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THE EFFECT OF FORECLOSURE AS REGARDS A COLLATERAL SECURITY.

A somewhat interesting question for mortgagees is discussed in the recent decision of the Supreme Court of Canada in *Isman v. Sinnott*, 61 S.C.R. 1.

The facts appear to have been as follows: The plaintiff purchased the Kamsack hotel from the defendant, and transferred to him as security for the balance of the purchase money a first and third mortgage due by one Yandt on another property, being the Redvers hotel; and as "collateral security" he also gave the defendant a mortgage on the Kamsack hotel, payable at dates corresponding with the respective dates of payment of the two Yandt mortgages on the Redvers hotel. The mortgages having become in default the defendant, it is said, foreclosed the first Yandt mortgage on the Redvers hotel, and subsequently sold the property comprised therein. The plaintiff then brought the present action upon the covenant in the "collateral" mortgage and the Judge at the trial gave judgment dismissing the action, which was reversed by the Court of Appeal of Saskatchewan. This latter judgment was reversed by the Supreme Court of Canada but the judgment of the Judge at the trial dismissing the action was not restored but, the judgment was varied by declaring that on payment of the third mortgage by which is meant, we presume, the so-called "collateral" mortgage, the defendant was entitled to a discharge of the mortgage on the Redvers hotel property, being the property included in the first mortgage that was foreclosed.

The true result of what took place was apparently that as to the two Yandt mortgages the plaintiff was a derivative mortgagee, and as to the so-called "collateral" mortgage he was an original mortgagee. The foreclosure of the derivative mortgage seems necessarily to involve the foreclosure of the equity of redemption

in all the securities held by the mortgagee, and the notion that this case seems to sanction, that a part only of a mortgagee's security may be foreclosed, is, we believe, altogether novel.

Where a mortgagee after foreclosure sues on the covenant for payment he *ipso facto* reopens the foreclosure, and this he can only do when he is in a position to reconvey the whole security on payment.

Mr. Justice Anglin seems to consider each mortgage to be a distinct and separate security, and to be properly the subject of a separate foreclosure, and to treat the inability to reconvey arising from the sale of one of the properties covered by one of the mortgages as only debarring the mortgagee from reopening the foreclosure as to that particular mortgage; but not as affecting his rights to reopen the foreclosure as to the property, or covenants, contained in the others; but if the security is indivisible for the purpose of redemption by the mortgagor, it would seem to be equally indivisible for the purpose of enforcing payment by the mortgagee, their rights are surely reciprocal.

With great respect to the learned Judges of the Supreme Court we venture to doubt the correctness of the principles on which its judgment proceeds, viz., that a foreclosure may be had of part of a security, leaving it open to the mortgagee to sue on a covenant contained in a so-called "collateral" security. The well understood principle is that on a foreclosure the mortgagee takes the security for his debt, and it bars his right to sue on his mortgagor's covenant, unless he is in a position to restore him the mortgage security in its entirety. But there is another principle which seems to have been overlooked in the case in question, which we think is equally well understood and unimpeachable, viz., that a foreclosure involves a foreclosure of the equity of redemption of the mortgagor in all securities held by the mortgagee. A foreclosure of part of his securities is, we think, a procedure hitherto unknown in equity. A mortgagee's securities for his debt are not divisible: all are redeemable or none. The effect of the foreclosure of the so-called principal mortgage, if the proceedings were properly conducted, appears to us to have worked not only a foreclosure of that one particular security, but of all securities

held by the mortgagee for his debt, all of which on redemption he would have been ordered to reconvey. So that if this is the right legal result of what took place, the mortgagor's equity of redemption had not only been barred in the first and second mortgages but also in the so-called collateral mortgage, assuming the foreclosure proceedings to have been properly conducted, because all securities were necessarily involved in the foreclosure of any one of them.

The calling of one of the mortgages "collateral" did not alter its true character, and it was really as far as the mortgagee and mortgagor were concerned just as much a principal security as either of the others. The three mortgages together constituted the mortgagee's security for his debt, none of which as we have said could be redeemed by the mortgagor without the others. Now, having foreclosed his security, the plaintiff took the properties comprised in the three mortgages for his debt, and could only reopen the foreclosure if he were in a position to restore all the securities to the mortgagor, this he was not in a position to do, and therefore, according to the well understood principles to which we have referred, he was not in a position to reopen the foreclosure, or to sue on any covenant for the payment of his debt.

It is possible that there may be something in the case which does not appear in the report, but as far as the report goes, with great respect to the Supreme Court of Canada, it does appear to us that the judgment of the Judge at the trial was correct and that the mortgagee's right to sue on the covenant contained in the so-called collateral mortgage was, in the circumstances, barred.

GERMAN REPARATION PROCEDURE.

The *Law Times* in a recent issue (vol. 151, p. 250) publishes the Rules of the Supreme Court, as promulgated by the Lord High Chancellor of England as to procedure for relief under the German Reparation (Recovery) Act, 1921. These Rules, subject to special provision as to where proceedings are to be commenced and as to service of notice of proceedings, are to follow the usual practice of the Courts where the action is brought.

PRIVY COUNCIL APPEALS.

In the discussions on this subject which arise occasionally, and are generally led by those with whom the Privy Council have not agreed, consideration is devoted to purely subjective arguments.

How should we regard the question; how does it affect our autonomy, our self respect, or our pockets? These are the only queries propounded. Does it ever occur to those concerned that there are other matters which might legitimately be considered?

First of all, let us clear the ground of some cant and also of some phrases. No one belonging to the British Empire can possibly urge legitimately that a right of appeal which is not imposed on us, and which we may abolish at any moment, can, while we permit it to exist, infringe or affect our autonomy. Consequently to raise that cry is pure nonsense. What about our self respect? Admittedly the English system of law, both as a body of jurisprudence and as a school for the scientific application of it to human affairs, is unrivalled. We have copied it here and we cannot honestly say that we have either improved on it or forestalled its successive advances. It is small wonder then that the Judges educated under it and practising its methods have attained a wide world renown unequalled by any body of jurists elsewhere, even in Canada. No one denies this, and it is hard to see why it should hurt our self respect that appeals from our Courts should go to a tribunal which we all agree is of the highest learning and ability. It is not really our self respect that is injured, but our false pride that because we have emerged into the world arena we must assert that we are sufficient unto ourselves in every way whether we really are or not. The fact remains that a man may be a good lawyer in the ordinary sense of the term, and yet he may not be a fully educated man, able to cope adequately with problems in constitutional, economic and international law, whose solution calls for wide reading and much study. We do not profess, in Canada, to educate our lawyers in any of these directions. Civilian or Roman law and constitutional law are unknown to our students. The study of comparative legislation in its con-

stitutional learning, and its necessity in the framing or understanding of economic and social legislation, is absolutely outside any Canadian law school. We cannot expect to turn out men who are the equals of those whose university training rounded out by the traditions of the English Bench and Bar incline to master and solve their problems. We have a Bench in Canada whose brains are able and alert and in its ranks are some who are equals of the best of the British judges. But we cannot at present assert that of all, though in the future when we have turned our attention to a closer acquaintance with jurisprudence as a science and to historical developments we will admit no superiors. Yet it is in the present that we seek to abolish the right of citizens, not of lawyers, to resort to the best trained and most enlightened and learned Court in the world. We may be able to do so later on with a clear conscience, but not just yet.

It may be said with apparent justice, that this criticism can hardly be true, because Canadian barristers argue the majority of important cases before the Judicial Committee. But is not that somewhat beside the mark? The counsel who equip themselves to plead before the Privy Council will not accept a seat on a poorly paid Bench, nor take a position which has now become that of a man-of-all-work for the politicians. It cannot be ignored that the legislation compelling Judges to act, against their will, upon commissions and enquiries, often born of party tactics, has taken away their independence and lowered the position of the Bench, and will impair its prestige in the eyes of the public.

Now, has the Judicial Committee no effect as a tonic and an example to our Bar and to our Bench? In no Court does one find more courtesy, more patience, more real acquaintance with the facts and appreciation of their relative importance, and more desire to apply the law justly and fairly.

The unconscious influence upon our Bar of the seemingly traditions of the English Bench and Bar of candour, directness and lucidity, has been enormously beneficial. And it affects not only those who have been privileged to practise before it, but those who have studied in this country under these favoured advocates. But the greatest boon has been that of the unfolding of our national life.

The conflicting powers of the Dominion and our Provinces has been lifted out of the region of local politics and dealt with, rightly or wrongly, upon the basis of pure law and constitutional right and justice. No Canadian can over-estimate the value of the elimination from the settlement of these puzzling questions of the heat and turmoil and bitterness of political struggles. It may well be that in cases which do not involve any large amount of money, an appeal to England should be denied. But that should be only if it might be oppressive to one or other of the litigants. In cases which are important, either because of the amount at stake or because the questions are of grave importance, this reason does not exist.

