Canada Law Journal.

VOL. XLIX. TORONTO, DECEMBER 1 No. 23

STATEMENTS OF DEFENCE.

A question which is agitating the minds of some practitioners, is whether, under the new Rules, an affidavit filed by the defendant with his appearance to a specially indorsed writ must, in default of his filing a formal statement of defence, be regarded as "a statement of defence." We should have thought that there could be hardly any question that it must, but it is said that some great authorities have expressed a different opinion. In the old days of equity pleading, the older practitioners will remember the statement of defence, or, as it was then called, "the answer" of a defendant, was, as a rule, required to be sworn; and was really in substance an affidavit. Our present system of pleading is based on the old Chancery system, the statement of claim is the old bill in Chancery under a new name, the statement of defence is the old "answer" under a new name, but with a difference that it is not as a rule required to be verified by oath. The new Rules, however, have in the case of specially indorsed writs, practically restored the old Chancery practice and required the defence of a defendant to be verified by oath. This it is true is done by what is called an "affidavit," but what is in substance and in fact, to all intents and purposes, is the old Chancery "answer."

By Rule 56 (2) the plaintiff is expressly authorised to treat this affidavit as constituting the defendant's pleading—just as he is authorised to treat the indorsement on the writ as "the statement of claim," Rules 56 (2), 111, but if he does not elect to proceed to trial as provided by Rule 56, the defendant "may deliver a defence or counterclaim." Now what is troubling some officers and practitioners is this. Suppose he does not avail himself of this right, can he be treated as in default of a defence?

As we have intimated we should say clearly not, his affidavit is on the files shewing his defence, and, moreover, he has sworn to its truth. The technical practitioner may say, "Oh! but an affidavit is not a defence," to which we would reply, "Neither is an appearance a statement of defence," but, nevertheless, when a defendant embodied in his appearance a notice that he disputed the plaintiff's claim, the Divisional Court held that such statement could not be treated as nugatory and a judgment signed in default of defence was set aside as irregular: *Voight* v. *Orth*, 5 O.L.R. 443.

It would seem to be *á fortiori* where a defendant has placed on the files of the court an affidavit setting forth his defence and swearing to its truth, that it could not be disregarded, and on the contrary, it would be the merest technicality and without any shadow of justice to say that a plaintiff might, in such circumstances, sign judgment because the defendant did not think fit to put in an unsworn statement to the same effect as that disclosed by his affidavit.

It is we are informed a well authenticated fact that the learned Chancellor just before his elevation to the Bench was called on to advise how the following answer to a bill for foreclosure was to be regarded.

"In Chancery,
Between Henry Hart, Plaintiff,
and
John Brooke, Defendant.

Please enter in the Master's Book,
That I the said defendant Brooke
Dispute the claim of Henry Hart,
As to the whole and every part.
Acacia Cottage still is mine,
As surely as the sun doth shine,
No cruel Chancery suit shall blot,
The sacred memories of that spot.

JOHN BROOKE,
Defendant, Poet."

This document was not sworn and therefore was not a good "answer"; but according to the practice, a defendant might file a dispute note without oath, and we are informed that the opinion given was that the poetical effusion was a valid dispute note and should be so treated, which seems to be common sense.

Since the foregoing was written, Mr. Justice Kelly, in the case of *Smith* v. *Walker,* on appeal from Mr. Holmested, acting as Master in Chambers, has decided that if a defendant does not file a statement of defence under Rule 112, the plaintiff may not treat his affidavit as a defence, but must disregard it altogether. The facts of the case before Mr. Justice Kelly were as follows: To a specially indorsed writ a defendant appeared and filed an affidavit of defence. The plaintiff did not elect to proceed under Rule 56 (2), but at the expiration of ten days from appearance, no statement of defence having been filed, he filed a joinder of issue and gave notice of trial. The defendant moved to set aside the joinder of issue as irregular. The acting Master in Chambers refused the application, holding that the plaintiff was regular, and that the affidavit was properly treated as the defence, following *Voight* v. *Orth, supra,* but Mr. Justice Kelly set aside the joinder of issue as being irregular and allowed the defendant to file a statement of defence. This decision therefore virtually determines that an affidavit disclosing a defence filed under Rule 56 is a defence only for the purposes of that particular Rule; but if the plaintiff does not elect to proceed under that Rule it is not a defence, and at the lapse of ten days from appearance, if no statement of defence is filed, the plaintiff may sign judgment for default of defence.

In short the whole procedure suggests a sort of thimble rigging performance as regards the defendant's affidavit of defence. "Now you see it and now you don't see it."

