method and begin at the beginning. Very often it is more convenient to begin at the end, that is, at the accident, and work back along the line of events which led up to it. The object of the inquiry is to fix upon some wrongdoer the responsibility for the wrongful act which has caused the damage. It is in search not merely of a causal agency, but of the responsible agent. When that has been done, it is not necessary to pursue the matter into its origins; for judicial purposes they are remote."

This view seems to be followed in strong Amercian decisions and is in entirely in accord with the trend of decisions in modern negligence law. The Supreme Court of Delaware, in *Lindsay* v. *Cecchi*, 3 Boyce 133, 35 L.R.A. (N.S.) 699, held that the failure of an automobile driver to have the statutory license will not render him liable for an injury in case of accident, unless such failure had some causal relation to the injury.

Negligence of the municipality in such case would be presumed by the application of the well-known principle of *res ipsa loquitur*. *Kearney* v. *London, etc., R. Co.* (1871), L.R. 6 Q.B. 759. "The defendants were under common law liability to keep the bridge in safe condition for the public using the highway to pass under it," said the Court. This decision has been followed in the State of New York, in the case of a building falling into the street. "Buildings properly constructed do not fall without adequate cause:" *Mullen* v. *St. John* (1874), 57 N.Y. 567, 569. See Pollock on Torts, 9th ed., p. 533.

In *Dick* v. *Vaughan*, 34 D.L.R. 577, 39 O.L.R. 187, a similar action was brought to recover damages because the plaintiff was compelled to travel by another way owing to the insufficient carrying power of the bridge. The action was dismissed because

the damages were held to be too remote, but the duty of the municipality as to the safety of the bridge and its liability in the event of accident, was not questioned. Meredith, C.J.C.P., remarking it to be one "owed as much to the beggar on foot, or the driver of a coach and four, as to the plaintiff, and a duty any one of them equally might have enforced by laying an information against the municipality."

We venture to think, the judgment of the County Court was correct and should have been sustained.

THE CONTROL OF JUVENILE COURTS.

It is cheaper and more humane to prevent crime than to imprison criminals, and one of the most beneficent developments of the 20th century is the Juvenile Court. But if a Juvenile Court is to be useful and do the work which it is intended to do, it is absolutely necessary that it should be properly equipped, conducted with dignity and decorum, and receive the support and sympathetic treatment of the authorities which called it into existence, and that governmental authority to which it is responsible.

The disgraceful treatment of the Juvenile Court of the city of Toronto, by the City Council, is a public scandal, and points to the necessity of a radical change in the control of these Courts. The dignity and decorum of a Court cannot be maintained without proper accommodation. The accommodation provided by the city for this court-room has hitherto consisted of a space without any ventilation or conveniences, walled off by canvas somewhere in the roof of the City Hall. The Judge, all the officers of the Court, the juvenile delinquents, and their parents all sit around one large table. The financial appropriation made by the city has been quite insufficient to provide an adequate and efficient staff. To make matters worse, the Judge inherited a staff of officials who were not subject to dismissal by him.

Recently the Judge found it necessary to recommend the dismissal of one of his subordinate officials, and his recommendation

was approved and acted upon by the Attorney-General. The trouble appears to have started with a conflict of opinion as to how the Court should be conducted, the Judge adopting the policy that where the object is to cure, rather than to punish, frequent remands are desirable to enable the Judge to keep in touch with the delinquent.

It so happened that this particular official was an ex-alderman, and ex-aldermen have a great appreciation of the effectiveness of "pull." He openly stated that he would get even with the Judge. But to get rid of a Judge, who is appointed for life subject to good behaviour, is not an easy thing to do. An ally was found in one of the aldermen at present sitting in the City Council. A campaign of criticism and publicity was started, and then the idea was conceived of holding a public investigation of the Court, apparently with the design that the usefulness of the Judge would be so impaired by the newspaper headlines during the conduct of this investigation that ultimately it might be necessary for the authorities to find a substitute. Accordingly a resolution was passed by the City Council calling upon the Attorney-General to hold a public investigation. Of course, nothing happened.

The next move of the City Council was on passing an appropriation to instruct the treasurer to pay for only four months, and they intimated to the Attorney-General that they would not authorize any further expenditure until their demand for an investigation had been acceded to.

From time immemorial public respect for the Court has been regarded as the foundation of Anglo-Saxon civilization, and the rule has always been scrupulously observed that nothing should be done to lower respect for the courts. A Judge may be impeached for malfeasance, but we can search in vain for a precedent for putting a Court of justice on the level of a municipal firehall department. Democracy comes pretty near to Bolshevism when the aldermen of a city like Toronto, in order to please a dismissed official, try to force the Attorney-General of the Province to break all records and do something which would be subversive of good government.

It soon became apparent to many who were interested in the

welfare of the children that the usefulness of the Court would be injured if these tactics of the wirepullers were permitted to continue; and so one of the best known and respected leaders of social workers took up the matter and made an independent investigation, collecting information from a number of persons who have had actual experience in social work and have had business dealings with the Court. Without exception, these competent and unbiased persons upheld the policy of the Judge, and are unanimous in their testimony of his fitness for the position. They deplore the conditions under which the Court has been conducted, and the totally inadequate support provided by the city.

We are not so much interested in the personal element as with the danger and more important difficulty which arises from dual control. The moral is plain. So long as the city authorities pay the Judge, the ward politicians will want to have a finger in his pie. The ordinary city alderman does not know anything about social work, and he is not equipped to form an opinion as to how a Juvenile Court should be conducted. It is absurd to expect him to do so. On the face of it, there would appear to be no sufficient reason why the Provincial Government, who control the appointments of the Court, should not also pay the salaries. The city is not called upon to provide funds for any other branch of the administration of justice.

The lesson of this experience in the metropolitan city of Ontario may prove useful. All Juvenile Courts should, so far as their maintenance and control are concerned, be in the same position as any other Court of justice.

POWERS OF PROVINCIAL COMPANIES.

Although the decision of Masten, J., in *Weyburn Townsite Co.* v. *Honsberger*, 43 O.L.R. 457, has been reversed by the Appellate Division on the ground that the contract in question was in fact made in Saskatchewan, and not in Ontario, as Masten, J., had found, yet the Chief Justice of Ontario, with whom the majority of the Court agreed, states that he agreed with the conclusion of

Masten, J., that the plaintiff company by its Provincial incorporation acquired a capacity to carry on its business beyond the limits of the Province of Saskatchewan where it was incorporated; and that the declaratory legislation of 1917 (which is in similar terms to the Ontario Provincial Act, 6 Geo. V, c. 36, s. 6), could not give validity to transactions entered into beyond the limits of the Province of Saskatchewan before the passing of the Act. The Appellate Division, however, does not express any opinion (nor was it necessary that they should) as to the question whether it is possible for a Provincial Legislature to give any company incorporated under the Provincial law a capacity to acquire extra-territorial powers *ab extra*. On this question, as we pointed out in a former article (*ante* vol. 54, p. 379) both Meredith, C.J.C.P., and Masten, J., have expressed opinions in the negative, and on the other hand Lennox, J., and Ferguson, J.A., have expressed opinions to the contrary. What is the true legal aspect of 6 Geo. V. c. 35, s. 6 and kindred enactments is therefore still a matter of doubt.

CONTRACT TO LEND MONEY.

Sherwood v. *Sheehy*, 15 O.W.N. 67, recently before the Divisional Court on appeal from the County Court of Peterborough was an action to recover damages for the alleged breach of a contract to lend money. The action failed because in the opinion of the Court the contract was to advance money as a building to be erected by the defendant on the mortgaged land should progress: and, as no building had been commenced, the Court held that there had been no breach. It may be useful to remember that a contract to lend money is not one that can be specifically enforced: *Western Wagon Co.* v. *West* (1892) 1 Ch. 271; 66 L.T. 402. The only remedy for breach of such contracts is by way of action for damages and if no actual damage is proved the damages are merely nominal: *South African Territories* v. *Wallington*, 76 L.T. 520; *Mennie* v. *Leitch*, 8 Ont. 397. If damages are recovered for the breach of such a contract, they are not so recovered by way of loan. The measure of damages in such cases is not to be based

on the inconvenience the plaintiff may suffer; but, is simply the difference in the rate of interest the plaintiff was to pay the defendant and the rate at which he could get the money elsewhere at the date of breach—see *per* Willes, J., *Fletcher* v. *Tayleur*, 17 C.B. 21.

CANADIAN BAR ASSOCIATION.

It was the hope of the promoters of this Association that it would exert a helpful influence in all matters connected with the administration of justice throughout the Dominion. We are glad to know that it has so proved its usefulness; but, for various reasons, only to a limited extent. It will make for the advancement of matters legal and judicial if its influence is felt in the future to a greater extent than in the past.

Our attention is drawn to this subject by reading a report of the action of the American Bar Association in connection with Court Martial law in the United States. Prominent members of the Association think that an investigation should be made to give better results and remedy injustice in the administration of the law referred to, and action has been taken toward such an investigation by the Association. It would appear also that this investigation is to have the co-operation and assistance of the army authorities.

The importance of this, so far as Canada is concerned, is that it draws attention to the influence which the Canadian Bar Association ought to have in public matters in which the administration of justice is in question. We are not concerned in Court Martial law, which is the matter at present under consideration in the United States; but we desire to strengthen the hands of those who are responsible for the conduct and development of our Association in connection with such matters as it has already taken up as part of its duties and responsibilities. In this connection we may mention the following subjects:—The general uniformity of laws throughout the Dominion, especially in reference to company law, testamentary provisions and the admin-

istration of estates, divorce, dower, real property and convey, ancing, devolution of estates, etc., and, not the least important- the appointment of Judges.