To speak of an appeal as carrying a cause to the foot of the throne, is to use a metaphor which may become a cause of offence to some. It is not necessary to reinforce sentiment by representing the King as redressing wrongs through his Privy Council. He does not do so in any sense other than that of providing, from that body, a tribunal unexceptional in point of ability and learning, to which his subjects may resort.

One thought still remains. Discussions which have for their object the exact definition of Canada's new status inevitably seek to carve out a definite and separate entity. No other position lends itself to completeness or finality. Anything else is more or less indefinite and hazy. And yet our greatest progress and freedom have been achieved in something other than a precisely expressed and well defined political status.

Is there not a danger that these discussions will give greater hardness of outline to our nationhood and familiarize us too much with the idea of separation?

—VIATOR.

INTERNATIONAL COURT OF JUSTICE.

On the 28th ultimo, the Dominion House of Common went into Committee on the Bill to authorize the ratification and carrying into effect of the protocol of December 16th, accepting the statute for the Permanent Court of International Justice, of December 13th, 1920. On that occasion the Minister of Justice (Hon. Mr. Doherty) explained at length the present position and enlarged upon the provisions of the Bill and the circumstances attending it.

The Bill has since been reported and received its third reading, and, as we write, is before the Senate, and will doubtless in due course receive the Royal assent.

As we have already, through the kindness of Mr. Rowell, K.C., fully discussed the subject, it is unnecessary to enlarge upon it except to give to our readers some of the concluding remarks of Mr. Doherty's speech. He says:—"The desire of the League of Nations in connection with this International Court is to build up a jurisprudence that will result in a more complete system of International Law. After all, the purpose of the establishment of the Court is to provide a method whereby justice may be done between the nations without resort to violence. What is hoped is that it may prove possible to repeat as between nations what history teaches us has happened as between individuals. Before you had Courts regularly administering justice to which individuals might have recourse, and at whose hands they could obtain justice and the vindication of their rights against other individuals, you had the resort to personal violence, each man taking the law into his own hands and endeavouring to vindicate his right by such force as was at his disposal. That is what we have to-day; that is what we have had as between the nations, I suppose, in all time past—a resort to the exercise of force to vindicate rights, real or believed in. The purpose of the Court is to endeavour to provide for the nations, just as the nations themselves have provided for the individual, a method of administering justice and securing to each nation its respective right without the necessity for resort to force."

We understand it is expected that the necessary number of members of the League will ratify the bill before next September, so that the election of the Judges may take place at the next meeting of the Assembly at Geneva, which has been called for the 5th of September next.

RESPONSIBLE GOVERNMENT.

This country when parental care was withdrawn was given Representative Government, which was, and is fundamental. Then followed, naturally, Responsible Government. The latter was a subject of much discussion and conflict in the early days of Canada, but it came in due course, and it was hoped it came to stay. Some people, however, are now beginning to ask how long can it continue (except in name) if governmental responsibility continues to be more or less ignored? A disintegrating process has come in of late years. In former days, strong men who realized the burden laid upon them accepted it and acted accordingly, and strong governments made a strong and robust country.

In these days when difficult questions arise, and have to be tackled, there is a tendency on the part of those who have to solve them to get rid of them by popular vote, by means of a referendum, or else by a Commission, appointed to advise the government what to do or not to do. The duly elected representatives of the people are passed by and the government, if a storm arises, seeks to shelter itself behind a so-called vote of the people (which after all is commonly a vote of the minority of the people) or behind the report of a Commission. It is usual to appoint a Judge as one of the commissioners in the hope that his judicial robes will form an additional shelter. These however have begun to look the worse for wear, and now their tatters fail to cover the nakedness of the false position of their owners and cease to be any protection to those who sought their shelter.

The divine injunction, so far as human affairs are concerned, is to bear one another's burdens, and this we ought to do; but, most certainly, we are expected to bear our own; and, in regard to their burden and responsibility, those who have voluntarily

undertaken to do duty to their country have no right to hand their responsibilities over to some other fellow and seek to make him a scapegoat.

These remarks are general observations. Our readers will have no difficulty in applying them specially in these days of "standing from under."

CHILDREN OF ROYALTY AS COMMONERS.

His Royal Highness Prince Henry, who attained his majority on the 31st ult., and on whom a Knighthood of the Garter has been conferred, shares with Sir Robert Walpole (afterwards first Earl of Orford), the famous Prime Minister; Lord Palmiston, who, although the holder of an Irish peerage, sat as Prime Minister for a British constituency in the House of Commons; and Sir Edward (Viscount) Grey the distinction of being one of the few commoners who have been made Knights of the Garter. The status of Prince Henry, who, although a younger son of the Sovereign, is a commoner—whatever titles he bears are simply titles of courtesy which carry with them no political privileges above other commoners—is an object lesson in the doctrine, on which Professor Freeman laid stress, that in strictness we have no nobility. "As the children of the peer," he wrote, "have no special advantage, so neither have the younger children of the King himself. The King's wife, his eldest son, his eldest daughter, his eldest son's wife, all have special privileges by law. His other children are simply commoners unless their father thinks good to raise them, as he may raise any other of his subjects, to the rank of peerage. There is perhaps no feature in our Constitution more important and beneficial than this, which binds all ranks together, and which has hindered us from suffering at any time under the curse of a noble caste. Yet this marked distinction between our own Constitution and that of most other countries is purely traditional." Professor Freeman in a note further explains and expounds this position. "As the law of England knows no classes of men except peers and commoners, it follows that the younger children of the King—the eldest is born Duke of Cornwall—are, in strictness of speech,

commoners unless they are personally raised to the peerage. I am not aware that either case has ever arisen, but I conceive there is nothing to hinder a King's son, not being a peer, from voting at an election or from being chosen to the House of Commons, and I conceive that if he committed a crime he would be tried by a jury. Mere precedence and titles have nothing to do with the matter, though probably a good deal of confusion arises from the very modern fashion—one might almost say the modern vulgarism—of calling all the children of King or Queen 'Princes' and 'Princesses.' As late as the time of George II. uncourtly Englishmen were still found who eschewed the foreign innovation, and who spoke of the Lady Caroline and the Lady Emily as their fathers had done before them." The intimation of a desire by Her Royal Highness Princess Patricia of Connaught to be known on her marriage as the Lady Patricia Ramsay is in itself a welcome return to the older practice.—*The Law Times*.

ARBITRARY WORD AS TRADEMARK.

An interesting discussion on this subject appeared as an annotation in a recent number of the Dominion Law Reports which we reproduce for our readers as follows:—

The questions already raised in the case there reported (*American Druggists Syndicate v. The Centaur Co.*) were the subject of annotation in the case of *Rubberset Co. v. Boeckh Bros. Co. Ltd.* (1919), 49 D.L.R. 13.

The most complete statement of the law with respect to the possibility of sustaining a trademark for the name of a new article is given by Fry, J., in *Linoleum Mfg. Co. v. Nairn* (1873), 7 Ch.D. 834, where he said, at p. 836: "In the first place, the plaintiffs have alleged, and Mr. Waiton has sworn, that having invented a new substance, namely the solidified or oxidised oil, he gave to it the name of 'Linoleum,' and it does not appear that any other name has ever been given to this substance. It appears that the defendants are now minded to make, as it is admitted they may make that substance. I want to know what they are to call it? This is a question I have asked but I have received no answer; and for this simple reason that no answer could be given, except that they must invent a new name. I do not take that to be the law. I think that if 'Linoleum' means a substance which may be made by the defendants, the defendants may sell it by the name which that substance bears. But then it is said that although the substance bears this name, the name has always meant the manufacture of the plaintiffs. In a certain sense that is true. Anybody who knew the substance, and knew that the plaintiffs

were the only makers of this substance, in using the word, knew he was speaking of a substance made by the plaintiffs, but, nevertheless, the word directly or primarily means solidified oil. It only secondarily means the manufacture of the plaintiffs, and has that meaning only so long as the plaintiffs are the sole manufacturers. In my opinion, it would be extremely difficult for a person who has been by right of some monopoly the sole manufacturer of a new article, and has given a new name to the new article, meaning that new article and nothing more, to claim that the name is to be attributed to his manufacture alone after his competitors are at liberty to make the same article. It is admitted that no such case has occurred, and I believe it could not occur; because until some other person is making the same article, and is at liberty to call it by the same name, there can be no right acquired by the exclusive use of a name as shewing that the manufacture of one person is indicated by it and not the manufacture of another."