COURTS OF FINAL APPEAL.

The findings of the judges of the Supreme Court in the cases submitted to them in reference to the incorporation of companies and as to the construction of the Insurance Act (see post pp. 749) are a somewhat remarkable illustration of the adage "Quot homines tot sententiæ."

It is common knowledge that in our Supreme Court, as at present constituted, there is a great lack of unanimity; and this is said to come more from one seat than from the others, doubtless indicating a virile independence of thought, and which may also possibly be an illustration of some one's saying that the minority is generally in the right. On the occasions before us, however, to use some nautical phrases which seem appropriate, it was not a spectacle of the result of the exhortation well known to rowing men, of "pull together," but rather of each of them "paddling his own canoe." The result in these cases is that it is not at all clear what the law is on any of the points involved.

We are quite aware that the opinions we have referred to were the result of references to the judges of the Supreme Court under s. 60 of the Supreme Court Act, a provision which came before the Privy Council in *Attorney-General of Ontario* v. *Attorney-General of Canada* (1912), A.C. 571 (see ante vol. 48, pp. 504-507) so that each judge was justified in expressing his individual opinion, and probably was so required. At the same time we wish to take this opportunity of again calling attention to the most important and desirable proposition that the judgments of our court of final appeal should express the views of the majority of the judges, if there are differing views, and that all dissenting opinions should remain a secret of the judge's private council chamber.

The subject of uniformity of decisions on such branches of law as are applicable to all the States of the Union is engaging the attention of judges and legal writers in the United States.

Greater uniformity in the laws of this Dominion was the wish of the fathers of Confederation, and some progress has been made in that direction. It should receive greater attention than it does from our legislators. We have perhaps done more than has been done by our neighbours, but much remains to be done. The subject is much discussed in recent legal journals, especially with reference to negotiable instruments. We have accomplished something in that direction, but there are other branches of the law which need similar attention here; and nothing would tend more to unification of the Dominion than uniformity in legislation.

POST-DATED CHEQUES.

The law relating to post-dated cheques is by no means well settled. In a recent case before Mr. Justice Scrutton (*Hutley* v. *Peacock*, Oct. 25) the defence of infancy was set up in an action by the holder of a post-dated cheque against the drawer. This defence was successful, and the case is referred to only because a mere passing mention of *Forster* v. *Mackreth* (16 L.T. Rep. 23; L. Rep. 2 Ex. 163) seems to have been considered a sufficient statement of the law relating to post-dated cheques. Now *Forster* v. *Mackreth* merely decided that the post-dated cheque there sued on could not in substance be distinguished from a bill of exchange at seven days' date, and it was accordingly treated as a bill of exchange and not as a cheque. *Forster* v. *Mackreth* is not an authority for the general proposition that a post-dated cheque is a bill of exchange properly so-called and not a cheque.

A post-dated cheque is, in fact, an instrument sui generis, being in some respects a bill of exchange payable at a future time and in other respects a cheque payable on demand. The principal sections of the Bills of Exchange Act, 1882, that are relevant are ss. 3, 13, and 73. S. 3 defines bills of exchange generally as unconditional orders to pay "on demand or at a fixed or determinable future time." S. 13 has reference to the date on bills; it enacts that the expressed date is to be deemed

the true date "unless the contrary be proved," and also enacts that "a bill is not invalid by reason only that it is . . . post-dated." S. 73 defines cheques as bills of exchange "drawn on a banker payable on demand."

That a post-dated cheque is a valid and negotiable instrument has been settled by many decisions of the courts, and it will be sufficient to cite what is believed to be the latest to that effect—*Royal Bank of Scotland* v. *Tottenham*, a decision of the Court of Appeal (71 L.T. Rep. 168; (1894) 2 Q.B. 715). In that case the plaintiffs on the 8th Aug. received and placed to the account of a customer a cheque dated the 10th Aug. drawn by the defendant. The cheque being dishonoured on presentation, through the defendant having stopped payment of it, the plaintiffs were held to be entitled to sue the defendant, as being holders for value.