In former days party politics had less to do with judicial matters than they have at present. In those days the Government felt the same responsibility and the same duty in the selection of the best men for Judges as does the Lord Chancellor of England in the Mother Country. There are of course difficulties in the way. One is the inadquacy of salaries allowed to Superior Court Judges. In the Province of Quebec Judges occupying positions much the same as County Court Judges in other Provinces are called Superior Court Judges; so that the Quebec leaders would expect their salaries to be increased because they are called Superior Court Judges, whereas their duties in the great majority of cases correspond more nearly to those who try Division Court cases. A proper equalization of salaries would be part of the duties of any committee or commission which might be appointed through the efforts of the Association whereon to found the necessary legislation.

It goes without saying that action in connection with such matters should receive the best attention of the best men of the Bar in Canada. Are they sufficiently patriotic, or sufficiently alive to the responsibilities which fall on them as leaders of the Bar to give the time and attention that would be necessary to produce results in the direction indicated?

It must be remembered that the men most prominent in the work of the American Law Association are leaders of the Bar in the various States where they reside. They are busy men whose time is very valuable; but they willingly give their time and talents in the service of the country. Their only reward is the esteem and admiration of their fellows in the profession, and the respect of all who are in a position to appreciate the value of their self-imposed labours.

ONTARIO BAR ASSOCIATION.

The Ontario Bar Association held its Thirteenth Annual Meeting at Convocation Hall, Osgoode Hall, Toronto, on Thursday and Friday, February 20th and 21st, 1919.*

Matters of far-reaching interest and importance were included in the agenda. The reports of officers and committees for the year 1918-1919 shewed the achievements of numerous useful measures of law reform at the instance of the Association with a residue of matters pending and not yet completed, which will engage the attention of the Council of the Association.

The retiring President, Mr. R. T. Harding, delivered a comprehensive address, referring to the achievements of the Association during the past year and containing particular reference to certain items, of which the following may be mentioned as of special interest both to the profession and to the general public:—

1. As to Soldiers' Memorial:—The erection of a fitting memorial at Osgoode Hall for the members of both Bench and Bar who have been killed in action in the Great European War we have already urged, and it has engaged the attention, both of the Benchers of the Law Society and of the Ontario Bar Association. It is in contemplation that the memorial will be of a character indicative so far as possible of the gigantic sacrifice which has been made by the members of the profession for the cause of liberty and justice, the maintenance of which has, within the past four years, involved loss of life, destruction of property and other losses and sufferings to a degree unprecedented in the world's history. It is expected that recommendations will be dealt with very shortly leading to the achievement of this object.

We notice that the Law Society of England at its last meeting took action of a similar character. The objects to be carried out being, (1) the erection of a Memorial in the Law Society's Hall; (2) the compilation of a record of service; and (3) the establishment of a relief fund for solicitors and articled clerks and the

*We are indebted for the matter of this excellent summary of the proceedings to Mr. A. A. Macdonald, the very efficient Recording Secretary of the Association.

families and dependents of those who have been killed. The whole scheme to be a national one.

It is pertinent to set out at this point the fact which was made public to the meeting that in the Province of Ontario nearly six hundred barristers, solicitors and students have been with the Colours, and the Military Service Act was responsible for less than three per cent. of that number.

2. Reforms and improvements in the administration of justice:—Suggestions along this line include the increased remuneration for Supreme Court Judges throughout the Province; abolition of the office of Junior County Court Judge, except in large centres; the designation of a Supreme Court Judge to sit permanently in Weekly Court so as to make for greater uniformity of practice; a central Criminal Court, at Toronto, to be presided over by a Judge of Supreme Court rank, to try all criminal cases; and specialization of cases so that each case might be tried by a Judge of special experience and training in the particular branch of law and practice involved in the case.

The above matters have been deliberated upon and interviews have been held with a view to these reforms being brought to pass, and it is the hope of the Association that some, or all of them, may be realized at an early date.

At the Friday morning session, Dr. John Hoskin, K.C., Treasurer of the Law Society of Upper Canada, addressed the meeting in a witty and impromptu speech that was well received.

Dr. Hoskin referred in particular and with great pride to his experience while Chairman of the Discipline Committee for over twenty years, during which time he discovered with surprise how few of the members of the Bar have strayed in their dealings with their clients or otherwise from the path of strict moral rectitude, "particularly," as the learned gentleman expressed it, "in view of all the rascality which some of their clients pour into their ears."

Hon. Mr. Justice Lennox addressed the meeting in the interests of the returned soldiers who are students or members of the profession, and spoke upon the desirability of vacation schools being held, with special lectures, for the benefit of those members of the profession, particularly, who, owing to long absence on

active service, have gotten out of touch with matters of practice and procedure, and have failed to keep abreast with the other changes in substantive law, without a full knowledge of which they could not with safety, either to themselves or to their clients, resume the practice of their profession. This is a matter for which there has finally, through the good offices of the Benchers of the Law Society, been adequate provision made; and, during the forthcoming summer, special lectures will be delivered at Osgoode Hall to meet this need.

Several other interesting addresses were also delivered. Hon. Mr. Justice Riddell read an instructive paper on the Judge in the Parliament of Upper Canada. Hon. Mr. Justice Craig, one of the Supreme Court Judges of the Yukon, read a paper, which was listened to with a great deal of interest, on the introduction of law in the Yukon. Mr. Henry R. Rathbone, counsellor-at-law of Chicago, Illinois, Mr. John Lord O'Brien, Assistant to the Attorney-General of the United States at Washington, and Captain Adolp Moilhut, a veteran of the famous 22nd Battalion, and who represented the Quebec Bar Association, were three of the special guests of the Association.

Mr. Rathbone delivered an eloquent address at the Friday afternoon session, when he told of the war work of the Chicago Bar Association, with particular reference to "The Draft Act," Where lawyers were needed, lawyers were sent to man the Exemption and Appeal Boards, and a resolution was passed by the Association making it absolutely impossible for a lawyer to make a single cent out of any of the war work he did. The Association was divided into four divisions. The first division provided assistance to the Federal Government in bringing to justice those engaged in enemy propaganda. The second division looked after the interests of those lawyers who had left their practices to go and fight, and the third division looked after their dependents. The fourth division supplied speakers from amongst the members of the Bar for all kinds of patriotic propaganda.

Another feature of Mr. Rathbone's most interesting address was the almost unqualified success which has attended the elective judiciary system. His remarks were such as to afford food for a

great deal of thought and possibly further action in regard to the filling of the ranks of the judiciary in this country in future generations.

Mr. O'Brien spoke of his experiences while in charge of the espionage cases, under the Departmnet of the Attorney-General of the United States, remarking that all cases were tried in open Court, as in peace time, and pointing out further that the entry of the United States into the war rendered necessary the passing of legislation, new in its entirety, for the protection of the country from the work of alien enemies, both within and without. The Internment Statute, which had been used first in the unsettled days of 1798, Mr. O'Brien said, was found to be of the utmost assistance. That statute had been used to some extent in the days of 1812, but had since been forgotten. The Germans had forgotten it, but, the day after the United States entered the war, the Germans, as well as the Americans, learned about it. Some seventy German spies disappearing in internment camps are to its credit.

Captain Adolp Moilhut, a Montreal lawyer, a veteran of the famous 22nd Battalion, mentioned that, out of the Bar of Montreal seventy members had enlisted. He also spoke with interest of various experiences at the Front, stating amongst other things that it was not generally known that it had been at the request of the mine-owners of France that the Canadians had been held at Passchendaele.

The annual meeting was brought to a close on the evening of Friday, February the 21st, with a large banquet at the King Edward Hotel, which was thoroughly enjoyed by all. It marked the beginning of a new international era for lawyers, and had a special charm by reason of the presence of some forty or fifty member of the Buffalo Bar Association.

The officers elected for the ensuing year were as follows:—Honorary president, Hon. N. W. Rowell, K.C., Toronto; president, N. B. Gash, K.C., Toronto; vice-presidents, Col. W. N. Ponton, K.C.; Belleville, Col. R. J. Maclennan, Toronto, J. H. Rodd, Windsor; treasurer, C. F. Ritchie, Toronto; recording secretary, A. A. Macdonald, Toronto; corresponding secretary, Z. Gallagher, Toronto; historian and archivist, W. S. Herrington, Napanee; executive committee (residing in Toronto), J. A. McAndrew, A. J. Russell Snow, K.C., J. H. Spence, Frank Denton,

K.C., Daniel Urquhart, W. K. Murphy, Gideon Grant; (out of town), F. D. Kerr, Peterbrough; J. S. Davis, Smithville, and W. S. Ormiston, Uxbridge.

CHANGE OF TIME.

The so-called "Daylight Saving" scheme has met with rather a rebuff owing to the opposition of the rural population. In cities and towns it met last year with general approval, and if the question had been left to them they would probably have given an unanimous vote in favour of the renewal of the Act, but the opposition of the farmers was so strong that the Government could not withstand the pressure. The result is, that while many cities and towns and the railways and banks have put on their clocks an hour, the farmers will be carrying on their business according to standard time. A certain amount of confusion in a variety of ways has arisen. One would imagine that the farmers must think that the passage of the proposed Act would compel all farmers to begin work an hour earlier than they wanted to do; whereas the Act would have no such effect; and if the farmers did not wish to get up an hour earlier, all they had to do was to arrange to get up an hour later than the nominal time, and from April to October get up, say, at six instead of at five.

It is surprising how people are led away by foolish clamour. We are no better in this respect than our forefathers, many of whom, when the change was made in 1752 from the old style to the new style, and as a necessary consequence eleven days were dropped from the calendar and September 2nd, 1752, was followed by September 14th, set up the cry "give us back our eleven days"! We heard of a farmer in a back township of Ontario who, when the Daylight Saving Act was first introduced, fiercely denounced Mr. Borden for assuming that he had power greater than the Almighty by passing a law affecting the rising of the sun! As we write there is an amusing and exasperating muddle in Courts and legal offices; Judges and officials at loggerheads; clocks being put on an hour, then back again, etc., and the world's spirit of unrest has invaded even the staid and dignified precincts of halls of justice.

REVIEW OF CURRENT ENGLISH CASES.