Following this statement of the law, Fry, J., referred to the case of *Braham v. Bustard* (1863), 1 H. & M. 447, 71 E.R. 195, where the words "Excelsior White Soap" were in question as applied to a new white soft soap, which had been invented by the plaintiffs, and held to be a good trademark. He discusses this case in the following terms, 7 Ch.D., at p. 838: "Now here, as I pointed out, the plaintiffs having invented, or their predecessors in title having invented, a new subject-matter, use merely the name distinguishing that subject-matter, but do not use a name distinguishing that subject-matter as made by them from the same subject-matter as made by other persons. The two cases are essentially different."

A number of names for drugs and medicines in the French Courts have been held not to be good trademarks. (See Allart, *Des Marques de Fabrique*, 1914, at 68, where the following, among many, were held not to be good trademarks: "Chloralose," "Antipyrène," "Lactopepine," "Vaseline," "Glycero-Kola," "Sirop Pegliano," "Glycerophosphine," "Phenosalyl," "Adrenaline," "Pyramidon," "Peptofor Perles d'ether.")

The *Linoleum* case, 7 Ch.D. 834, above quoted, has been followed in nearly all succeeding English cases on the same subject-matter, and has never been overruled or in any way limited. The other judgment of Fry, J., to the same effect in *Sigert v. Findlater* (1878), 7 Ch.D. 801, was followed by Lord Davey in *Cellular Clothing Co. v. Maxton and Murray*, [1899] A.C. 326, which was quoted at length in the judgment of the Appellate Division of the Ontario Supreme Court, in *Rubberset Co. v. Boeckh Bros. Co., Ltd.*, 49 D.L.R. 13 46 O.L.R. 11.

The doctrine laid down in the *Linoleum* case was adopted and approved by the United States Court, in *Singer Mfg. Co. v. June Mfg. Co.* (1894), 163 U.S. 169, in which the American, English and French authorities were all discussed.

Similar facts to those that issue in the foregoing case were in question in a corresponding United States case, the situation differing, however, in that in the United States, a patent had been taken out on the medicine "Castoria," whereas in Canada no patent had been taken out. The case reached the Court of Appeal, in the United States, under the title of *Centaur Co. v. Heinsfurter* (1898), 84 Fed. Rep. 955, at 957, in which part of the judgment

read: "It matters not that the inventor coined the word by which the thing has become known. It is enough that the public has accepted that word as a name of the thing for thereby the word has become incorporated as a noun into the English language, and the common property of all. (*Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169.)" And at page 959: "That the word 'Castoria' has become the one name by which this medicine is generally known, does not admit of doubt. The testimony make this perfectly clear. No other name is suggested by which the article is called. It is universally bought and sold as 'Castoria' and not by any other name. Indeed, the Court might almost take judicial notice of this fact."

The doctrine of the *Linoleum* case has been quite recently explained in the *Chocaroons* case, which is perhaps the most recent case in Great Britain dealing with this class of trademark, viz: *Re Williams Ltd.* (1917), 34 R.P.C. 197, 33 T.L.R. 199, in which Warrington, L.J., said, at p. 204: "The danger of allowing the name given to a new article to be registered as a trademark is that the article may become known and popular under that name, and other persons, though they have a right to make and sell the article, are practically debarred from doing so, because the public would refuse to buy it unless sold under the name by which they know it. The owner of the trademark may thus obtain a monopoly in the goods by having the exclusive right to use the name. (See *per Parker, J.*, in the case of *Philippart v. William Whitely Ltd.*, [1908] 2 Ch. 274, 25 R.P.C. 572.) In my opinion on the evidence it is clear that the word has been used, and is proposed to be used, as the name of the article put upon the market by the applicants under that name, and not *bonâ fide* for the purpose of distinguishing the applicant's goods from those of other makers."

The United States Supreme Court discussed this in the case of *Holzapfels Co. v. Rahtjen's Co.* (1901), 183 U.S. 1, where there was a British, but no United States, patent on paint for ship's bottoms. Part of the judgment read, *per Peckham, J.*, at p. 9: "This way of designating the composition was employed by Rahtjen, in Germany, for his own sales and Suter, Hartmann & Co. simply copied his method of describing the same. How else could this article thereafter be described? When the right to make it became public, how else could it be sold than by the name used to describe it? And when a person having the right to make it described the composition by its name and said it was manufactured by him, and said it so plainly that no one seeing the label could fail to see that the package on which it was placed was Rahtjen's composition, manufactured by Holzapfel & Co., or Holzapfels' Composition Company (Limited), how can it be held that there was any infringement of a trademark by employing the only terms possible to describe the article, the manufacture of which was open to all? Of necessity when the right to manufacture became public the right to use the only word descriptive of the article manufactured became public too."

(See, also, "Valvoline" for oil, in *Re Leonard & Ellis's Trade Mark* (1884), 26 Ch.D. 288. "Haematogen" for a chemical product, in *Re Hommel v. Bauer & Co.* (1904), 22 R.P.C. 43, 21 T.L.R. 80. *In re Magnolia Metal Co.*, [1897] 2 Ch. 371, 391.)

On the other hand, the following words have been supported as trademarks, some of them as being fancy words: "Bovril," [1896] 2 Ch. 600, 13

R.P.C. 382; "Solio," [1898] A.C. 571, 15 R.P.C. 476; "Vaseline," [1902] 2 Ch. 1, 19 R.P.C. 342; "Chartreuse," [1910] A.C. 262, 27 R.P.C. 288, "Alundum" (1919), 36 R.P.C. 153; "Lactobaciline" (1912), 29 R.P.C. 497, "Microbe Killer" (1897), 23 O.R. 612; "Tabloid," [1904] 1 Ch. 736, 21 R.P.C. 217; "Painkiller" (1867), 13 Gr. 523; "C.A.P." (1902), 4 O.L.R. 545; "Gripe Water" (1915), 32 R.P.C. 173, 85 L.J. (Ch.) 27; "Fruitatives" (1912), 8 D.L.R. 917, 14 Can. Ex. 30; "Tachytype," [1900] 2 Ch. 238, 17 R.P.C. 380.

In the matter of the *Farbenfabriken Trade Mark, Somatose* (1893), 11 R.P.C. 84, the majority of the Court held that the word "Somatose," used as the name of a pharmaceutical product, was descriptive and therefore not a good trademark; Lindley, L.J., dissented and in his opinion said: "If a person selects as a trademark for his goods a word which no one has ever heard of before, no injury is done to any one simply because he is prevented from taking the same word to designate his goods. The inconvenience, moreover, is not so great as represented. No one would care to register as a trademark a new word, which would not be likely to attract customers, and be remembered. A good catch word is what is wanted, and this practically limits the choice of new words."

In the *Solio* case, *Eastman etc., Co. v. Comptroller-General of Patents, etc.*, [1898] A.C. 571, 15 R.P.C. 476, Lord Herschell, referring to, and disapproving the *Somatose* case, said, [1898] A.C., at 580-581: "The vocabulary of the English language is common property; it belongs alike to all; and no one ought to be permitted to prevent the other members of the community from using, for purposes of description, a word which has reference to the character or quality of the goods . . . But with regard to words which are truly invented words—words newly coined—which have never theretofore been used, the case is, as it seems to me, altogether different; and the reasons which required the insertion of the condition are altogether wanting. If a man has really invented a word to serve as his trademark, what harm is done, what wrong is inflicted if others be prevented from employing it, and its use is limited in relation to any class or classes of goods to the inventor? . . . An invented word is allowed to be registered as a trademark, not as a reward of merit, but because its registration deprives no member of the community of the rights which he possesses to use the existing vocabulary as he pleases."

In *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* (1887), 32 Fed. 94, at 98, Bradley, J., of the Supreme Court of the United States, said: "As to the complainant's alleged right to the exclusive use of the word 'celluloid' as a trademark, and the defendant's alleged imitation thereof. On this branch of the case, the defendant strenuously contends that the word 'celluloid' is a word of common use as an appellative, to designate the substance celluloid, and cannot, therefore, be a trademark; and, secondly, if it is a trademark the defendant does not infringe it by the use of the word 'cellonite.' As to the first point, it is undoubtedly true, as a general rule, that a word merely descriptive of the article to which it is applied cannot be used as a trademark. Everybody has a right to use the common appellatives of the language, and to apply them to the things denoted by them. A dealer in flour cannot adopt the word 'flour' as his trademark, and prevent others from applying it to their packages of flour. I am satisfied from the evidence adduced before me that the

word 'celluloid' has become the most commonly used name of the substance which both parties manufacture, and, if the rule referred to were of universal application, the position of the defendant would be unassailable. But the special case before me is this: The complainant's assignors, the Hyatts, coined and adopted the word when it was unknown, and made it their trademark, and the complainant is assignee of all the rights of the Hyatts. When the word was coined and adopted, it was clearly a good trademark. The question is whether the subsequent use of it by the public, as a common appellation of the substance manufactured, can take away the complainant's right. It seems to me that it cannot."