With respect to stamp duty, a post-dated cheque is on the footing of an ordinary cheque and not a bill of exchange. Being payable "on demand," the post-dated cheque comes under the heading of the schedule to the Stamp Act, 1891, "Bill of exchange —payable on demand or at sight or on presentation—1d." The fact of the date constituting a direction not to present or pay at once does not prevent the instrument being payable "on demand." This was decided in *Royal Bank of Scotland* v. *Tottenham* (*sup.*). See also *Hitchcock* v. *Edwards* (60 L.T. Rep. 636, Mr. Justice Cave). In every reported case of an action against the drawer of a post-dated cheque the action has almost necessarily been heard some time after the date expressed on the cheque, and the cheque then necessarily appears on its face to be properly stamped, there being nothing to indicate that it was actually drawn and issued before the date appearing on it. Apparently, if an action could be conceived as being brought on a post-dated cheque long before the expressed date, the cheque would have to be stamped as an ordinary bill of exchange in order to be valid and admissible in evidence. However valueless for practical purposes this consideration may be, it certainly follows from the ratio decidendi in *Royal Bank of Scotland* v. *Tottenham* (*sup.*), and the decision in that case as to the 1d. stamp duty on post-dated cheques being sufficient is somewhat unsatisfactory from a theoretical and juridical point of view.

As regards some of the consequences of the drawee or banker paying the cheque before its expressed date, the post-dated cheque resembles a bill of exchange. It is laid down by Baron Parke in *Morley* v. *Culverwell* (7 M. & W., at p. 178) as follows: "If the acceptor pays the bill before it is due to a wrong party, he is not discharged. It has been so held in the case of a banker's cheque payable to bearer; if the banker pays it before it is due, he is not protected." The authority cited for the latter of these two propositions is *Da Silva* v. *Fuller*, an old unreported case of 1776, of which the note in Chitty on Bills (11th edit., 1878), p. 188, is: "Where, however, a cheque, which had been lost by the payee, was paid the day before it bore date, such payment was held to be invalid, and the banker was held liable to repay the amount to the loser." There appears to be no more modern case on this point than *Da Silva* v. *Fuller*.

In actions against the drawer by the holder, the post-dated cheque is precisely on the same footing as an ordinary cheque. *Royal Bank of Scotland* v. *Tottenham* (*sup.*) and *Hitchcock* v. *Edwards* (*sup.*) are examples of this. In both cases the holder gave value for the cheque before the expressed date of it, and succeeded in his action against the drawer after payment at the drawer's bank had been stopped. *Carpenter* v. *Street* (6 Times L. Rep. 410) was another case of the same kind before the Divisional Court (Lord Coleridge, C.J. and Mr. Justice Wills). The defendant stopped payment of the cheque, and the principal defence was that the plaintiff had taken the cheque before its expressed date and when it was not "regular on the face of it": (s. 29). It was held, however, that the cheque was "regular on the face of it," notwithstanding the date it bore had not yet arrived when the plaintiff took it, and the plaintiff succeeded.

With regard to one consequence of a post-dated cheque being paid by the banker on whom it is drawn before the date, neither bills of exchange nor ordinary cheques afford a clear analogy, and the post-dated cheque in this respect stands by itself. It may happen that the drawer's account at the bank is not sufficient to meet the payment of further cheques in the event of the post-dated cheque being presented and paid before the date upon it.

If then, in consequence of a too early payment of the post-dated cheque, another cheque, subsequently drawn (not post-dated) and immediately presented, is dishonoured, has the drawer and customer any remedy against the bank? There appears to be no reported case in England of any action having been brought against a bank under such circumstances. In the text-books on banking, the case of *Da Silva* v. *Fuller* (*sup.*) is cited for the proposition that a banker is not justified in paying a post-dated cheque before its expressed date, but this case is not an authority as between banker and customer, and only relates to the risk the bankers run in possibly paying the wrong person. In the absence of authority, the question would have to be decided on principle should it arise in the English courts. Singularly enough, the question has arisen more than once in the Australasian courts, and contrary decisions have been arrived at. In Victoria and New Zealand a bank has been held liable in damages for dis honouring cheques in consequence of the customer's account being depleted by the premature payment of a post-dated cheque. In Queensland, under precisely similar circumstances, the bank was held not to be liable. The references to these cases are: *Hinchcliffe* v. *Ballarat Banking Company* (1870, 1 V.R.L. 229 (Victoria)); *Pollack* v. *Bank of New Zealand* (1901, 20 N.Z.R. 174 (New Zealand)); *Magill* v. *Bank of North Queensland* (1895, 6 Q.L.J. 262 (Queensland)).