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BETTING — PLACE USED FOR BETTING — CLUB — BETS MADE BETWEEN MEMBERS ONLY—MEMBERS ACTING AS BOOKMAKERS—"BETTING WITH PERSONS RESORTING THERETO—BETTING ACT, 1853 (16-19 VICT. C. 119) SS. 1, 3—(CR. CODE S. 227 AS AMENDED 1910 (D.), C. 10, S. 1).

Jackson v. *Roth* (1919) 1 K.B. 102. This was a case stated by a magistrate. The defendants were prosecuted for an offence against the Betting Act, 1853, ss. 1, 3 (see Cr. Code, s. 227, as amended by 1910 (D.), c. 10, s. 1). The facts were that the defendants were members of a social club in whose premises a place was set apart and used for the purpose of betting on horse races by members of the club with each other, and to the place in question the defendants had resorted and betted with each other. The club was a bona fide social club and non-members were not knowingly admitted thereto. The magistrate had held that no case had been made out by the prosecutor, but a Divisional Court (Darling and Avory, JJ.) held that as a soc al club and for social purposes the club was a legitimate place of meeting, but that it was illegitimately used for the purpose of betting, and in resorting thereto for the purpose of betting the defendants committed a breach of the Betting Act and should have been convicted, and the case was accordingly remitted to the magistrate.

COPYRIGHT — ASSIGNMENT — ASSIGNMENT OVER — ROYALTIES —LIABILITY OF SECOND ASSIGNEE—CHARGE—VENDOR'S LIEN.

Barker v. *Stickney* (1919) 1 K.B. 121. This was an appeal from the decision of McCardie, J. (1918) 2 K.B. 356, noted *ante* p. 25. The case was whether or not an assignee of a copyright, taking from an assignor who was under obligation to pay royalties, was also bound to pay the royalties, he having entered into no express obligation so to do. McCardie, J., held that he was not liable, and the Court of Appeal (Bankes, Warrington, and Scrutton, L.JJ.) have now affirmed his decision. The rules which McArdie, J., stated, as governing the question of the reservation of a vendor's lien, were not, however, approved.

MANDAMUS—PUBLIC AUTHORITIES PROTECTION ACT, 1893 (56 & 57 VICT. c. 61) s. 1—(R.S.O. c. 89, s. 13)—LIMITATION.

The King v. *Port of London* (1919) 1 K.B. 176. This case may be briefly noticed for the fact that the Court of Appeal (Bankes, Warrington, and Scrutton, L.JJ.) express a strong opinion, although they do not actually decide, that an application for a prerogative writ of mandamus is not within the six months' limitation prescribed by the *Public Authorities Protection Act*, s. 1 (R.S.O., c. 89, s. 13).

INSURANCE (MARINE)—PROFIT ON CHARTERPARTY—WAR RISKS—CAPTURE OF VESSEL—CONSTRUCTIVE TOTAL LOSS—SUBSEQUENT RECOVERY OF SHIP AND CARGO BY OWNERS—NOTICE OF ABANDONMENT.

Boura v. *Townend* (1919) 1 K.B. 189. This was an action on a policy of insurance on profit on charterparty. The vessel was chartered by the plaintiffs to carry a cargo of jute from Calcutta to Valencia in Spain. The plaintiffs valued their profit on the venture at £30,000, for which the policy in question was issued. The chartered vessel was to proceed from Delagoa Bay to Calcutta so as to arrive there the first week in December, 1917. She was not heard of after leaving Delagoa Bay on November 4, 1917, until February 27, 1918, when news arrived in England that the vessel was stranded on the coast of Denmark. It was then learnt that she had been captured in the Indian Ocean on her way to Calcutta on November 10, 1917, and a prize crew had been placed on board, and in the endeavour to take her to Germany she had been stranded. The policy was against total or constructive loss of steamer only from Delagoa Bay, via Colombo, to Calcutta and until sailed; and was against marine and war risks including capture by enemies of Great Britain, but excluding all claims arising from delay. And the plaintiff claimed as for a total constructive loss of the venture. No notice of constructive total loss was given to the defendants. Roche, J., who tried the action, held that the plaintiffs were entitled to recover: that the capture of the vessel constituted a total constructive loss, and that it was not necessary that notice should have been given. He held that the fact that the vessel was ultimately recovered did not enable the defendants to rely on the clause in the policy excluding all claims arising from delay. He accordingly gave judgment for the plaintiffs for the amount claimed with costs.

SALE OF GOODS—C.I.F. CONTRACT—PAYMENT ON PRODUCTION OF SHIPPING DOCUMENTS—LOSS OF GOODS BEFORE TENDER OF DOCUMENTS—KNOWLEDGE OF VENDORS—POLICY OF INSURANCE COVERING OTHER GOODS—VALIDITY OF TENDER—NON-COMPLIANCE WITH TERMS OF CONTRACT.

Manbre Saccharine Co. v. *Corn Products Co.* (1919) 1 K.B. 198. This was an action to recover damages for the breach of two c.i.f. contracts for the sale of goods, in which some nice points of law are discussed: (1) Can a buyer under a c.i.f. contract refuse to pay the contract price on tender of the necessary documents, because, prior to the tender, the goods have been lost to the knowledge of the vendor? McArdie, J., who tried the action, answers this question in the negative and holds that a contract of that description is virtually a contract to pay on tender of the documents. (2) It then became necessary to decide whether the tender of documents which had been made was sufficient: and as it appeared that the insurance effected by the seller did not cover solely the goods in question but also other goods in which the buyers were not interested, the learned Judge held that this was not a sufficient compliance with the contract. (3) There was still a further point, the contract was for starch in 280 lbs. bags. The goods shipped were in 220 lbs. and 140 lbs. bags; and it was held that this also was not a compliance with the contract. Judgment was therefore given in favour of the plaintiffs.

MASTER AND SERVANT—CONTRACT OF SERVICE—SERVANT AUTHORIZED TO RECEIVE "TIPS"—WRONGFUL DISMISSAL—MEASURE OF DAMAGES.

Manubens v. *Leon* (1919) 1 K.B. 208. This was an action by a servant to recover damages for a wrongful dismissal. By the terms of the contract the plaintiff was to receive 30s. per week wages and to be authorized also to receive "tips" from plaintiff's customers, which had amounted to 30s. per week. The plaintiff was wrongfully dismissed. The defendant paid into Court a week's wages in lieu of notice, but the plaintiff also claimed an allowance in respect of the loss of "tips." This the County Court Judge disallowed, but a Divisional Court (Lush and Bailhache, JJ.) held that the plaintiff was entitled to an additional 5s. in respect of the loss of "tips."

MASTER AND SERVANT—MONTH'S NOTICE BY SERVANT—WRONGFUL DISMISSAL DURING CURRENCY OF NOTICE—MEASURE OF DAMAGES—LOSS OF BOARD AND LODGING.

Lindsay v. *Queen's Hotel Co.* (1919) 1 K.B. 212. This also was an action by a servant to recover damages for wrongful dismissal. In this case the servant had given a month's notice of leaving. But six days before the month had expired the defendants wrongfully dismissed her. The County Court Judge allowed the plaintiff wages up to the time she would have left, and also an extra month's wages for dismissal without notice. On appeal by the defendants a Divisional Court held that although a master is entitled to dismiss a servant without notice on payment of a month's wages, that that was not the measure of damages in this case, but that it was merely the actual loss which the plaintiff had suffered, which the Court held was simply her wages for the six days and also an allowance for board and lodging for that period.

RAILWAY — TRAVELLING WITHOUT PAYING FARE — INTENT TO AVOID PAYMENT OF FARE—PURCHASE OF NON-TRANSFERABLE TICKET FROM ANOTHER PASSENGER—(R.S.C., c. 37, s. 281).

Reynolds v. *Beasley* (1919) 1 K.B. 215. This was a case stated by a magistrate. The defendant was summoned for breach of the Regulation of Railways Act, 1889, which provides that if any person travels or attempts to travel on a railway without having paid his fare, and with intent to avoid payment thereof . . . he shall be liable on conviction to a fine. The defendant had purchased a non-transferable ticket from another passenger which he tendered to the collector. The Justices were of opinion that no intention to avoid payment of fare had been disclosed; but a Divisional Court (Darling, Coleridge and Shearman, JJ.) held that the defendant had no right to travel on the non-transferable ticket, and was guilty of a breach of the Act. See R.S.C., c. 37, s. 281.

MEDICINE MAN — MEDICAL ASSOCIATION — INTERFERENCE BY ASSOCIATION WITH PRACTICE OF A PROFESSION—UNLAWFUL MEANS — THREATS — BOYCOTT—DEFAMATION—CORPORATION —MALICE—RESTRAINT OF TRADE.

Pratt v. *British Medical Association* (1919) 1 K.B. 244. This was an important case and one deserving of careful consideration.

The plaintiffs were medical men and had accepted appointments in the Coventry Provident Dispensary, an association formed for securing medical attendance for its members and their families. The members paid an annual fee of 4s., and the income of the Dispensary was about £4,000, one-half of which was expended in drugs, and payment of skilled dispensers, and the balance in payment of doctors on the medical staff. The Medical Association was an association of doctors having branches in Coventry and elsewhere. The members in Coventry appear to have conceived that there was something unprofessional on the part of the plaintiffs in being connected with the Dispensary, and with a view to compel them to disassociate themselves therefrom, the Medical Association published defamatory statements concerning the plaintiffs and caused them to be boycotted by the other members of the profession in Coventry and elsewhere. The action was brought to recover damages for conspiracy, slander and libel. The defendants did not offer any justification or defence of their defamatory statements, but the Medical Association asserted a legal right to boycott the plaintiffs and accepted responsibility for the acts of the various divisions of the Association concerned in the boycott and for threats of its officials and agents. McArdie, J., who tried the action, in a very elaborate judgment discussed the rights of the parties, and came to the conclusion, that there being no substantial ground for saying that the acts of the plaintiffs were unprofessional or contrary to the honour of the profession, the conduct of the Medical Association and its various divisions and officials was wholly unwarranted and an unlawful interference with the plaintiffs in the practice of their profession, and he gave a judgment for very substantial sums in favour of the respective plaintiffs.