The word "Fruitatives" was held to be a valid trademark, *Fruitatives Ltd. v. La Compagnie, etc.*, 8 D.L.R. 917, 14 Can. Ex. 30.

In *Linotype Co.'s Trade Mark case*, [1900] 2 Ch. 238, 17 R.P.C. 380, the Linotype company of England was permitted to register the word "Tachytype" although it was a name invented by an American company which permitted the Linotype company to use it in England, apparently retaining the right to use the name in the United States.

In some instances a secondary meaning has been held to have been established for words which, in their primary sense, would be descriptive, or not supportable as a trademark.

In *Reddaway v. Banham*, [1896] A.C. 199, at 212, 13 R.P.C. 218, Lord Herschell said: "Lord Westbury pointed out that the term 'Glenfield' had acquired in the trade a secondary signification different from its primary one; that in connection with the word starch it had come to mean starch which was the manufacture of the plaintiff," and also [1896] A.C. at p. 210: "The names of a person, or words forming part of the common stock of language may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves without explanation or qualification by another manufacturer would deceive a purchaser into the belief that he was getting the goods of A. when he was really getting the goods of B."

In *Rey v. Lecouturier*, [1908] 2 Ch. 715, 25 R.P.C. 265, Lord Alverstone, C.J., said (25 R.P.C., at 284): "Had Chartreuse, in the year 1903, acquired, in England, in the liqueur market, a secondary meaning? And if it had acquired a secondary meaning who is entitled to the benefit of the liqueur protected by that secondary meaning?" And continuing, the Lord Chief Justice said: "I have not the slightest doubt that for a great many years before 1901 the word 'Chartreuse' or 'Grande Chartreuse' had acquired in the English liqueur market the secondary meaning that it was a liqueur manufactured by the monks of the monastery."

See also *Provident Chemical Works v. Canada Chemical Co.* (1902), 4 O.L.R. 545 (1902), 3 Com. L.R. 414 as to "C.A.P."; *Bucyrus Co. v. Canada Foundry Co.* (1912), 8 D.L.R. 920, 14 Can. Ex. 35; *Boston Rubber Shoe Co. v. Boston Rubber Co.* (1902), 32 Can. S.C.R. 315; *Montgomery v. Thompson*, [1891] A.C. 217, 8 R.P.C. 361.

As stated above, whether or not a word has acquired a secondary meaning is a question of fact, as in the *Cellular case*, [1899] A.C. 326, at 336, where Halsbury, L.C., said: "It cannot be denied, therefore, under those circumstances, that it was for the appellants to establish if they could, that an ordinary

word in the English language, properly applicable to the subject-matter of the sale, was one which had so acquired a technical and secondary meaning differing from its natural meaning, that it could be excluded from the use of everything else. That is the proposition the pursuers had to make out."

It is easier to prove a secondary meaning where the word is a fancy or invented word; see *per* Lord Davey, in the *Cellular* case, [1899] A.C. 326, at p. 343: "But there are two observations which must be made; one is that a man takes upon himself to prove that words, which are merely descriptive or expressive of quality of the goods, have acquired the secondary sense to which I have referred, assumes a much greater burden—and indeed a burden which is not impossible, but at the same time extremely difficult to discharge—a much greater burden than that of a man who undertakes to prove the same thing of a word not significant and not descriptive but what has been compendiously called a 'fancy' word."

A class of cases which differs somewhat in type from those discussed above, is the so-called *Yorkshire Relish* case in which the trademark was supported largely on the grounds that the infringer did not possess the secret of its manufacture, and, therefore, could not make the same article. *Birmingham Vinegar Brewery Co., v. Powell* [1897] A.C. 710, 14 R.P.C. 720. There Lord Shand said, at pp. 730-731: "When a purchaser came into the market and asked for 'Yorkshire Relish' . . . the result of the purchase was that the plaintiff got the benefit of it and it appears to me under those circumstances the defendants were not entitled, by using the same name for the article, to appropriate those profits . . . I think it has not been made out that there was a direct representation, or that there was such representation by means of the labels, because I have rather felt that the argument . . . that the labels were of the kind sufficiently to distinguish the article was a sound argument. But there remains the fact that this article was called by the name 'Yorkshire Relish,' and in this particular case, whatever may be said of others, it occurs to me that the mere use of the words 'Yorkshire Relish' was a representation that those were the goods manufactured by the plaintiff, for this reason: that the plaintiff had given that name to his goods, he exclusively had made goods of that class; and the public had bought those goods to an extent which had given the plaintiff very large profits . . . It is what may be called a fancy name in its outset and it appears to me to remain the same still. It is not such a case as was put in the course of the argument of a person giving a mere description of the article he makes by describing the materials from which it is made, such as 'whole meal bread,' or the like. A trader who sells whole meal bread could never complain of another coming forward and using the same term. But when 'Yorkshire Relish' is given—not as a description of the article, but as something that would enable persons to identify the article as of the same manufacture as they had before—the very use of the term 'Yorkshire Relish' appears to me to be a representation that the article sold is the article which the plaintiff makes. Therefore, on that ground, as well as upon the ground that this is really not 'Yorkshire Relish' at all, as it was made by the plaintiff, I am of opinion that the judgment of the Court below is sound."

See, also, the remarks by Alverstone, C.J., in *Rey v. Lecouturier*, [1908] 2 Ch. 715, 25 R.P.C. 265, at 284.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

SALE OF GOODS—CONTRACT FOR DELIVERY WITHIN A REASONABLE TIME—ANTICIPATORY BREACH—MEASURE OF DAMAGES—SALE OF GOODS ACT, 1893 (56-57 VICT. c. 71), s. 51 (3)—(10-11 GEO. 5 c. 40, s. 52 (3) ONT.).

Millett v. Van Heek (1920) 3 K.B. 535. This was an appeal from a Referee on the question of the measure of damages where the contract was for delivery of goods within a reasonable time after the removal of an embargo. Before the embargo was removed the defendants repudiated the contract and refused to be any longer bound thereby. Before the embargo was removed the plaintiff commenced these proceedings for the recovery of damages for breach of the contract. The Referee assessed the damages on the basis of the difference in price between the market and the contract price of the goods on the date of the letter of repudiation. A Divisional Court (Bray and Sankey, JJ.), held that the contract was not one for delivery within a fixed time and therefore was not within the Sale of Goods Act, 1893, s. 51 (3), (10-11 Geo. 5 c. 40, s. 52 (3) Ont.), and that that section did not apply to the case; nor does it apply where, as in this case, there is an anticipatory breach: but that the case was governed by s. 51 (2), (52 (2) of Ont. Act): and that the measure of damages was the difference between contract and market price at the date when each delivery should have been made, unless it could be shewn that the plaintiff's could have minimised the loss by entering into a forward contract on the date when the repudiation was accepted.

STATUTORY REGULATION—CONSTRUCTION—FORFEITURE—MONEY—“GOODS.”

Rez v. Dickinson (1920) 3 K.B. 552. In this case the motion was to quash a conviction of forfeiture, for the breach of certain regulations made pursuant to a statute. The regulation in question forbade certain acts involving the use of gold coins other than for currency, and provided that, on breach, the offender in addition to being subject to fine and imprisonment, should also forfeit any “goods” in respect of which the offence had been committed: and the question for the Court was whether the gold coins in respect of which the offence had been committed were “goods” within the meaning of the regulation. A Divisional Court (Bray and Sankey, JJ.) held that they were.

RESTRAINT OF TRADE—CONTRACT OF SERVICE—SEVERABILITY OF COVENANT.

Attnood v. Lamont (1920) 3 K.B. 571. In this case the Court of Appeal (Lord Sterndale, M.R., and Atkins and Younger, L.JJ.) have reversed the decision of the Divisional Court (Bailhache and Sankey, JJ., (1920), 2 K.B. 146 (noted *ante* vol. 56, p. 383), touching the validity of a covenant in restraint of trade. The covenant was entered into by the defendant with the plaintiff, his former employer, as a part of a contract of service and provided that the defendant on leaving the plaintiffs' employment would not enter into, or in any way be party to the carrying on of any of the following trades or businesses within the precincts of Kidderminster, viz.: tailor, dressmaker, general draper, milliner, hatter, haberdasher, gentlemen's, ladies' and children's outfitter. The defendant left the plaintiff's employment and set up trade as a tailor, upwards of two miles from Kidderminster, but received and executed orders from persons in Kidderminster. The Divisional Court held that the covenant was severable, and confined to the business of a tailor, was binding on the defendant. The Court of Appeal on the other hand held that a covenant of the kind is severable, only where it is clear that the covenant is in effect a combination of several distinct covenants; and that in the present case the contract was not severable; and was too wide for the reasonable protection of the plaintiff's business and could not be enforced. The judgment of the Divisional Court was therefore reversed and the action dismissed.