The Bills of Exchange Acts then in force in Australasia were, for the present purpose, identical with the English Act of 1882. The Victorian case was decided before any codifying statute was in operation, the New Zealand and Queensland cases after codifying Acts had come into operation. The salient points in these cases were these: The Victorian and New Zealand courts relied on *Forster* v. *Mackreth* (*sup.*) and treated the post-dated cheque as a bill of exchange payable on the expressed date of the cheque, the New Zealand court holding that the codifying statute had made no difference in the law; the Queensland court held *Forster* v. *Mackreth* no longer applicable since the codifying statute, and also held that the true date of the post-dated cheque was the day of its issue and not the date expressed in it, with the result

that the post-dating was under the circumstance quite ineffective. There is a sharp contrast between the views of the New Zealand and Queensland courts respectively as to the effect of the bank paying the cheque in the face of what amounted to a direction not to pay until a certain future date. The New Zealand court held this to be fatal, and that the bank had done a wrongful act for which it must suffer the consequences. The Queensland court held that the bank had given value for a valid and negotiable instrument and were holders of the cheque and so entitled to set it off against the customer's balance in the bank's books.

To give effect to the view that prevails in Queensland, it is necessary to presume that a banker can pay his customer's cheque in spite of notice not to pay it, and also that presentment of a post dated cheque before its expressed date is in itself evidence that the expressed date is not the true date. Neither of these positions seems correct. The balance of argument therefore seems to lie with the New Zealand view, and it is submitted that the English courts would under similar circumstances agree with the New Zealand rather than the Queensland decision. The New Zealand decision was that a bank was liable to its customer for dishonouring his cheques if the depletion of the account was caused by the bank's own act in prematurely paying a post-dated cheque drawn on the bank by the customer.—*The Law Times.*

THE VETO OF THE CROWN.

The controversy with reference to the veto of the Crown as an operative part of our Constitution in practice has elicited very intense antagonism of opinion on the part of leading constitutional authorities. On the 20th April, 1911, when the measure which is now the Parliament Act, 1911, was under discussion in its committee stage in the House of Commons, Mr. Asquith said: "I have pointed out over and over again in these debates, that the veto of the Crown was just as operative 200 years ago as the veto of the House of Lords to-day. We have got rid of the veto of the Crown without any breach of continuity in

the history of our Constitution. The veto of the Crown has gone. It is as dead as Queen Anne. It has gone by disuse, and so ought the veto of the House of Lords to have gone by disuse." Mr. Dicey, however, in a letter to the *Times*, relies on a dictum of Edmund Burke that the veto of the Crown is a reserved power still capable of being put into operation should occasion arise for its exercise. Professor Hearn maintains that although under the House of Hanover, the power of refusal has never been directly exercised, it must not on that account be supposed that the power is obsolete or inoperative. "On two occasions," he writes, "within the present [nineteenth] century, Acts of Parliament, although they had duly received the Royal Assent, have failed to come into operation from the refusal of the Crown to perform some act which was necessary to give them effect. One was an Act passed in 1794 (34 Geo. 3, c. 4) to enable the Government to carry into effect Mr. Bentham's celebrated project of the Panopticon. It appears that, whether from personal dislike to the author (as Bentham asserted) or for some reason now unknown, George III. disapproved of the plan. Various delays took place until at length all the arrangements were approaching completion, and nothing more remained except the purchase of one portion of ground. It appears that the King refused to sign the proper documents for the issue of the purchase money. Nothing further was done in the matter, but the Government was so much compromised that seventeen years after the first Act a second Act (52 Geo. III., c. 144) was passed by which a different system was adopted and compensation for the breach of contract to the amount of £23,000 was paid to Bentham. In 1850 an Act (13 & 14 Vict. c. 72) was passed under the auspices of Lord Romilly to improve the system of registration of assurances in Ireland. It contained a provision suspending its operation until certain indices were prepared and notice of its commencement consequently thereon was given by the Commissioners of the Treasury. No such notice, however, has yet (in 1867) been published. Probably, considering the advance made in public opinion since 1850 upon the sub-

ject of the registration of land, it never will be published." Queen Elizabeth in the Parliament of 1597 assented to forty-three Bills, public and private, and rejected forty-eight that had passed both Houses. James I., in assenting to all the Bills of the session, explained that he did so "as a special token of grace and favour, being a matter unusual to pass all Acts without any exception." Although the Stuarts preferred to use the dispensing power and lightly assented to Bills that they never intended to observe, yet the close of their system brought back the use of the old prerogative. On four important occasions, and once afterwards on a matter of less moment, William III. declined to sanction Bills. Once, and once only, after his death, when Queen Anne vetoed the Scottish Militia Bill under peculiar circumstances and in conformity to the wishes of both Houses, were the words *La Reine s'avisera* heard in Parliament. —*Law Times.*

POSSESSION AS A ROOT OF TITLE.