SHIP REQUISITIONED BY ADMIRALTY — SALVAGE SERVICES PERFORMED BY VESSEL REQUISITIONED—RIGHT TO SALVAGE—"SHIP BELONGING TO HIS MAJESTY"—MERCHANT SHIPPING ACT, 1894 (57-58 VICT. C. 60), S. 557—MERCHANT SHIPPING ACT, 1916 (6-7 GEO. 5, C. 41), S. 1.

Admiralty Commissioners v. *Page* (1919) 1 K.B. 299. This was an appeal from the decision of Bailhache, J. (1918) 2 K.B. 447 (noted *ante* p. 27), and the Court of Appeal (Eady, M.R., and Duke, J.A., and Eve, J.) have affirmed the judgment.

Reports and Notes of Cases.

Province of British Columbia.

COURT OF APPEAL.

BROWN'S TRAVELLING BUREAU v. TAYLOR.

Macdonald, C.J.A., Martin, McPhilips, J.J.A.] [44 D.L.R. 204.

Insurance—Undertaking to have policy ready at a certain time—Agent staying hand of company—Policy not ready—Liability for premium.

An insurance agent who undertakes to have an insurance policy ready at a certain date, and, by an unauthorized departure from the terms of the application, stays the hand of the insurance company so that the contract is not concluded or the policy issued until after the date agreed upon, cannot recover the insurance premium from the insured.

Sir Charles H. Tupper, K.C., for appellant. *Martin*, K.C., for respondent.

ANNOTATION TAKEN FROM 44 D.L.R.

What is the Exact Moment of the Inception of a Contract of Insurance

By F. J. LAVERTY, K.C., Montreal. Author of "*Insurance Law of Canada.*"

This judgment appears to be based partly on the issue of fact as to what was the agreement between the parties, and partly on the finding in law that the policy did not cover the respondent when he went aboard his ship at Montreal on the 2nd June.

The question of the exact moment of the inception of a contract of insurance has given rise to a number of important decisions; the latest is that of the House of Lords in 1916, *Allis-Chalmers Co.* v. *Fidelity & Deposit Co. of Maryland*, 114 L.T.R. 433. Plaintiffs had requested a bond guaranteeing them against loss through the dishonesty of their Paris manager to be in force "from issuance"; in terms the bond recited that it covered plaintiffs from March 8, 1912, to March 7, 1913; it was executed on March 8, and immediately tendered to plaintiffs, but as their manager was absent, it was arranged to stand over to his return, which occurred on April 18, on which date he paid the premium. The Paris manager had disappeared on April 13, and by the 18th plaintiffs suspected that he might have absconded. They later claimed for defalcations occurring before April 18, but their action was dismissed on the grounds that they had concealed material facts, and that the contract was not completed until April 18.

Loreburn, L.J., found that the parties had never been *ad idem* on the subject of the exact premium to be paid, and there was no evidence that the other terms of the policy were ever agreed to by the insured, or that he had ever agreed to take the usual form, whatsoever it might be.

The Supreme Court of Canada dealt with a similar question in *Donovan* v. *Excelsior Life Insurance Co.* (1916), 31 D.L.R. 113, 53 Can. S.C.R. 539, and held that there was not a completed contract of insurance between the company and the insured at the time of his death, inasmuch as the condition in the policy as to its delivery and surrender of the receipt during the lifetime and continued good health of the insured was not complied with. In this case the application stated the insured's age as 64, and the doctor's report as 65; the premium was paid and the policy written on the basis of the age being 64, and it was sent to the agent with instructions to reconcile the discrepancy. He ascertained that the age should have been 65 and obtained from insured the additional premium; a new policy was prepared and sent to the agent, who did not deliver it on learning that the insured was ill; she died a few days later.

The court distinguished *North American Life Insurance Co.* v. *Elson* (1903), 33 Can. S.C.R. 383, on the ground that in the *Donovan* case, the policy was sent to the company's agent not for unconditional delivery as in the *Elson* case, but to be delivered only upon the conditions stated in the letter from the company to their agent referring to it.

The facts of the *Elson* case were that the policy provided that it would not be in force until the first premium had been paid and accepted and the receipt delivered; the policy purported to be signed on September 27, 1894, and to cover insured until October 5, 1895; it was sent to the company's agent at Winnipeg on September 27, and forwarded by him to the insured, who received it on October 7; he died on September 30, 1897; it was held that the contract of insurance was completed on September 27, 1894, and that it had been in force 3 full years when insured died.

In the United States we find a case of *McMaster* v. *New York Life Ins. Co.*, (1901) 183 U.S.R. 25, in which the Circuit Court of Appeals held that the policy was not in force till the date of its execution, December 18, 1893, although it recited that the annual premium was to be paid on December 12 in each succeeding year; it was delivered and the first premium paid on December 26, 1893, and it was held to be still in force on the date of the death of the insured on December 18, 1894.

In the *Donovan* case the Supreme Court also distinguished the ruling in *Roberts* v. *Security Co.*, [1897] 1 Q.B. 111, where the policy recited that the premium had been paid, and that no insurance would be held to be effected until such payment; it was sealed with the seal of the company and signed by two directors and the secretary and remained in its possession. A loss occurred before payment of the premium, which in fact never was paid; it was held that there was a concluded agreement, and that the company had waived the condition as to payment of the premium.

The House of Lords in *Xenos* v. *Wickham* (1867), L.R. 2 H.L. 296, dealt with a case where a broker had submitted a slip for marine insurance, and the insurer prepared a policy in accordance; it was tendered to the broker,

one of whose clerks returned it, and had it cancelled, stating that there had been a mistake. The ship being lost, the owner succeeded in recovering on the policy, on the ground that he had never authorized the broker to cance the insurance; that a policy executed by an insurer is complete and binding against him, although in fact it remains in his possession, unless there is some particular act required to be done by the other party to declare his adoption of it, and that it is not necessary that the insured should formally accept or take away a policy, in order to make the delivery complete.

McPhillips, J.A. (in *Brown's Travel Bureau* v. *Taylor, supra*), refers to a judgment of the Privy Council, *Re Equitable Fire & Accident Office* v. *Ching Wo Hong*, [1907] A.C. 96, where the policy under consideration also contained a condition that it was to be of no effect unless the premium had been wholly or partially paid; the fact that no payment had been made was held to have prevented it from ever coming into force.

It is apparent that no hard and fast rule can be laid down to determine the moment when any particular policy may come into effect, this being a point to be decided according to the facts of the case and the wording of the instrument.

Province of Ontario

SUPREME COURT.

SCOTT v. CRINNIAN.

Falconbridge, C.J.K.B.] [44 D.L.R. 24.

Vendor and purchaser—"Mortgage"—Definition of under Mortgages Act—Vendor's lien—Insurance money—Application.

The definition of "mortgage" in the Mortgages Act, R.S.O. c. 112, is wide enough to cover the charge known as a vendor's lien and the holders of such vendor's lien are entitled as mortgagees to have insurance money on the property applied in accordance with the provisions of s. 6 of that Act. Although they are entitled to the security of the insurance money, they are not entitled to apply the insurance money in payment of purchase instalments not yet due, but such moneys should be held in trust or invested or paid into court if the parties cannot agree as to its disposal.

Corham v. *Kingston* (1889), 17 O.R. 432; *Edmonds* v. *Hamilton Provident* (1881), 18 A.R. (Ont.) 347, followed.

Sir George Gibbons, K.C., for plaintiffs. *T. G. Meredit* for defendant.

ANNOTATION TAKEN FROM 44 D.L.R.

INSURANCE ON MORTGAGED PROPERTY.

BY JOHN DELATRE FALCONBRIDGE, M.A., LL.B.

1. Insurable interest.
2. Right or obligation to insure.
3. Insurance in the name of the mortgagor.
4. Mortgage clause in insurance policy
5. Insurance in the name of the mortgagee.
6. Application of insurance money.

1. Insurable interest.

The mortgagor has by virtue of his equity of redemption an insurable interest in the mortgaged property, and his right to insure is co-extensive with the value of the property (*a*), but if he makes an absolute transfer of his equity of redemption he no longer has an insurable interest, and any insurance then existing in his favour ceases to be effectual unless it be assigned with the consent of the insurers to the transferee of the equity of redemption. The mortgagor's insurable interest does not cease until the mortgage debt has been paid, even although the mortgage has been foreclosed, for the mortgagor may nevertheless continue to be liable for the mortgage debt (*b*).

By a condition in a policy of insurance against fire the policy was to become void "if the assured is not the sole and unconditional owner of the property . . . or if the interest of the assured in the property whether as owner, [illegible]stee . . . mortgagee, lessee or otherwise is not truly stated." It was held that a mortgagor was sole and unconditional owner within the terms of said condition. By another condition the policy was to be avoided if the assured should have or obtain other insurance, whether valid or not, on the property. The assured applied for other insurance, but before being notified of the acceptance of his application the premises were destroyed by fire. It was held that there was no breach of said condition (*c*).

A mortgagor who had made a mortgage, under the Short Forms of Mortgages Act, containing a covenant to insure the mortgaged premises against fire, effected an insurance thereon with the defendant company, the loss, by the policy, being payable to the plaintiff, the mortgagee, as his interest might appear under the mortgage. Subsequently the mortgagor conveyed his equity of redemption to the mortgagee without the consent of the company having been obtained therefor. The premises having been afterwards destroyed by fire, it was held that the plaintiff was not entitled to the insurance moneys, for (1) the fact of the conveyance made by the mortgagor to the plaintiff, whereby the former ceased to have any interest at the time of the fire, was a good answer to the claim; and (2) such conveyance constituted a breach of

(*a*) *Glover* v. *Black*, 1763, 1 Wm. Bl. 396; 3 Burr. 1394 97 E.R. 891.
(*b*) *Parsons* v. *Queen Insurance Co.*, 1878, 29 U.C.C.P. 188, at p. 211; appeal to Privy Council on another point, 7 App. Cas. 96.
(*c*) *Western Assurance Co.* v. *Temple*, 1901, 31 Can. S.C.R. 373, following *Commercial Union Assurance Co.* v. *Temple*, 1898, 29 Can. S.C.R. 206.

a statutory condition which provides against the insured premises being assigned without the company's consent (*d*).