LANDLORD AND TENANT—LEASE—COVENANT TO REPAIR, INSURE AND REINSTATE DEMISED PREMISES—BREACH—IMPOSSIBILITY OF PERFORMANCE—ACT OF STATE.

Curling v. Matthey (1920) 3 K.B. 608. This was an action by a landlord for rent and for breach of a covenant to repair and reinstate demised premises in case of destruction by fire. The term expired on 25th March, 1919. In January, 1918, the Secretary of State for War under the Defence of the Realm Regulations requisitioned the premises as a place of internment for prisoners of war and retained possession until June, 1919. The house on the premises was destroyed by fire on 12th February, 1919. The defendant claimed to have been evicted by title paramount, but Bailhache, J., following *Whitehall Court v. Ettlinger* (1920), 1 K.B. 680, held that that defence was not tenable and therefore that the defendant was liable for rent; but not for breach of the covenant to repair, because the performance of it had been rendered impossible by an act of State.

SALE OF GOODS EX STORE ROTTERDAM—CONGESTED PORT—GOODS
IN LIGHTERS.

Fisher v. Armour (1920) 3 K.B. 614. In this case the construction of a contract for the sale of goods "ex store Rotterdam" was in question. It appeared that the goods in question had arrived in Rotterdam some months prior to the contract consigned to the seller's agents; but owing to the congested state of the port there was no room in any warehouse to store the goods, and they had to be stored in lighters where they were, at and after the date of the contract. In these circumstances Bailhache, J., held that the goods answered the contract; but the Court of Appeal (Bankes and Scrutton, L.JJ., and Eve, J.) were of the opinion that they did not, and reversed his decision.

COSTS — TAXATION — BANKRUPTCY — ORDER FOR BANKRUPT'S
WIFE TO ACCOUNT ON OATH FOR FURNITURE—VALUATION—
VALUER'S FEE.

In re Lavey (1920) 3 K.B. 625. In this case on motion of the trustee a bankrupt's wife was ordered to account on oath for certain furniture and to pay costs of and incident to the motion, and as an indulgence to the wife it was provided that she might buy the furniture at a value to be fixed by an independent valuer. The valuation was made and the furniture bought at the value fixed, and the only question in dispute was whether the valuer's fee was taxable as part of the trustee's costs. Horridge, J., held that it was, and held the case governed by the rule laid down by Mellish, L.J., in *Krebe v. Park* (1875), L.R. 10 Ch. 334, 339, that "where costs of suit were given generally by decree of the hearing, the subsequent costs of working out the directions of the decree will be included."

CRIMINAL LAW—USING INSTRUMENTS TO PROCURE ABORTION—
EVIDENCE OF SIMILAR USE ON ANOTHER WOMAN—ADMISSIBILITY.

The King v. Lovegrove (1920) 3 K.B. 643. This was a prosecution for using instruments on a woman to procure abortion. For the prosecution evidence was adduced to show that the accused had used instruments on another woman also for procuring abortion. The accused was convicted. An appeal from the conviction was brought on the ground that this evidence was inadmissible. The Court of Criminal Appeal (Lord Reading, C.J., and Salter and Acton, JJ.) held that the evidence was rightly admitted.

TAXATION—EXCESS PROFITS—MONEY BORROWED—SHARE OF PROFITS PAID AS PART CONSIDERATION FOR LOAN.

Walker v. Commissioners of Inland Revenue (1921) 3 K.B. 648. This was a case stated, on a question of taxation. The plaintiff firm had borrowed £4,000 for the purposes of their business, and in consideration agreed to pay yearly £200, and 3/20ths of the profits made in excess of £1,000, but not exceeding £3,000. The firm made £3,000 profit and accordingly paid the lenders, in addition to the £200, a further sum of £300 which they contended was in the nature of interest on money borrowed and therefore not subject to taxation as part of excess profits; but Rowlatt, J., refused to accede to this contention and held that the £300 was a distribution of a share of the profits and therefore in calculating the profits made by the firm no deduction ought to be made in respect thereof.

ARMY—PRIVATE SOLDIER—RIGHT OF SOLDIER TO SUE FOR PAY.

Leaman v. The King (1921) 3 K.B. 663. This was a petition of right brought by a private soldier to recover pay claimed to be due to him. The Attorney-General, on behalf of the Crown, demurred. Acton, J., before whom the demurrer was argued, held that all engagements between those in the military service of the Crown are voluntary only on the part of the Crown and give no occasion for an action against the Crown. The demurrer was therefore allowed.

INSURANCE—MOTOR CAB—STATEMENT IN PROPOSAL FOR INSURANCE—"TO BE DRIVEN ON ONE SHIFT FOR 24 HOURS"—STATEMENT MADE BASIS OF INSURANCE—WARRANTY OR DESCRIPTION OF RISK.

Farr v. Motor Traders Mutual Ins'ce Co. (1920) 3 K.B. 669. This was an action on a policy of insurance on a motor cab against accidents. In the proposal for insurance, the assured stated that the two cabs to be insured were each used in one shift of 24 hours—and it was provided that the statements in the proposal were to form the basis of the contract. While the policy was in force, one of the cabs was used in one shift of 48 hours—for a very short time. Subsequently an accident happened to this cab while being used in shifts of 24 hours only. The defendants contended that the statement in the proposal was a warranty that the cabs during the currency of the policy would not be otherwise used, and claimed that the breach had the effect of putting an end to the policy, and therefore that they were not liable in respect of the accident

subsequently occurring. Rowlatt, J., who tried the action, however, held that the statement was not a warranty, but merely descriptive of the risk, indicating that the cab while being driven in more than one shift of 24 hours would cease to be covered by the policy; but that it would be covered whilst being driven as stated. He therefore held the defendants liable.

RAILWAY—CLOAK-ROOM—DEPOSIT OF ARTICLE—DEPOSIT TICKET
—CONDITIONS ON TICKET—NON-COMPLIANCE BY BAILOR WITH
CONDITIONS—NEGLIGENCE IN CUSTODY OF ARTICLE.

Gibaud v. Great Eastern Ry. Co. (1920) 3 K.B. 689. In this case the plaintiff had deposited a bicycle in the defendants' cloak-room. He paid the charge demanded and received a ticket which, on its face, bore a statement to the effect that the company would not be liable for any article deposited whose value exceeds £5 unless the value is declared and a charge of one penny per pound of the declared value was paid. The value of the bicycle exceeded £5, its value was not declared, nor the required charge per pound paid. He was told by the official to leave the bicycle by the open door of the cloak-room and he, the official, would put it away. When the plaintiff returned to claim the bicycle it could not be found. In the County Court judgment was given in favour of the plaintiff for £15, the value of the bicycle, but a Divisional Court (Bray and Sankey, JJ.) reversed the judgment, holding that the plaintiff was bound by the condition on the ticket, which was not unreasonable, nor of such an extravagant character as to justify the conclusion that the plaintiff's assent to it could only have been obtained by fraud.

ADMIRALTY—SALVAGE SERVICES BY KING'S SHIP—MERCHANT
SHIPPING (SALVAGE) ACT, 1916 (6-7 GEO. 5 c. 41), s. 1.

The Morgana (1920) P. 442. This was a claim for salvage service rendered by one of His Majesty's ships under the Merchant Shipping Act, 1916, s. 1, which provides that where salvage services are rendered by a ship belonging to His Majesty and that ship is a ship "specially equipped with salvage plant," notwithstanding anything in s. 557 of the Merchant Shipping Act, 1804, a claim for salvage service is allowable. The ship which rendered the services in question, viz., towing a disabled ship, was in the service of the Post Office, was specially constructed for laying and repairing submarine telegraph cables, and had on board grappling ropes and other gear which could be used for salvage purposes. Hill, J., however, held that it could not be said that the vessel was "specially equipped with salvage plant" within the meaning of the Act, and therefore the claim of the Admiralty was disallowed.

ADMIRALTY—COLLISION—DAMAGES—FOREIGN CURRENCY—RATE OF EXCHANGE.

The Volturno (1920) P. 447. This was an action to recover damages against an Italian ship for collision with a British ship, and the sole point was how the damages in foreign currency should be assessed. Hill, J., held that in case of collision where the damages are assessed in a foreign currency they must be converted into English currency at the rate of exchange ruling at the date with reference to which the damages have to be assessed. Thus, in the present case, the loss suffered by the detention of the vessel during repairs, he held must be assessed with reference to the actual period of detention, and if proved in a foreign currency, must be converted into English currency at the rate of exchange ruling. Strictly speaking, this might vary from day to day, but as the hire was payable fortnightly he fixed those periods for the detention during temporary repairs, and another rate in respect of the time occupied in permanent repairs.