In these days when nearly every transaction connected with land is committed to writing there is a tendency to overlook the importance attached by the law to mere possession. but nevertheless possession still remains a root of title. In very early days, no doubt, possession was practically the only title to land; he was the owner who, with his retainers, was strong enough to take, and then to retain, possession. And in the more civilized of ancient communities land was transferred from one person to another by physical possession being given in the presence of witnesses. A record of what was done might be drawn up and signed, as in the case of livery of seisin, but the writing did not constitute the title to the land; it was merely evidence in support of the title.

If a person to-day enters upon and takes possession of a parcel of land, without any title or even colour of title thereto, but merely as a wrongdoer, what is his position in the eyes of the law? At first no doubt he is a mere trespasser, and could

be evicted by the true owner, or by any person, not being the true owner, who was in possession of the land. But this latter person may himself have originally been a mere trespasser. This raises the question, at what point of time does the original taking possession by a stranger to the title cease to be regarded as a mere trespass, and evolve into the "possession" that is so respected by the law? The answer appears to be, when he has remained for some time in peaceable possession of the land, exercising with respect to it the ordinary rights of an occupier.

In *Doe d. Hughes* v. *Dyeball* (1829), Moody and Malkin's Rep. 346, the plaintiff in ejectment proved a lease to himself and a year's possession, and rested his case there. The defendant, who had forcibly taken possession, objected that no title was proved in the demising parties to the lease. Lord Tenterten, C.J., said: "That does not signify; there is ample proof; the plaintiff is in possession, and you come and turn him out: you must shew your title."

The failure on the part of the plaintiff to prove that his lessors title obviously made the lease worthless as evidence of the plaintiff's title, and the plaintiff succeeded on the other evidence adduced by him, viz., that he had had a year's possession. Thus the case shews that possession in the plaintiff and nothing more is sufficient to enable him to maintain ejectment against a stranger.

In *Asher* v. *Whitlock* (1863), L.R. 1 Q.B. 5, Cockburn, C.J., referring to the above mentioned case, said: "In *Doe* v. *Dyeball* one year's possession by the plaintiff was held good against a person who came and turned him out, and there are other authorities to the same effect," thus putting that case upon possession alone.

Perhaps the most emphatic way in which the law shews its respect for possession is by its rule that "the fact of possession is primâ facie evidence of seisin in fee." *Per* Mellor, J., in *Asher* v. *Whitlock*, 6; see also Newell on Ejectment (1892), 433.

"The wrongful seisin acquired by a disseisor gave him a real, though wrongful, estate, a 'tortious fee simple' valid as

against everyone but the person truly entitled, and capable of being made right and perfect by a release from that person to the person in actual seisin." (Pollock & Wright on Possession, 94.) This is very instructive. The law insisted on livery of seisin, but when once a person had been put in possession by this means he was capable of taking a release by deed of an estate in remainder. Here we see that the real owner could perfect the title of a disseissor by giving him a release, no livery of seisin being necessary.

The necessity of possession as a root of title explains the rule of common law which prevented a person from conveying to himself. "The ancient common law essayed to wield the land itself—'the most ponderous and immovable of all the elements.' Hence all its rules and forms regarded real property as more or less identified with actual possession. The single consideration that *livery* was the primitive mode of conveyance, for which other forms were but substitutes, and that a man could not deliver seisin to himself, explains many otherwise inexplicable doctrines." Hayes' Elementary View of Uses (1840), 80.

A person occupying land without any title has a devisable interest therein, and if he settles it by his will for successive estates those estates take effect as against a person who enters upon the land, and ejectment may be maintained accordingly. *Asher* v. *Whitlock*, supra.

And the interest of a mere possessor may also be inherited or conveyed. Moreover if the land be taken compulsory he is entitled to compensation. *Perry* v. *Clissold* (1907), Law Reports, Appeal Cases 73.

In the last cited case, the decision in *Doe d. Mary Carter* v. *Barnard* (1849), 13 Queen's Bench 945, was disapproved of as being inconsistent with *Asher* v. *Whitlock*, already cited, and with the views of Mr. Preston, Mr. Joshua Williams, Professor Maitland and Mr. Justice Holmes. The reporter adds a reference to an article by Professor J. B. Ames in the *Harvard Law Review*, vol. 3, p. 324(n). In the above cited case of *Doe* v. *Barnard* the plaintiff in ejectment, though having had thirteen

years' possession, failed in her action against a defendant (who had turned her out), on the ground that her own case shewed possession, and, therefore, a presumed fee simple, in her late husband, and shewed also that her husband left an heir. The plaintiff's possession was not connected with her husband's, and the defendant was allowed to set up the title of the heir in answer to the plaintiff's claim. As above shewn the case has been disapproved of.