In order to come within a condition providing against the assignment of the insured premises, an assignment must be an absolute transfer of the subject matter. An assignment by way of mortgage (*e*) or an agreement to sell, the vendor retaining the legal estate (*f*), does not constitute a breach of the condition.

A mortgagee, unpaid vendor or other person having a limited interest in property, may effect insurance either (1) on his own interest merely, or (2) on his own interest as well as the interests of all other persons in the property. For instance, a mortgagee may effect insurance either (1) on his own interest as mortgagee or (2) on the property as a whole, including the equity of redemption (*g*).

It has been held in New Brunswick that the interest of the mortgagee as such ends on foreclosure absolute, and that if a loss occurs thereafter the mortgagee cannot recover on a policy issued to him as mortgagee (*h*).

2. Right or obligation to insure.

It is usual in Ontario to insert in a mortgage the short form of covenant provided by the Short Forms of Mortgages Act (*i*), as follows:—

> And that the said mortgagor will insure the buildings on the said lands to the amount of not less than of lawful money of Canada.

In the case of a mortgage expressed to be made in pursuance of the statute, the foregoing covenant has the same effect as if it were in the following terms (*j*):—

> And also that the said mortgagor or his heirs, executors, administrators or assigns shall and will forthwith insure unless already insured and during the continuance of this security keep insured against loss or damage by fire, in such proportions upon each building as may be required by the said mortgagee his heirs, executors, administrators or assigns, the messuages and buildings erected on the said lands, tenements, hereditaments and premises hereby conveyed or mentioned, or intended so to be, in the sum of of lawful money of Canada, at the least, in some insurance office to be approved of by the said mortgagee, his heirs, executors, administrators or assigns, and pay all premiums and sums of money necessary for such purpose, as the same shall become due, and will on demand assign, transfer and deliver over unto the said mortgagee, his heirs, executors, administrators or assigns the policy or policies of insurance, receipt or receipts thereto appertaining; and if the said mortgagee, his heirs, executors, administrators or assigns, shall pay any

(*d*) *Pinhey* v. *Mercantile Fire Insurance Co.*, 1901, 2 O.L.R. 296.
(*e*) *Sands* v. *Standard Insurance Co.*, 1879, 26 Gr. 113, 27 Gr. 167; *Sovereign Fire Insurance Co.* v. *Peters*, 1885, 12 Can. S.C.R. 33.
(*f*) *Keefer* v. *Phœnix Insurance Co.*, 1901, 31 Can. S.C.R. 144; *Troller and Douglas* v. *Calgary Fire Insurance Co.*, 1910, 3 A.L.R. 12.
(*g*) *Castellain* v. *Preston*, 1883, 11 Q.B.D. 380, at p. 398; *Keefer* v. *Phœnix Insurance Co.*, 1901, 31 Can. S.C.R. 144, at pp. 148, 149. As to insurance of limited interests, see an article by William Harvey in 10 L.Q.R. 48 (Jan., 1894). As to insurance in the name of the mortgagee, see § 5, *infra*.
(*h*) *Goskin* v. *Phœnix Insurance Co.*, 1886, 11 N.B. R. (6 Allen) 249.
(*i*) R.S.O. 1914, c. 117, schedule B, clause 12.
(*j*) R.S.O. 1914, c. 117, s. 3.

premiums or sums of money for insurance of the said premises or any part thereof, the amount of such payment shall be added to the debt hereby secured, and shall bear interest at the same rate from the time of such payments and shall be payable at the time appointed for the then next ensuing payment interest on the said debt.

Under the Mortgages Act, R.S.O. 1914, c. 112, in the case of a mortgage which contains no power to insure and no declaration excluding the application of Part II. of the statute, there is a power to insure as therein provided (*k*).

In England it is provided by the Conveyancing Act, 1881, ss. 19 and 23, as follows:—

19—(1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

. . . . . .

(ii) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money.

23—(1) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this Act, shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, then shall not exceed two-third parts of the amount that would be required, in case of total destruction, to restore the property insured.

(2) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases (namely):

(i) Where there is a declaration in the mortgage deed that no insurance is required;

(ii) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed;

(iii) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by this Act authorized to insure.

(3) [*This sub-section relates to the application of the insurance money* (*l*).]

If a mortgage company through its manager undertakes with the mortgagor to keep alive an insurance on the mortgaged property, and takes steps towards carrying out such undertaking, but fails to carry it out, it is guilty of such negligence as to render it liable in damages to the mortgagor, if he is ignorant of such failure, for the amount of such insurance in case the property is burned after the policy lapses (*m*).

(*k*) R.S.O. 1914, c. 112, ss. 19, 26.

(*l*) Sub-s. 3 is similar in terms to s. 6 of the Mortgages Act, discussed in § 6, *infra*.

(*m*) *Campbell* v. *Canadian Co-operative Investment Co.*, 1906, 16 M.R. 464, following *Skelton* v. *London and North Western Ry. Co.*, 1867, L.R. 2 C.P. 631, at p. 636.

3. Insurance in the name of the mortgagor.

Usually, when mortgaged property is insured, the insurance is effected in the name of the mortgagor, and a clause is inserted in the policy that the loss, if any, shall be payable to the mortgagee as his interest may appear. Under such a clause, it would seem that the mortgagee could give a good discharge for money paid to him only to the extent of his claim as mortgagee, and that as to any surplus the receipt of the mortgagor would be necessary, whereas if the words "as his interest may appear" are omitted, the mortgagee could give a good discharge as to the whole sum paid (*n*). In any case the mortgagee has an equitable lien upon the policy and its proceeds. (*o*)

Notwithstanding the insertion of the clause mentioned, the mortgagor is the person assured and may sue in his own name upon the policy (*p*). Furthermore, apart from a provision in the policy to the contrary (*q*), a subsequent breach by the mortgagor of any of the conditions of the policy, as, for instance, of a condition avoiding the policy in the event of the assignment of the property without the consent of the insurer, will avoid the policy as against both mortgagor and mortgagee (*r*).

Whether, in the case of a policy purporting to insure the mortgagor and containing a clause that the loss if any shall be payable to the mortgagee as his interest may appear, the mortgagee may sue in his own name without joining the mortgagor is a question which has been much discussed. The weight of authority in Ontario is in favour of the view that the mortgagee may maintain the action. As against the objection that the contract is between the insurer and the mortgagor and that the mortgagee being a stranger to the contract is not entitled to sue upon it, the clause in question being a mere direction and authority to the insurer to pay the mortgagee instead of the mortgagor (*s*), it has been held that the effect of the issue of the policy to the mortgagor with the loss, if any, payable to the mortgagee as his interest may appear is to create the relation of trustee and *cestui que trust* between the mortgagor and the mortgagee. The subject of the trust is the right to receive the money payable under the policy and to sue for it, and this right may be exercised by the mortgagee in his capacity as *cestui que trust*, at least to the extent of his interest (*t*). In some of the cases where the policies were not under seal, emphasis was laid on this fact, but it would seem that the absence of a seal would not assist a third party in an action upon a contract to which he was not a party, and that the presence of a seal would not disentitle the third party from suing if the effect of the contract was to constitute him a *cestui que trust* (*u*).

(*n*) *Mitchell* v. *City of London Assurance Co.*, 1888, 15 O.A.R. 262, at p. 279.

(*o*) *Chev. Traders Bank of Canada*, 1909, 19 O.L.R. 74.

(*p*) *Caldwell* v. *Stadacona Fire and Life Insurance Co.*, 1883, 11 Can. S.C.R. 212; *cf. McQueen* v. *Phœnix Mutual Fire Insurance Co.*, 1880, 4 Can. S.C.R. 660.

(*q*) As to the effect of a "mortgage clause" in a policy, see § 4, *infra*.

(*r*) *Livingstone* v. *Western Assurance Co.*, 1868, 14 Gr. 461, 16 Gr. 9; *Chisholm* v. *Provincial Insurance Co.*, 1869, 20 U.C.C.P. 11; *Mitchell* v. *City of London Assurance Co.*, 1888, 15. A.R (Ont.) 262; *Haslem* v. *Equity Fire Insurance Co.*, 1904, 8 O.L.R. 246.

(*s*) See *Mitchell* v. *City of London Assurance Co.*, 1888, 15 A.R. (Ont.) 262, at p. 274.

(*t*) *Mitchell* v. *City of London Assurance Co.*, 1888, 15 A.R. (Ont.) 262, where the earlier authorities are discussed; *Haslem* v. *Equity Fire Insurance Co.*, 1904, 8 O.L.R. 246; *Laidlaw* v. *Hartford Fire Insurance Co.*, 1916, 10 A.L.R. 7, 29 D.L.R. 229.

(*u*) *Mitchell* v. *City of London Assurance Co.* was followed in *Agricultural Savings and Loan Co.* v. *Liverpool, etc., Insurance Co.*, 1901, 3 O.L.R. 127, reversed, without any decision as to the right of the mortgagee to sue in his own name, 33 Can. S.C.R. 94. It is pointed out in 3 O.L.R. at p. 136, that the policy though by deed was not a deed *inter partes* but a deed poll upon which anyone named in it might sue. In this case there was also a "mortgage clause," as to which, see § 4, *infra*.

In a Nova Scotia case a policy not under seal contained the following provision: "Loss, if any, payable to the order of Peter Brush, if claimed within sixty days after proof, his interest therein being as mortgagee," and it appearing that the policy was obtained by the mortgagor in pursuance of a covenant entered into by him with Brush, that he should insure in the name and for the benefit of Brush, it was held that the mortgagee was entitled to sue on the policy in his own name (*v*).

In England it has been held that a covenant on the part of the mortgagor to insure, nothing being said as to the application of the insurance money, does not confer upon the mortgagee any right to the money in the event of the bankruptcy of the mortgagor (*w*), but in Ontario it has been held that a covenant to insure in the form provided by the Short Forms of Mortgages Act (*x*) operates as an equitable assignment of the insurance when effected (*y*). If there is neither a covenant to insure nor a provision that the money in case of loss shall be payable to the mortgagee, the mortgagee has no claim to money arising from insurance effected by the mortgagor (*z*).