WILL—REAL ESTATE—DEVISE TO ISSUE OF LIVING PERSON WITH REMAINDER OVER—INTERIM ACCELERATION OF ESTATE IN REMAINDER UNTIL ISSUE BORN.

In re Conyngham, Conyngham v. Conyngham (1920) 2 Ch. 495. The point decided by Astbury, J., in this case was, that where an estate is devised to the issue of a living person in tail, with remainder over; until there is actually issue born, there is an interim acceleration of the estate in remainder.

WILL—CONSTRUCTION—LIFE ESTATE TO HUSBAND "KNOWING THAT HE WILL CARRY OUT MY WISHES"—SUBSEQUENT UNATTESTED MEMORANDUM—ENFORCEABLE TRUST.

In re Gardner, Huey v. Cunnington (1920) 2 Ch. 523. This was an appeal from the decision of Eve, J. (1920) 1 Ch. 501 (noted *ante*, vol. 56, p. 395). The facts of the case were somewhat unusual. Elfrida Gardner, by her will made in 1909, gave all her real and personal estate to her husband Herbert for his use and benefit during his life "knowing that he will carry out my wishes." She subsequently made a memorandum in writing setting forth her wishes which was found in her husband's safe after his death, and she also, in her lifetime, made an oral statement as to how the property was to be divided after her death as mentioned in the memorandum, to which he assented. The testatrix died in 1919 leaving £3,000, and her husband survived her. He had therefore under the will a life interest in the £3,000 and as husband of the testatrix he was entitled under the Statute of Distribution to the remainder. Having by her will only pur-

ported to dispose of a life interest, the question was whether the words "knowing that he will carry out my wishes" could be applied to the undisposed of remainder. Eve, J., held that they could not; but the Court of Appeal (Lord Sterndale, M.R., and Warrington and Younger, L.JJ.) held that they could, and that they created a trust which the Court could and should enforce as against the husband's representatives. With all due respect to their Lordships, however, the case seems to sanction what looks very like an evasion of the Wills Act, and in effect gives force to a testamentary paper not executed as required by the Act; although it must be admitted it probably effectuates the true intention of the parties.

LANDLORD AND TENANT—OPTION DURING TERM TO PURCHASE REVERSION—OVERHOLDING—OPTION NOT A TERM OF RESULTING YEARLY TENANCY.

In re Leeds and Batley Breweries, Bradbury v. Grimble (1920) 2 Ch. 548. The neat point decided in this case by Peterson, J., was, that where an option to purchase the reversion during the term is given to a lessee: if the option is not exercised during the term, and the tenant holds over, the option to purchase is not incorporated into the terms of the yearly tenancy created by the tenant overholding.

COMPANY — INSURANCE — WINDING-UP — POLICY MORTGAGED TO COMPANY—POLICY CURRENT AT WINDING-UP—VALUATION OF POLICY—ACTION TO REDEEM—SET OFF—COUNTERCLAIM —BANKRUPTCY ACT 1914 (4-5 GEO. V. c. 59) s. 31—(9-10 GEO. V. c. 36, s. 31 (D).)

Paddy v. Clutton (1920) 2 Ch. 554. This was an action to redeem a policy of life insurance, and for a declaration that the plaintiff was entitled to set off against the amount due to the mortgagee and its sub-mortgagee, the value at which the policy had been valued in the winding-up proceedings which had been instituted against the mortgagee, under the Bankruptcy Act (4-5 Geo. V. c. 59), s. 31 (see 9-10 Geo. V. c. 36, s. 31 (D).) The policy in question had been mortgaged to the company by which it was issued, and the company had sub-mortgaged it to another person. The company having been ordered to be wound up, the policy was valued at £125, 4s.; this sum the plaintiff claimed to set off against the amount due by him on his mortgage; but Russell, J., who tried the action, held that the claim of the plaintiff was not the subject of set off, although it might properly be made the subject of a counterclaim in an action by the mortgagees. The claim to set off was therefore held to be inadmissible.

LAWYERS' LYRICS.

Our readers will be glad to have another short poem of the great lawyer poet of Canada, Hon. Sir John Hawkins Hagarty, Knt., at one time Chief Justice of Ontario, on a subject of world-wide interest. It was especially so to those who lived in the times when the "Tight little Island" forbade the madness of the great warrior who sought to enslave the world, but who met his fate at Waterloo, in 1815, near the spot where the "contemptible little army" beat back the butchers of 1914. Napoleon was at the height of his fame in 1804, but in 1840 his conquerors gave up the body of the exile of St. Helena to be buried with military honours in his native land; and so we are given in classic verse:

THE FUNERAL OF NAPOLEON.

15th December, 1840.

Cold and brilliant streams the sunlight on the wintry banks of
Seine

Gloriously the Imperial City rears her pride of tower and fane—
Solemnly with deep voice pealeth, Notre Dame, thine ancient
chime,

Minute guns the death-bell answer in the same deep measur'd time

On the unwonted stillness gather sounds of an advancing host,
As the rising tempest chafeth on St. Helen's far-off coast;
Nearer rolls a might pageant—clearer swells the funeral strain,
From the barrier-arch of Neuilly pours the giant bu. ial train.

Dark with Eagles is the sunlight—Darkly on the golden air
Flap the folds of faded standards, eloquently mourning there—
O'er the pomp of glittering thousands, like a battle-phantom flits
Tatter'd flag of Jena—Friedland—Arcola, and Austerlitz.

Eagle-crown'd and garland circled, slowly moves the stately car,
'Mid a sea of plumes and horsemen—all the burial pomp of war—
Riderless, a war-worn charger follows his dead Master's bier—
Long since battle-trumpet roused him—he but lived to follow here.

From his grave, 'mid Ocean's dirges, moaning surge and sparkling
foam,

Lo, the Imperial Dead returneth:—Lo, the Hero-dust comes home:
He hath left the Atlantic island, lonely vale and willow tree,
'Neath the Invalides to slumber, 'mid the Gallic chivalry.

Glorious tomb o'er glorious sleepers: gallant fellowship to share—
 Paladin and Feer and Marsbal—France, thy noblest dust is there:
 Names that light thy battle annals—names that shook the heart of
 Earth—

Stars in Crimson War's horizon—synonyms for martial worth:

Room, within that shrine of Heroes: place, pale sceptres of the past;
 Homage yield, ye battle-phantoms: Lo, your Mightiest comes at
 last.

Was his course the Woe out-thunder'd from propetic trumpet's
 lips?

Was his type the ghostly Horseman shadow'd in the Apocalypse?

Grey-hair'd soldiers gather round him, relics of an age of war,
 Followers of the Victor-Eagle, when his flight was wild and far,
 Men who panted in the death-strife on Rodrigo's bloody ridge,
 Hearts that sicken'd at the death-shriek from the Russian's
 shatter'd bridge.

Men who heard th' immortal war-cry of the wild Egyptian fight—
 "Forty centuries o'erlook us from yon Pyramid's grey height:"
 They who heard the moans of Jaffa, and the breach of Acre knew—
 They who rush'd their foaming war-steeds on the squares of
 Waterloo—

They who lov'd him—they who fear'd him—they who in his dark
 hour fled—

Round the mighty burial gather, spell-bound by the awful Dead.
 Churchmen—Princes—Statesmen—Warriors—all a kingdom's
 chief array,

And the Fox stands—crowned Mourner—by the Eagle's hero-clay:

But the last high rite is paid him, and the last deep knell is rung—
 And 'he cannons' iron voices have their thunder-requiem sung—
 And, 'mid banners idly drooping, silent gloom and mouldering
 state,

Shall the trampler of the world upon the Judgment-trumpet wait.

Yet his ancient foes have given him nobler monumental pile.
 Where the everlasting dirges moan'd around the burial Isle—
 Pyramid upheav'd by Ocean in his loneliest wilds afar,
 For the War-King thunder-stricken from his fiery battle-car.

Correspondence.

OCCASIONAL JUDGES.

To the Editor, CANADA LAW JOURNAL:

DEAR SIR,—While some of our Canadian Judges have been "good sports" in their day, they have not had the luck (or otherwise) of Mr. Justice Landis, one of the Judges of a Federal Court in the United States, who secured a berth as Supreme Arbiter of Organized Baseball at a salary of \$42,500 per annum. His impeachment for this alleged inroad into his judicial duties has been asked for.