If A, having no title, should acquire possession and hold it animo dominendi for say one year and then mortgage the property to B and remain in possession paying the interest, and then C, a stranger, acquired and held possession for less than 20 years, also animo dominendi, it would appear that B, the mortgagee (although neither he nor the mortgagor had obtained a title under the Statutes of Limitation) could eject C, since B would claim under the earlier possession. A's possession would be primâ facie evidence of his seisin in fee; would be capable of conveyance to his mortgagee, and the mortgagor's possession would be attributed to the mortgagee. Cole on Ejectment, 462, 479 (1857). (The mortgagee, in the case above put, would, of course, not be claiming adversely to the mortgagor.) A title would, therefore, be set up good as against all persons except the true owner proving right to immediate possession. Or if, in the simpler case, without there being any mortgage, A held peaceable possession for one year, and went out of possession, animo revertendi, and C took possession and held it for any period less than required by the Statutes of Limitations A could in like manner eject him in reliance on his (A's) earlier possession and presumed fee simple.

The case first put of there being a mortgage is exemplified by "*Doe* on the several demises of *Smith and Payne* v. *Webber* (1834), 1 A. & E. 119. The plaintiff Payne had been in possession for a number of years, though no statutory title was relied on. Then he mortgaged the property to the plaintiff Smith, but remained in possession, paying the interest on the mortgage. After the date of the mortgage the defendant brought ejectment under

some claim of title against the plaintiff Payne (who was still in possession) and the cause was submitted to arbitration, which went in favour of the defendant, who thereupon went into possession under a writ of habere facias possessionem and remained in possession for about six years before the action was brought. The defendant set up the award as against the plaintiff Smith, who was proved to have been present at the arbitration proceedings, but not to have taken any part in them. The evidence was ruled out as being res inter alios acta, and the plaintiff Smith obtained the verdict. All that the case decides is that the evidence was rightly rejected.

It would be interesting to know what direction was given by the trial judge to the jury, but it is not reported. The verdict seems, however, to have been right. The plaintiff Smith was deemed to be in possession by reason of his mortgagor's continued possession and payment of interest, and the defendant had not acquired a statutory title.

The effect of the case is thus given in Pollock and Wright on Possession: "Ten years' possession has been decisive even against several years' subsequent possession under colour of title."

As exemplifying at once the risks attending nisi prius practice and the necessity of some system of registration of title or of deeds, it appears that the defendant went to trial in ignorance of Smith's title, and had trained the evidence concerning the award against the plaintiff Payne. Then, discovering the mortgage, the defendant sought to deflect this evidence against the mortgagee, which was not allowed. The two plaintiffs appeared to have been working together in the action, and it was complained by the defendant's counsel that Payne was going behind the award by way of using Smith's name as a second plaintiff.

The minor, though none the less important, question of the costs of the evidence concerning the award was later dealt with, when the defendant was allowed such costs as against Payne, as costs of the issue found in favour of the defendant as against Payne, who, of course, could not succeed in face of the award.

The doctrine that possession is a root of title exists independently of the Statutes of Limitation. It is true that the judges, when speaking of a title by possession short of a statutory title, generally go on to say that the title is one that may ripen into an absolute title, but it seems clear that a possessory title would be recognized by the courts if there were no Statutes of Limitation. It would follow, therefore, in a case where no Statute of Limitation operated, that so long as a mere possessor was left in undisturbed possession by the true owner and those rightfully claiming under him, he, the possessor, would have a title recognized by the courts and one that would descend to his heirs or could become the subject of conveyance or devise, and would be good as against all the world except the true owner for the time being.

In conclusion it may be pointed out that where there have been several successive possessions by strangers to the title, the last possessor can take advantage of the prior possessions only if all the possessions have been continuous, and are connected as of right.—*University of Pennsylvania Law Review.*

CRIMINAL LAW AND THE JURISDICTION OF MAGISTRATES.