Where an owner of property effects insurance thereon and subsequently mortgages the property, assigning the policy to the mortgagee, the insurance company cannot by arrangement with the mortgagee without the knowledge or consent of the mortgagor cancel the insurance. The mortgagor notwithstanding the assignment continues to be the person assured within the meaning of the Insurance Act, and the policy cannot be cancelled unless notice in writing is served upon the assured and the unearned portion of the premium is paid to him as required by the statute (*a*).

Where the mortgagor and the mortgagee effect separate insurances on their respective interests with different companies, and the mortgagee upon a loss occurring settles the amount of the loss with the company insuring him, this, even although the mortgagor may assent to such settlement, is not an estoppel against the mortgagor in favour of the other insurance company and the mortgagor may nevertheless claim payment under his policy (*b*).

A statutory condition (in Ontario) provides that if the property insured is assigned without the written permission of the company the policy shall thereby become void. This, however, applies only to an assignment of the property and not to an assignment of the policy unaccompanied by a transfer of ownership of the property (*c*).

If mortgaged property is insured in the name of the mortgagor, with loss, if any, payable to the mortgagee as his interest may appear, and a loss occurs, the surplus insurance money, after payment of the mortgagee's claim, belongs to the mortgagor by virtue of his contract with the insurer, and not by virtue of any obligation of the mortgagee to account in equity to the mortgagor. It follows therefore that the mortgagee is not entitled to invoke the doctrine

(*v*) *Brush* v. *Ætna Insurance Co.*, 1864, 1 Old. (N.S.) 459.
(*w*) *Lees* v. *Whiteley*, 1866, L.R. 2 Eq. 143.
(*x*) See § 2, *supra*.
(*y*) *Grant* v. *Citizens Insurance Co.*, 1880, 5 A.R. (Ont.) 596, affirming 27 Gr. 121; *Goldie* v. *Bank of Hamilton*, 1900, 27 A.R. (Ont.) 619.
(*z*) *Miller* v. *Teio*, 1909, 20 O.L.R. 77, at pp. 90, 91.
(*a*) *Morrow* v. *Lancashire Insurance Co.*, 1899, 26 A.R. (Ont.) 173.
(*b*) *Prittie* v. *Connecticut Fire Co.*, 1896, 23 A.R. (Ont.) 449.
(*c*) *McPhillips* v. *London Mutual Fire Ins. Co.*, 1896, 23 A.R. (Ont.) 524.

of consolidation of mortgages so as to enable him to apply the surplus on account of an overdue mortgage held by him upon other property (*d*).

4. Mortgage clause in insurance policy.

In the case of insurance effected by a mortgagor upon mortgaged property it is now a common practice in Canada to insert in or attach to the policy a so-called "mortgage clause," safeguarding the mortgagee against the danger of the policy being avoided by the act or neglect of the mortgagor, and conferring upon the insurer the right to be subrogated (*e*) to the rights and securities of the mortgagee in the event of the insurance company claiming that the policy is avoided as against the mortgagor.

The form of mortgage clause adopted by The Canadian Fire Underwriters' Association is as follows:—

> Policy No. . . . It is hereby provided and agreed that this insurance, as to the interest of the mortgagees only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy.
>
> It is further provided and agreed that the mortgagees shall at once notify said company of non-occupation or vacancy for over thirty days, or of any change of ownership or increased hazard that shall come to their knowledge; and that every increase of hazard, not permitted by the policy to the mortgagor or owner, shall be paid by the mortgagees on reasonable demand from the date such hazard existed, according to the established scale of rates, for the use of such increased hazard during the continuance of this insurance.
>
> It is also further provided and agreed that whenever the company shall pay the mortgagees any sum for loss under this policy, and shall claim that as to the mortgagor or owner no liability therefor existed, it shall at once be legally subrogated to all rights of the mortgagees under all the securities held as collateral to the mortgage debt, to the extent of such payment, or, at its option, the company may pay to the mortgagees the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage, and all other securities held as collateral to the mortgage debt, but no such subrogation shall impair the rights of the mortgagees to recover the full amount of their claim.
>
> It is also further provided and agreed that in the event of the said property being further insured with this or any other office, on behalf of the owner or mortgagees, the company, except such other insurance when made by the mortgagor or owner shall prove invalid, shall only be liable for a ratable proportion of any loss or damage sustained.
>
> At the request of the assured, the loss, if any, under this policy is hereby made payable to ——— as —— interest may appear, subject to the conditions of the above mortgage clause.

Mortgagees applied for a policy of insurance to be issued in the name of

(*d*) *Re Union Assurance Co.*, 1893, 23 O.R. 627.
(*e*) As to the right of subrogation, see also § 5, *infra*.

the mortgagor. The policy was so issued in the name of the mortgagor, loss, if any, payable to the mortgagees, and subject to a mortgage clause. The premiums were paid by the mortgagor. A fire occurred and the insurance company paid the mortgagees the amount of the policy. The mortgagor claimed to have the mortgage discharged as being satisfied by the insurance money; the insurance company claimed that the mortgagor for certain reasons had forfeited any claim under the policy, that notwithstanding that no liability existed on its part to the mortgagor it had paid the insurance money to the mortgagees upon the condition that it should be subrogated to the rights of the mortgagees as provided by the mortgage clause, and that it was entitled to an assignment of the mortgage. It was held that as the insurance company had failed to shew any good defence as against the mortgagor, it was not entitled to repayment of the money or to be subrogated to the rights of the mortgagee, and that the insurance effected by the mortgagee, was effected for the benefit of the mortgagor, the payment consequently enuring to the benefit of the latter (*f*). In other words, the insurance company's right of subrogation depends upon the validity of its defence as against the mortgagor.

An insurer entitled to subrogation may recover from the assured not only the amount of any compensation or the value of any benefit received by the assured in excess of his actual loss, but also the full value of any rights or remedies against third persons which have been renounced by the assured and to which, but for such renunciation, the insurer would have been entitled to be subrogated (*g*).

The mortgage clause does not effect a new insurance in favour of the mortgagee. The insurer thereby agrees with the mortgagee that to the extent of his interest the insurance will not be invalidated by future act or negligence of the mortgagor, but the insurer is not debarred from setting up that the insurance was procured by fraud and therefore void *ab initio* (*h*).

It has been said that the mortgage clause constitutes a contract between the insurance company and the mortgagee, and that consequently the mortgagee's right to sue upon the policy without joining the mortgagor does not rest solely upon the clause providing that the loss, if any, shall be payable to the mortgagee as his interest may appear (*i*). The case in which this opinion was expressed was reversed on appeal on the ground that in any event the mortgage clause did not protect the mortgagee against the consequence of misstatements made by the mortgagor in the application for the insurance. Such misstatements rendered the original insurance void, and a subsequent renewal by way of renewal receipt was likewise a nullity (*j*).

5. Insurance in the name of the mortgagee.

A mortgagee, unpaid vendor or other person having a limited interest in

(*f*) *Bull* v. *North British Canadian Investment Co.*, 1888, 15 A.R. (Ont.) 421, affirmed, 1889, 18 Can. S.C.R. 697, Cameron, S.C. Cas. 1. In the Supreme Court of Canada Taschereau and Gwynne, JJ., expressed the opinion that the interest of the mortgagees was the same as if they were assignees of a policy effected with the mortgagor.

(*g*) *West of England Fire Insurance Co.* v. *Isaac*, [1897] 1 Q.B. 226.

(*h*) *Omnium Securities Co.* v. *Canada Fire and* [illegible]*ual Insurance Co.*, 1882, 1 O.R. 494.

(*i*) *Agricultural Savings and Loan Co.* v. *Liver*[illegible]*etc., Insurance Co.*, 1901, 3 O.L.R. 127, at p. 141. See § 3 *supra*, as to the effect of the last mentioned clause.

(*j*) *Liver*[illegible]*ool and London and Globe Insurance Co.* v. *Agricultural, etc., Co.*, 1903, 33 Can. S.C.R. 94.

property may effect insurance either (1) on his own interest merely, or (2) on his own interest as well as the interests of all other persons in the property. For instance, a mortgagee may effect insurance either (1) on his interest as mortgagee, or (2) on the property as a whole, including the equity of redemption. In order that the insurance effected by a mortgagee should cover the property as a whole (*a*) the mortgagee must have intended to insure the interest of the mortgagor as well as his own, and (*b*) the policy must not by its terms be limited to the mortgagee's interest in the property. *Primâ facie* the insurance is intended to cover the property as a whole, but the amount of the premium may make it clear that the risk is more limited. If only the mortgagee's interest is insured, the mortgagee is entitled to receive only the amount to which he is damnified, whereas if the property as a whole is insured, he is entitled to receive the whole amount of the damage to the property to the extent of the insurance, holding the surplus over and above his own loss for the mortgagor (*k*).

If a mortgagee insures the mortgaged property out of his own funds without having any right under the mortgage deed or otherwise to recover the premium from the mortgagor, the insurance is for the benefit of the mortgagee alone, and in the event of loss he is entitled to receive the amount of the policy without giving credit therefor upon the mortgage (*l*), that is, he may hold the money as security for payment of the mortgage debt (*m*)

A contract of fire insurance, like a contract of marine insurance, is a contract of indemnity, and of indemnity only, and the assured, in case of a loss against which the policy has been made is entitled to be fully indemnified but is never entitled to be more than fully indemnified. One of the doctrines adopted in favour of the insurer in order to prevent the assured from recovering more than a full indemnity is the doctrine of subrogation. If an unpaid vendor or a mortgagee insures his interest in property and upon a loss occurring receives the insurance money, and if he afterwards receives the purchase price or the mortgage money, as the case may be, without deduction on account of the insurance, he is liable to the isurer for an amount equal to the insurance money received by him, because he is not entitled to be more than fully indemnified (*n*).