It would appear therefore that there are other ways in which Judges can add to their limited salaries besides sitting on Commissions. It may be a question whether it is more harmful or more objectionable, on public grounds, for a Judge to spend part of his time and strength (perhaps all of it at times) in promoting clean sport, than as a Commissioner striving to disentangle a dirty mess in the game of party politics caused by squabbles between rival aspirants for timber licenses, which, some say, no honest Government should ever have granted. The evidence, in the Landis case, if it goes further, will be interesting in this regard.

It will also be interesting to see what view the Senate of the United States may take of Judges "accepting outside employment, while serving on the Bench;" and, whether or not, or to what extent, it is consistent with their judicial position to give up their proper work and accept employment which takes up part of their time therefrom. The sympathies of the many sporting men in our profession will probably go out to "Brother Landis."

Yours, etc.,

AMICUS CURIAE.

PRIVILEGES OF JUDGES.

To the Editor OF THE CANADA LAW JOURNAL:

DEAR SIR,—In the *Toronto Globe* of April 27th, 1921, there is a long editorial headed "Judges not law makers." It is practically an attack on Mr. Justice Orde and a defence of the Ontario Temperance Act. The writer of the article seems to think that Mr. Justice Orde is not justified in making observations in cases that come before him under this outrageous Act.

In one paragraph it states that "The Legislature may find it necessary, in face of these reiterated criticisms, to tell Mr. Justice

Orde and other members of the High Court Bench to cease censuring the law makers of the Province and attend more strictly to their own business." In other words, that the members of the High Court Bench should be muzzled and prohibited from expressing any opinions not in accordance with the views of a newspaper editor.

The *Globe* has for its motto a saying of Junius as follows: "The subject who is truly loyal to the Chief Magistrate will neither advise nor submit to arbitrary measures." And yet that journal supports a statute which is the most arbitrary and tyrannical Act ever passed by any British Legislature outside of Canada in recent years.

Let us hope the Judges of the High Court will always be at liberty to freely express their opinions and grant relief against tyranny and oppression.

Yours, etc.,

E.J.B.

Dominion of Canada.

EXCHEQUER COURT OF CANADA.

RE BILLINGS AND SPENCER CO.

Audette, J.] [57 D.L.R. 216.

*Trademark—Registration—False statements and misrepresentation—
"Without sufficient cause"—Expunging from register—Persons
aggrieved.*

If the registration of a trademark is obtained through false statements and misrepresentations the Court will exercise its discretion to order the removal from the register of the entry as having been made "without sufficient cause" within the meaning of sec. 42 of the Canadian Patent Act, R.S.C. (1906), ch. 71.

Persons who have been using their trademark, both in Canada and the United States, for a great many years to distinguish their goods, and if the trademark left remaining on the register would limit the legal rights of such persons are "persons aggrieved" within the meaning of the Act.

Russel S. Smart and J. Lorn McDougall, for petitioners; A. W. Anglin, K.C. and J. A. Hutcheson, K.C., for objecting parties.

ANNOTATION FROM 57 D.L.R.

By *Russel S. Smart, B.A., M.E., of the Ottawa Bar.*

The term "person aggrieved" has been discussed at length in many English cases. (See Kerly on Law of Trade Marks, 4th ed., p. 313, and Sebastian's Law of Trade Marks, 5th ed., p. 621). In one leading case, *In re*

Apollinaris, [1891] 2 Ch. 186, at pp. 224 & 225, the matter is put as follows: "The question is merely one of *locus standi*. . . . Whenever one trader, by means of his wrongly registered trademark narrows the area of business open to his rivals, and thereby either immediately excludes or, with reasonable probability, will in the future exclude, a rival from a portion of that trade into which he desires to enter, that rival is an 'aggrieved person'."

In another leading case, *Re Powell's Trade Mark* (1893), 10 R.P.C. 195; 11 R.P.C. 4, Lord Herschell said, 11 R.P.C. at p. 7: "Wherever it can be shewn, as here, that the Applicant is in the same trade as the person who has registered the Trade Mark, and wherever the Trade Mark, if remaining on the Register, would, or might limit the legal rights of the Applicant, so that, by reason of the existence of the entry on the Register, he could not lawfully do that which but for the existence of the mark upon the Register, he could lawfully do, it appears to me he has a *locus standi* to be heard as a person aggrieved. A person who has before registration used the registered trade mark is a 'person aggrieved.'"

See also *Re Zonophone Trade-Mark* (1903), 20 R.P.C. 450.

In the leading Canadian case, *Re Vulcan Trade-Mark* (1915), 24 D.L.R. 621, 51 Can. S.C.R. 411, affirming (1914), 22 D.L.R. 214, 15 Can. Ex. 285, Davies, J., said, 24 D.L.R. at p. 623: "Any person aggrieved, used in both statutes, embrace any one who may possibly be injured by the continuance of the mark on the register in the form and to the extent it is so registered."

See also *Autosales Gum & Chocolate Co.* (1913), 14 Can. Ex. 302; *Bawker Fertilizer Co. v. Gunns Ltd.* (1916), 27 D.L.R. 469, 16 Can. Ex. 520.

RIGHTS TO A TRADEMARK BETWEEN MANUFACTURING AND SELLING AGENT:

In the leading case of *The Leather Cloth Co. Ltd. v. The American Leather Cloth Co. Ltd.* (1863), 4 DeG. J. & S. 137, 46 E.R. 868; (1865), 11 H.L. Cas. 523, 11 E.R. 1435, an English company purchased the business of an American company and used the trademark. Wood, V.-C., granted injunction, Westbury, L.C., reversed the decision, and this reversal was confirmed by the House of Lords. Westbury, L.C., delivering the judgment, said (4 DeG. J. & S. at pp. 143, 144 (46 E.R. at p. 871): "But suppose an individual or a firm to have gained credit for a particular manufacture . . . (there being no secret process or invention), could such person or firm on ceasing to carry on business sell and assign the right to use such name and mark . . . ? Suppose a firm of A. B. & Co. to have been clothiers, in Wiltshire for fifty years . . . and that on discontinuing business, [they] sell and transfer the right to use their name and mark to a firm of C. D. & Co., who are clothiers in Yorkshire, would the latter be protected by a Court of Equity in their claim to an exclusive right to use the name and mark of A. B. & Co. I am of opinion that no such protection ought to be given. . . . To sell an article stamped with a false statement is *pro tanto* an imposition on the public, and, therefore, in the case supposed the Plaintiff and Defendant would be both *in pari delicto*. This is consistent with many decided cases."

In another leading case of *Re Magnolia Metals Co.'s Trade Marks* (1897), 14 R.P.C. 621, the Court dealt with an agency contract from an American firm to a firm in Great Britain. The business in America was assigned. The question was whether the trademark in Great Britain for the manu-

factured goods, which were bearings, was transferred when the practice was for the British agent to import the metal in bulk and make the bearings in Great Britain. The judgment, at p. 630, reads:—

"But, under each agreement, the agents were in important respects, and particularly with respect to trade marks, really, and in law agents for the American company, and the American company, whilst reserving to themselves all rights in the trade marks, also bargained for an interest in the nature of a reversion in the business that was being built up under a name founded upon their own, and used by their agents because they were agents for them.

. . . That the American company did indirectly, during the existence of the agreements referred to, by means of an English partnership trading under their authority, procure the bearings to be made, and had a clear commercial interest in their being made, and that they reserved a right in the nature of a reversion in the goodwill of the business so being carried on, the question should, in our judgment, be answered in the affirmative" (i.e., whether business transferred was concerned with metal bearings).

The registration by a foreign importer of the trademark of a foreign producer has been held bad. *Re the Apollinaris Co.'s Trade-Marks* (1890), 8 R.P.C. 137; *Apollinaris Co. v. Snook* (1891), 8 R.P.C. 166.

An American trade mark registered by the importer of the goods in England without the consent of the owner of the American mark was struck off the register on the application of the successor of the American owner. *Re The European Blair Camera Co.'s Trade Mark* (1896), 13 R.P.C. 600.

The sole wholesale agents of foreign manufacturers of goods were held to have no right of action for "passing off," the get-up of the goods not being associated with themselves: *Dental Mfg. Co. v. C. de Trey & Co.* (1912), 29 R.P.C. 617.

In Canada, a case of agency relation was dealt with in *Canada Foundry Co. v. Bucyrus Co.* (1913), 10 D.L.R. 513, 47 Can. S.C.R. 484.

The judgment of the Supreme Court, 10 D.L.R. at p. 516, reads in part: "To refuse to expunge from the register the trade mark 'Canadian Bucyrus' would be to encourage unfair dealing. The object of a trademark is not to distinguish particular goods but to distinguish the goods of a particular trader. It is reasonably clear by the terms of the contract between the parties that the 'Bucyrus' specialties meant, to the ordinary public, machinery used in the construction of railways, made by a particular firm or company."