It is a well-known maxim that no one shall be put twice in peril for the same offence, but the recent decision of the Divisional Court in *Rex* v. *Simpson and others; Ex parte Smithson*, ante, p. 10, appears to have stretched the doctrine to a somewhat extraordinary length. The point raised in that case was whether a dismissal of a criminal information by a bench of justices, some of whom were by statute disqualified from adjudicating upon the particular case, could be quashed by certiorari. The court decided that it could not, the three learned judges who took part in the decision arriving thereat upon different grounds. Except for some decisions of the Irish Court of King's Bench, the point was apparently hitherto not covered by author-

ity. It has, of course, been repeatedly laid down that after a hearing and acquittal upon the merits by a court of competent jurisdiction, the defendant cannot again be tried upon the same charge. This was emphatically affirmed in the case of *Wemyss* v. *Hopkins*, 32 L.T. Rep. 9, in the Court for Crown Cases Reserved, and in *Reg.* v. *Miles*, 62 L.T. Rep. 572, by the Queen's Bench Division. In case of a conviction or acquittal by a court of competent jurisdiction, the defendant, if again charged with the same offence, may plead autrefois convict or autrefois acquit, as the case may be. So far as the English decisions are concerned, the maxim has been enunciated by the judges only in cases where there has been a trial by a competent court. Thus in *Reg.* v. *London Justices*, 25 Q.B. Div. 357, it was held that there was no appeal to quarter sessions by the prosecutor when an information has been dismissed under the Highway Act, 1835, although sec. 105 of that Act gives a right of appeal to anyone who thinks himself aggrieved by "any order, conviction, judgment, or determination." The case before the Divisional Court would appear to be distinguishable from those above referred to, because the petty sessional court which dismissed the information was not duly constituted. In *Reg.* v. *Antrim Justices* (1895), 2 Ir. 603, and certain other Irish decisions which were quoted during the course of the argument, it was held that where a defendant was acquitted after a hearing on the merits by a court of summary jurisdiction, the acquittal could not be quashed by certiorari, although some of the justices were disqualified for bias or interest, because the decision was not void, but merely voidable, so that the defendant was in peril thereunder until it could be set aside. The Irish courts appear to have been by no means unanimous, as appears by the judgment of Mr. Justice Holmes in the *Antrim* case. Whether the Irish decisions are right or wrong, it is disappointing to find the Divisional Court, having regard to the public and, indeed, constitutional importance of the point, refusing to give it more than a cursory consideration. Mr. Justice Ridley thought that the rule ought to be discharged, on the ground that in no case

could a man, once acquitted after a hearing on the merits, again be tried for the same offence. Mr. Justice Scrutton gave as the ground of his decision that he did not wish to prevent the defendants from pleading autrefois acquit, in case a fresh summons were issued against them, his judgment apparently involving a petitio principii; while Mr. Justice Bailhache seems to have been impressed chiefly by the absence of any English authority for the proposition put forward in favour of the rule. It is to be regretted that no more authoritative decision is available, for the case cannot, of course, go to a higher court, being a criminal matter.—*Law Times.*

PRINTERS' PRIVILEGE.

All who aid or counsel, direct or join in, the commission of a tort are joint tortfeasors. Hence a person who is injured by a printed libel sues the author, if he can discover him, and the printer jointly. If, as between the author and the person defamed, the libel is published on a privileged occasion, can the printer avail himself of the privilege? If he can, does express malice of the author expose the printer to liability?

These questions were discussed and decided by Mr. Justice Bankes in the case of *Smith* v. *Streatfeild and others* (109 L.T. Rep. 173; (1913), W.N. 263). The rector of a parish complained of the negligent performance by the plaintiff of his duties as one of the surveyors of ecclesiastical dilapidations of the diocese—a matter in which, if established, the rector and the rural deans of the diocese had a genuine interest. The rector wrote a letter on the subject, employed a firm of printers to print it, and sent a printed copy to each of the rural deans. In getting the letter printed he took a natural and proper means of circulating the letter among those who were interested in its contents. The letter contained statements defamatory of the surveyor in the way of his business, and he brought an action against the rector and the printers. As between the

rector and the rural deans the letter was published on a privileged occasion. The jury found that the rector was actuated by malice, but that the printers were not so affected. The question was whether the printers were liable.

It seems well settled that, so far as the author of a libel is concerned, he may publish the libel to a printer or to a shorthand clerk or typist, provided that this is an ordinary and usual course to adopt. "Independently of any authority," said Mr. Justice Mellor in *Lawless* v. *Anglo-Egyptian Cotton Company* (L. Rep. 4 Q.B. 262), "I am quite prepared to hold that a company having a great number of shareholders, all interested in knowing how their officers conduct themselves, are justified in making a communication in a printed report relating to the conduct of their officers to all shareholders whether present or absent, if the communication is made without malice and bonâ fide." Similarly, publication by a solicitor to his copying clerk of a letter written in the interests of his client, but containing defamatory statements, is not an actionable publication: (see *Boxsius* v. *Goblet*, 70 L.T. Rep. 368; (1894), 1 Q.B. 842). *Edmondson* v. *Birch and Co.*, 96 L.T. Rep. 415, (1907 1 K.B. 371), is to the same effect, where the managing director of a company, having occasion to make a confidential communication by cable to certain correspondents, dictated it to a clerk in their office, and it was held that this was not an actionable publication.