So, if a mortgagee, after the occurrence of damage insured against, is paid by the mortgagor, the mortgagee is not entitled to recover from the insurer upon a policy covering his interest only, because he has not been damnified. If, on the other hand, the mortgagee obtains payment of the whole amount of the mortgage debt from the insurer, the insurer is entitled to be subrogated to the rights of the mortgagee and is entitled to a transfer of the mortgagee's securities (*o*). There can, however, be no right of subrogation unless the mortgagee's claim is wholly satisfied (*p*).

(*k*) *Keefer* v. *Phœnix Insurance Co.*, 1901, 31 Can. S.C.R. 144, at pp. 148, 149, quoting from *Castellain* v. *Preston*, 1883, 11 Q.B.D. 380, at p. 398, and *Insurance Co.* v. *Updegraff*, 1853, 21 Penn. 513, at p. 520.

(*l*) *Russell* v. *Robertson*, 1859, 1 U.C. Chy. Ch. 72; *Dobson* v. *Land*, 1850, 8 Hare 216; *King* v. *State Mutual Fire Insurance Co*, 1851, 61 Mass. 1.

(*m*) See also § 6, *infra*.

(*n*) *Castellain* v. *Preston*, 1883, 11 Q.B.D. 380, especially at pp. 386 ff.

(*o*) *Castellain* v. *Preston*, 1883, 11 Q.B.D. 380; *Smith* v. *Columbia Insurance Co.*, 1851, 17 Penn. 253; *King* v. *State Mutual Fire Insurance Co.*, 1851, 61 Mass. 1.

(*p*) *National Fire Insurance Co.* v. *McLaren*, 1886, 12 O.R. 682.

The case of two persons effecting, in different insurance companies, insurance of the same property in different rights has been stated thus (q):—

"Where different persons insure the same property in respect of different rights they may be divided into two classes. It may be that the interest of the two between them makes up the whole property, as in the case of a tenant for life and remainderman. Then if each insures, although they may use words apparently insuring the whole property yet they would recover from their respective insurance companies the value of their interests, and of course those values added together would make up the value of the whole property. Therefore it would not be a case either of subrogation or contribution, because the loss would be divided between the two companies in proportion to the interests which the respective persons assured had in the property. But then there may be cases where, although two different persons insured in respect of different rights, each of them can recover the whole, as in the case of a mortgagor and mortgagee. But wherever that is the case it will necessarily follow that one of these two has a remedy over against the other, because the same property cannot in value belong at the same time to two different persons. Each of them may have an interest which entitles him to insure for the full value, because in certain events, for instance, if the other person become insolvent, it may be he would lose the full value of the property, and therefore would have in law an insurable interest; but yet it must be that if each recover the full value of the property from their respective offices with whom they insure, one office must have a remedy against the other. I think wherever that is the case the company which has insured the person who has the remedy over succeeds to his right of remedy over, and then it is a case of subrogation."

6. Application of insurance money.

It is provided by the Mortgages Act, R.S.O. 1914, c. 112, s. 6, as follows:—

6.—(1) All money payable to a mortgagor on an insurance of the mortgaged property, including effects, whether affixed to the freehold or not, being or forming part thereof, shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(2) Without prejudice to any obligation to the contrary imposed by law or by special contract, a mortgagee may require that all money received on an insurance of the mortgaged property be applied in or towards the discharge of the money due under his mortgage.

This section was originally passed in 1886 (r), and was based on the English Conveyancing Act, 1881 (s).

Sub-s. 1 is practically declaratory of the mortgagee's right under the English statute, 14 Geo. III,, c. 78, now cited as the Fires Prevention

(q) *North British and Mercantile Insurance Co.* v. *London, Liverpool and Globe Insurance Co.*, 1877, 5 Ch. D. 608 at pp. 583, 584, Mellish, L.J.

(r) 49 Vict., c. 20, s. 9.

(s) 44 & 45 Vict., c. 41. The clause in the English statute is found in connection with various special provisions as to the mortgagee's power to insure, which were substituted for Lord Cranworth's Act (1860), 23 & 24 Vict., c. 145. See § 2, *supra*.

(Metropolis) Act, 1774 (*t*), s. 83, formerly in force in Ontario (*u*). It gives the mortgagee the right, where insurance is effected by the mortgagor, even where there is no covenant on the part of the mortgagor to insure, or a covenant to insure merely but not to assign the policy, to require the money to be applied in making good the loss or damage (*uu*).

Sub-s. 2 confers on the mortgagee a new right, namely, the right to "require that all money received on an insurance of the mortgaged property be applied in or towards the discharge of the money due under his mortgage." The words "without prejudice to any obligation to the contrary imposed by law" have probably lost their significance since the statute 14 Geo. III. c. 78, s. 83, ceased to be in force. The words "special contract" mean a special contract relating to the insurance (*v*). The sub-section presumably refers to insurance money received by the mortgagor, for no statutory provision was needed as to money received by the mortgagee (*w*).

The mortgagee is not at liberty without the consent of the mortgagor to accelerate the times of payment under the mortgage by applying the insurance money in payment of instalments of principal or interest not yet due, but he may apply it in payment of overdue instalments (*x*). On the other hand, subject to a provision in the mortgage to the contrary, he still has the right, which he had before the passing of the statute, to hold the money as he held the policy, as collateral or additional security for the mortgage debt, and he is not bound to apply it towards payment of either principal or interest overdue (*y*).

"Now the Act does not profess to interfere with any right the mortgagee had theretofore possessed to deal with the proceeds of the policy when the mortgage money was overdue. He was not compelled to apply it at all, or if he did apply it he might apply it in such a way as to preserve the full benefit of his contract. The new right or option which is given to him must, I think, be considered as one controlling any right which the mortgagor might otherwise have had to direct the disposition of the insurance received by or paid into the hands of the mortgagee before the mortgage debt becomes due. In effect the option given by the section is either to have the money applied in rebuilding or to have it at once applied in reducing the debt secured by the mortgage. If the latter option is not exercised the money remains in the mortgagee's hands (in those cases in which he has had, apart from the statute, the right to receive it) as it would have done before the Act, and subject to whatever rights or interests the parties by law respectively had therein, and *inter alia* to the right of the mortgagee to make such application of it as he might deem proper to the payment either of principal or of interest, or of both, overdue, or to make no application of it if he should deem it more advisable

(*t*) See *In re Quicke's Trusts, Poltimore* v. *Quicke*, [1908] 1 Ch. 887; *Sinnott* v. *Bowden*, [1912] 2 Ch. 414.

(*u*) This statute, commonly referred to as the Metropolitan Building Act, was held to be in force in Ontario. *Stinson* v. *Pennock*, 1868, 14 Gr. 604; *Carr* v. *Fire Assurance Association*, 1887, 14 O.R. 487. By the Ontario Insurance Act, 1887, 50 V., c. 26, s. 154, it was provided that the statute should not "be deemed to be in force with regard to property in this Province."

(*uu*) *Edmonds* v. *Hamilton Provident and Loan Society*, 1891, 18 A.R. (Ont.) 347, at pp. 354-355.

(*v*) 18 A.R. (Ont.) at p. 355.

(*w*) 18 A.R. (Ont) at p. 368.

(*x*) *Corham* v. *Kingston*, 1889, 17 O.R. 432.

(*y*) *Edmonds* v. *Hamilton Provident and Loan Society*, 1891, 18 A.R. (Ont.) 347, reversing judgment of the Queen's Bench Division on this point, 19 O.R. 677, and disapproving of *Corham* v. *Kingston*, 1889, 17 O.R. 432, in so far as it may be supposed to have decided that the mortgagee was bound to apply the insurance money on principal and interest as they matured.

for the security of his contract not to adopt that course, but to require the mortgagor to make his payments in accordance with his covenants" (*a*).

If the mortgagee receives the insurance money before the time appointed for payment of the money secured by the mortgage he is entitled, nevertheless, to the interest without abatement (*a*).

"He may keep the insurance money by him and sue for arrears, or distrain for them, if he has that power, or he may at his option apply the whole or part of the insurance money to the arrears. It is part of his security, and whenever there is default he may resort to it, or he may resort to his personal or other remedies. Of course, as soon as the debt is reduced to an equality with the insurance money in his hands he must apply the latter *pro tanto* from time to time to subsequently maturing payments. It hardly needs to be added that a mortgagee retaining insurance money in his hands as security for future payments is accountable for any profit he makes with it, and that he ought not to leave it lying idle, but ought, if possible, to concur with the mortgagor in some profitable way of laying it out." (*b*)

In view of the definition of "mortgage" in the Mortgages Act as including "any charge on any property for securing money or money's worth" (*c*), it has been held that s. 6 of the statute is applicable to the case of insurance effected by a purchaser of land with loss, if any, payable to the vendors. Therefore, when the buildings on the land are destroyed by fire, the vendors are entitled to the security of the insurance money, just as before the fire they were entitled to the security of the buildings, but they are not entitled to apply the insurance money in payment of instalments of the purchase money not yet due (*d*).

Mortgaged property was insured in the name of the mortgagor with loss payable firstly to the first mortgagee and secondly to the second mortgagee as their interests might appear. The first mortgagee having received insurance money applied it on the first mortgage and subsequently sold the property under power of sale. It was held that the insurance money was properly applied, the effect being to reduce the first mortgage for the benefit of execution creditors intermediate between the two mortgagees, and that there was no case for marshalling of two funds as between the two mortgagees (*e*).

Under a contract with the owner of a mill and machinery which was subject to three mortgages (the second and third in favour of the same mortgagees), each containing a covenant to insure, the plaintiffs took out the machinery, replacing it with new machinery, reserving a lien thereon for the balance of the price, the lien agreement providing that the mill-owner should insure the machinery for the plaintiffs' benefit. Before any further insurance was effected the mill and machinery were destroyed by fire. It was held, upon the evidence, that the second mortgagees had consented to the purchase of the new machinery upon the terms specified, and, as a result of that finding, that the plaintiffs were entitled, subject to the first mortgagee's claim, to payment of the insurance money on the machinery and to be subrogated to the first mortgagee's rights against the land to the extent to which that insurance money was exhausted by him (*f*).