The above case had to do with the Bucyrus Company who manufactured steam shovels, etc., and who, for a number of years, had an agency agreement with Canada Foundry Co. Ltd., which was finally terminated, and after termination the Canada Foundry Co. Ltd. registered the trademark "Canadian Bucyrus," which was later expunged on petition of the Bucyrus Company.

In the Canadian case of *Gramm Motor Truck Co. v. Fisher Motor Co.* (1913), 17 D.L.R. 743, the right of the Canadian company to the word "Gramm" as applied to motor trucks was supported against the American company who were successors of the originator of the truck.

Province of Ontario.**SUPREME COURT, APPELLATE DIVISION.**

First Divisional Court.]

[February 1st, 1921.

PAMMENT V. THOMPSON.

Trespass—Marsh lands—Trapping muskrats—Crown grant—Lands covered with water—Metes and bounds—Inlet area—R.S.O., ch. 262—Possession—Enclosure.

An appeal by the defendant from the judgment of Meredith, C.J.C.P., in favour of the plaintiff, after trial of this action together with *Pamment v. Mather*, at Cobourg Fall Assizes, without a jury, on the 10th and 11th November, 1920.

William Pamment, the owner in fee simple of broken lots 17 and 18, in the second concession of the Township of Monaghan, in the County of Northumberland, part of which is marsh land adjacent to the waters of Rice Lake and the Otonabee River, in the spring of 1920 put up notices, pursuant to sec. 23 R.S.O., ch. 362, on the boundaries of his said lands, forbidding hunting or trapping thereon. The defendant, disregarding the notices, set traps and took muskrats on said lands, alleging that they were not enclosed, and that the terms of the Crown grant were not such as to give to plaintiff such exclusive possession as to preclude defendant from trapping thereon. The plaintiff claimed damages and a declaration of his rights.

D. W. Dumble, K.C., and *Frank M. Field*, K.C., for the plaintiff.

F. D. Kerr (Peterborough), for the defendant.

MEREDITH, C.J.C.P., delivering judgment, said:—

When anyone takes that which does not belong to him he is very likely to be doing something which is dishonest; and if he does anything that is dishonest it is very likely that he is breaking the law and must pay for it sooner or later.

Now everyone should know that wild animals in a state of nature when killed belong to the owner of the land upon which they are killed, no matter who kills them, unless he has parted with his right to them in some way.

These young men, who are defendants in these two actions, killed and took wild animals in a state of nature on and from Whittington's and Pamment's marshes—marsh is a term which everyone quite well understands—marshes are everywhere and the legal rights in respect of them have been dealt with so there can be no doubt about the law, for instance in a case not many years ago in the Ontario Court of Appeal—I forget the plaintiff's name—the City of Toronto were the defendants.

So that the whole question in this case is whether the muskrats which these defendants took were killed upon and taken from the plaintiff's land. One of the defendants says that five of them were killed upon and taken from Pamment's marsh; the other defendant says ten, of the two hundred that he took, were taken and killed upon Pamment's marsh. Until this year, apparently, the plaintiff did not object to hunters going upon his land and taking game; and so it may be that if he had not given notice to these defendants they ought not to be held answerable to him in damages; it may be that, under those circumstances, it ought to be considered he had given a tacit consent, a tacit license, to hunt. But there is nothing of that kind now applicable. The plaintiff put up notices, which these defendants saw, forbidding hunting; and more than that told each of them that they must not trespass upon his land. But they did in defiance of his rights a thing that was very unwise to do. They knew the plaintiff owned that farm. Now they come here with a legal pretence that his patent does not cover his marsh, the marsh that they call Pamment's marsh, a marsh that everyone calls Pamment's marsh; and the marsh that they call Whittington's marsh and that everybody else calls Whittington's marsh. It does seem to me to be idle to contend that the reservation in the patent of the "inlet" which has been called by some Steamboat Creek extends not only to Steamboat Creek but to the whole of these marshes, over more than a quarter of all the lands that were patented to the plaintiff Pamment and to Whittington or their predecessors in title. The lands are clearly defined in the Crown grant and in the deeds to these farmers, and the lines in question run plainly from the adjoining farms back to the river both north and south. They cannot go to the river if the contention made for these defendants is right; because the "inlet," including these marshes, intervenes and prevents. What was meant by that reservation is perfectly obvious. The Otonabee River was or was to become a navigable river a backwater in that river which is now called by some "Steamboat Creek" might become very useful for navigable purposes, a place where a boat might run in out of the current and be moored. Uses might be made for very obvious purposes of the navigable waters of the inlet, but beyond that a reservation would have been senseless. Its navigability extends up from the river only from 150 to 250 yards according to the different views of the different witnesses; and yet it is contended that the Crown rights extend up all through these marshes to high water mark a thing that seems to me to be without reason, taking away nearly half of Whittington's farm, according to the acreage and according to measurement of the land, that is, accord-

ing to the acreage given in the patent and deeds; and perhaps more than one-quarter of Pamment's land. I find no pretence of right in these defendants to do that which they did in defiance of the land-owner.

And all this is entirely in accord with the field notes and plan of the original survey, which shew plainly on inlet extending only a short way up from the river into Whittington's farm. I hold that the plaintiff has proved title to his land; and if that were not so, I should hold that way, he had such possession of it that, as against trespassers, such as these defendants were, he has these rights of action.

There will be judgment for the plaintiff in the case of Mathers and \$22.75 damages with costs of action upon the Supreme Court scale without set off; and in the other case a similar judgment and damages \$45.50.

I think it is extremely regrettable that the title of the plaintiff and of Whittington to their farms was raised in these cases; that these defendants should be obliged to pay heavy costs for having come into the Supreme Court on such an issue. In each case the whole title of the plaintiff to all parts of his farm is denied. The cases are, I think, such as should have been tried—if tried at all—in an inferior Court.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS and FERGUSON, JJ.A.

F. D. Kerr, for the appellant.

F. M. Field, K.C., for the plaintiff, respondent.

At the conclusion of the argument, Meredith, C.J.O., said:—

Mr. Kerr has very fully argued the main question in this case; which is as to the effect of a grant of Crown land in respect to which the dispute has arisen.

The Crown granted the whole of broken lot 18. There follows a description by metes and bounds which it is said does not include the area within an inlet. The patent also grants the waters on the land which are mentioned in it.

It is quite clear that if lot 18 contains more than the land that is defined by metes and bounds, the description by metes and bounds is to be rejected as *falsa demonstratio*. It is clear we think that lot 18 does contain more than is included within the metes and bounds mentioned in the patent.

In order to ascertain what the lot described in a Government survey is, you are to look to the field notes and also to the plan in the Crown Lands Department, which the Crown Lands Department has adopted, and in this case this shews that the inlet is part of lot No. 18; the field notes shew that by the work on the ground the inlet is part of lot 18; so that it is beyond question that the inlet is part of lot 18.

It is argued that the Crown intended to exclude the inlet by the description which they adopted in the patent. If the Crown had intended to do that there was a simple way of doing it; it could have granted part of lot 18 mentioning the whole lot and stating that there was excepted out of it the inlet with the proper description of it by describing it by metes and bounds, but it appears that it was a grant of the whole lot without exception.

This seems to be an end of the matter and the appeal is dismissed with costs.

Bench and Bar.

THE NEW LORD CHIEF JUSTICE OF ENGLAND.

From a purely personal standpoint, the appointment of Mr. Justice A. T. Lawrence to be Lord Chief Justice of England will be distinctly popular with the whole profession. During the seventeen years he has sat as a Judge of the King's Bench Division he has shewn himself a good lawyer and a model of what a Judge should be. But no one can pretend that it is for these excellent qualities he has been chosen at the age of seventy-eight to succeed Lord Reading. His selection bears out our suspicions that political exigency is responsible for the way in which the office of Lord Chief Justice has been treated since January last, and the sooner considerations of this kind are removed from the field of judicial selection the better it will be for this country. In the future we hope that no law officer of the Crown will be a member of the Cabinet, but that both Attorney-General and Solicitor-General will revert to their former status of legal advisers.—*Law Times.*

DEATH OF LORD MOULTON.

Lord Moulton died suddenly on Tuesday night in London, aged seventy-seven. John Fletcher Moulton was the son of the Rev. James Egan Moulton, and was educated at St. John's College, Cambridge, and became Senior Wrangler and Smith's Prizeman and a Fellow of Christ's. He was called to the Inner Temple in 1874 and took silk in 1885. He was made Lord Justice in 1906 and a Lord of Appeal in Ordinary in 1912. During the war he rendered valuable service to the country as Director-General of Explosive Supplies to the Ministry of Munitions.