(*a*) *Edmonds* v. *Hamilton Provident and Loan Society*, 1891, 18 A.R. (Ont.) 347, at p. 357, Osler, J.A.
(*a*) 18 A.R. (Ont.) at p. 350; *Austin* v. *Story*, 1863, 10 Gr. 306.
(*b*) 18 A.R. (Ont.) at p. 367, Maclennan, J.A.
(*c*) R.S.O. 1914, c. 112, s. 2.
(*d*) *Scott* v. *Crinnian*, *supra*.
(*e*) *Midland Loan and Savings Co.* v. *Genitti*, 1910, 36 O.L.R. 163, 30 D.L.R. 52.
(*f*) *Goldie* v. *Bank of Hamilton*, 1900, 27 A.R. (Ont.) 619.

Obituary

E. F. B. JOHNSTON, K.C.

It is with deep regret and with a sense of great personal sorrow that we record the death of the late Ebenezer Forsyth Blackie Johnston, K.C., who passed away at his residence on Bernard Avenue, Toronto, on January 29th, in his sixty-ninth year.

On a previous occasion we spoke at some length of the early life and career of this eminent member of the Bar and worthy citizen (*ante* vol. 31, p. 321), and to that article we would refer our readers.

Mr. Johnston was born in Scotland December 20th, 1850, coming to this country whilst still young. Like some others who have achieved distinction at the Bar, he began by teaching school in one of the public schools in the county of Wellington. He subsequently chose the law as his life's work, and began practice in the town of Guelph.

Called to the Bar in 1880, he was created a Queen's Counsel ten years later. Practising in Guelph for three years, he then came to Toronto, where, for four years, he was Deputy Attorney-General and Clerk of the Executive Council, and later was Inspector of Registry Offices for Ontario. Mr. Johnston has been the Honorary President of the Ontario Bar Association, and was a Bencher of the Law Society.

His sound knowledge of business methods and his astuteness in commercial affairs, naturally resulted in his being placed on the boards of various banks and companies, but it is with the commanding position he occupied in the legal fraternity that we are more intimately concerned. Whether for the Crown or the defence he was equally painstaking and thorough, both in the preparation of his cases and in his argument, and the remarkable success which followed him was due, undoubtedly, in a large measure to these characteristics. During a great part of his legal career he was looked on as one of our best criminal lawyers. To his telling manner of placing a case before a jury, and his skilful methods of cross-examination were largely due his success in the well-known cases—in which he acted for the defence—of Clara Ford, Hyams, Sifton, Sternaman and Hammond; whilst he was equally well known in those—in which he took the Crown's case—of the Welland dynamiters, Queen v. Harvey, Queen v. Day, and Queen v. Brennan. There will also be remembered his counsel work in the libel action of Sir Geo. Foster against Dr. J. A. Mac-

donald, the Gamey charges, the constable case, and the grocers combine. His address to the jury in the Foster v. Macdonald case has been described as one of the most brilliant ever given in the Ontario Courts.

One of our High Court Judges, in referring to Mr. Johnston, said: "He had a keen appreciation of the turning point in a case. His cross-examination was masterly, and more than once I have seen a case won by a short cross-examination of an important witness."

Like some other leading members of our Bar in the past, Mr. Johnston's experience, knowledge and kindly friendship were always at the service of younger members of the profession. He was always ready to advise and help, and those who knew him best will feel his loss most.

Mr. Johnston's devotion to his legal work did not interfere with his literary and artistic instincts, which were keen and comprehensive, but his success in his chosen profession will be an inspiration to those who desire success honestly earned by honest work.

A. H. F. LEFROY, K.C., M.A.

We have also to record the death of Mr. Lefroy, whose name is well known as that of a writer of repute on questions of constitutional and international law.

Mr. Lefroy was born in Toronto on June 21, 1852, the son of General J. H. Lefroy, K.C.M.G., his mother being a daughter of Chief Justice Sir John Beverley Robinson. He was educated in England at Rugby and Oxford. He was called to the Bar in England in 1877, and to the Ontario Bar in 1878. Mr. Lefroy was Professor of Roman Law and Jurisprudence in the University of Toronto. He was the author of several valuable works on constitutional law, and wrote numerous articles of a legal literary character which appeared in the *Law Quarterly Review* and other publications.

Mr. Lefroy was a man of much literary ability, and may be regarded as having been one of the foremost academic lawyers in the province. He was for some years an assistant editor of this journal, and latterly was editor of the *Canadian Law Times*. His works on constitutional law have an international reputation, and he has thus left a more enduring title to remembrance than many other members of the profession who may have occupied a more prominent place in the public estimation. We can ill afford in this country to lose lawyers of this stamp—men of

liberal education, and with wider views than are necessary for the grubby grind of everyday practice in a solicitor's office.

Mr. Lefroy's death at a comparatively early age came as a surprise to many, but it would seem that his health had not been good for some time past; and it was his lot to mourn, like so many of our profession, the loss of a son, dying as others of our best and bravest have in the defence of the Empire.

Bench and Bar

Judicial Changes in England.

We learn from *The Law Times* that at last the vacancy created in the Court of Appeal by the acceptance by Lord Sterndale of the Presidency of the Probate, Divorce, and Admiralty Court has been filled by the promotion of Mr. Justice Atkin. No better selection could possibly have been made, for, during the period of nearly six years in which he has sat as a Judge of first instance, he has amply proved that he possesses in a marked degree those attributes which go to make a good Judge. His successor in the King's Bench is Mr. Greer, K.C., and the choice, we think, will be approved by the profession.

Students at the Front.

The Attorney-General of Ontario has introduced a Bill for the relief of Law Students who have served in the war which provides as follows:—

1. This Act may be cited as The Law Society Act, 1919.

2. Where any person has served in the Canadian Expeditionary Force, or in the Imperial Expeditionary Forces, or in the Naval Forces in the late war, and is in good standing, or has been discharged in good standing, The Law Society of Upper Canada, notwithstanding anything contained in The Law Society Act, The Barristers' Act, The Solicitors' Act, may, in its discretion, by resolution of the Benchers in Convocation assembled, shorten the period for which such person would otherwise be required to stand upon the books of the Society before being called to the Bar.

3. Notwithstanding anything contained in the said Statutes, or in the Articles of Clerkship by which an articled clerk is bound to serve, the Society may, in like manner, and in such cases, in its discretion, shorten the time of service under such Articles, and any such resolution shall be a complete discharge of such articled clerk from the obligations of such Articles for any time in excess of such shortened period.

4. Notwithstanding anything in the said statutes, the said Society may in like manner authorize such of the aforesaid persons as they may deem proper who were not articled before joining any such Forces, to enter into Articles of Clerkship for such shortened period as they may deem proper in each case.

5. The Benchers may make such rules as they may deem necessary for the better carrying of this Act into effect.

Law Society of Alberta.

The twenty-second convocation was held at Edmonton on the 7th, 8th and 9th days of January, 1919.

The Benchers present were:—

Messrs. James Muir, K.C., LL.D., President, in the Chair; C. F. P. Conybeare, K.C., D.C.L., Vice-President; R. B. Bennett, K.C.; A. H. Clarke, K.C.; J. C. F. Bown, K.C.; Frank Ford, K.C., D.C.L.; A. F. Ewing, K.C.; C. C. McCaul, K.C.; W. A. Begg, K.C.

The following information is extracted from the Secretary's report:—

Numbers of Barristers and Solicitors on the rolls at 31st December, 1918, 743; number added during half year, 10.

Of these the following were students-at-law of the Society, who had been admitted to the Bar pursuant to the rules:

Samuel Bacon Hillocks, Wilfred Gustave Soltau, John Vaselenak, Vernon Elgin Way, B.A.; Frederick Ten[illegible]son Congdon, K.C.; Orrin Henry Eyres Might.

The following were admitted from other Provinces:—Robert Howarth, English solicitor; Lawrence Edward Ormond, Nova Scotia Barrister and Solicitor; John Harris, Scotch Solicitor; Jean Baptiste Dalphond, admitted from the Province of Quebec.

Total number in active practice, including members kept in good standing while on active service without payment of annual fee, 488. Number of students enrolled during half year, 20. Number of conditioned students, 1.

The following Barristers and Solicitors have been reported during the half year as killed in action, died of wounds or missing on active service:—

Stanley Donald Skene, Calgary; William Jermy Jephson, Calgary; John Douglas Hazelton, Olds; Frank James Ap'John, Edmonton; Robert William Cassels, Edmonton; Charles Arnold Grant, K.C., Edmonton.

The following Barristers and Solicitors have died during the half year:—

Clare Montrose Wright, Calgary; William Brooks Waters, Calgary; Louis Dorais Methot, Pincher Creek; Joseph Edward Caldwell, Moose Jaw, Sask.; Thomas Sydney McMorran, Regina, Sask.

The following resolutions were passed:—

Resolved, that in the opinion of the Benchers of the Law Society of Alberta in Convocation assembled the question of judicial salaries should receive early consideration and that such increases should be made as will render the salaries adequate for the support and maintenance of the Judges and their families according to the dignity of their positions; the scale recommended by the Canadian Bar Association at its meeting in Montreal last summer meets with our approval, and further, that by reason of the volume and importance of the litigation now being dealt with in the Western Provinces and of the high cost of living in the West, the salaries to the Judges in these Provinces should be as great as those paid in any of the older Provinces.

Resolved, that Dr. C. F. P. Conybeare be appointed a committee of one to obtain suggested designs and estimated cost of erecting duplicate tablets in the Edmonton and the Calgary Court Houses to the memory of the members of this Society who have fallen in the war, and report to next Convocation.

Resolved, that Wednesday the 2nd day of July, 1919, at the Banff Springs Hotel, Banff, at 10 o'clock a.m. be fixed as the time and place for the holding of the next meeting of Convocation.

JAMES MUIR, President.

CHARLES F. ADAMS, Secretary.