The liability of the printer, shorthand clerk, or typist for publication by them is a different question. Where the author of the libel can plead a privileged occasion, does his privilege cover the printer or clerk?

The learned judge held that the privilege of the rector covered all acts done in the natural and proper course and so enured to the benefit of the printers. In so holding, he followed the case of *Baker* v. *Carrick*, 70 L.T. Rep. 366, (1894), 1 Q.B. 838). In that case the defendants were a firm of solicitors acting for their clients, to whom the plaintiff owed a sum of money and who had commenced an action to recover it. The

plaintiff had placed certain goods in the hands of auctioneers for sale, and a sale of the goods had been advertised. The defendants, believing that the plaintiff had committed an act of bankruptcy, wrote to the auctioneers informing them of their surmise and directing them not to part with the proceeds of the sale. It was held that the communication to the auctioneers, being one which might properly have been made by the clients themselves, was properly made by the defendants in the course of their duty to them; and, there being no evidence of malice, judgment was given for the defendants. It seems to follow from this decision that a communication which may lawfully be made by a party to a litigation may lawfully be made by his solicitor acting on his instructions or otherwise in the course of his duty to his client. Does it follow that all that may be lawfully written by one man to others having a common interest with him on a particular matter may be lawfully printed by a firm of printers acting on his instructions? According to *Smith* v. *Streatfeild*, the answer is Yes, if the persons sharing in the common interest are so numerous as to make the printing of the defamatory matter a natural and proper means of communication. This view is not unsupported by authority. In *Mangena* v. *Wright*, 100 L.T. Rep. 960, (1909) 2 K.B. 958, a defamatory statement in the *Times* newspaper was held to have been published on a privileged occasion where the matter was of public interest as to which the public were entitled to information, and a newspaper was the ordinary channel by means of which the communication could be made public. But we must not delude ourselves into the belief, that from the decision of *Baker* v. *Carrick*, we glide imperceptibly to the conclusion arrived at in *Smith* v. *Streatfeild*.

The duty which a printer owes to his customer bears hardly any analogy to the duty which a solicitor owes to his client. The relation of solicitor to client is part of the machinery for the administration of justice. Great injustice might be suffered if a person who has been, or conceives himself to have been, subjected to a legal injury could not retain the services

of a solicitor because the proper conduct of his case might necessitate the publication of defamatory statements which might involve the solicitor in a lawsuit. This is the real reason why defamatory communications made by a solicitor in the course of his duty to his client are privileged. The duty of a printer to his customer is imposed and undertaken simply by the contract between the parties and for the printer's own profit. If a printer should decline to print a circular on the ground that it contained defamatory statements, no injury to the public is involved comparable to the denial of justice which might result if a solicitor should refrain from writing a letter in the interest of his client because it was uncomplimentary to other persons. In truth, the gap between *Baker* v. *Carrick* and *Smith* v. *Streatfeild* is a wide one—too wide to be spanned by human symmetry. The latter decision may be a good and wise one, but, in so far as it rests on the earlier as an authority, it seems to be based on a false analogy. The real road is through *Mangena* v. *Wright* and not through *Baker* v. *Carrick*.

Having decided that the privilege of the rector enured to the benefit of the printers, Mr. Justice Bankes further held that the malice of the former destroyed the privilege not only for him, but for the printers also. It follows from this that the printers have no privilege of their own, but can only shelter themselves behind the privilege of the author of the libel they array themselves in his armour, and take his accoutrements with all faults. This, again, seems to distinguish the principle of *Smith* v. *Streatfeild* from that of *Baker* v. *Carrick*. It is not by any means clear that the privilege of a solicitor would cease to protect him if his client in giving him instructions to write a letter should chance to be actuated by malice.—*Law Times*.

The new Lord Chief Justice of England has had a career well described by that much-abused word "romantic." As a boy, he left the home of his father, a merchant in London, to go to sea; where he served before the mast. After this he went on the Stock Exchange, where fortune was not kind to him, and at twenty-four nothing but his mother's persuasion prevented his emigration to the United States. Then he studied law, and in 1887 he was called to the Bar by the Middle Temple. Success came to him quickly in this new sphere, and his mastery of figures, in particular, earned him a high reputation. As a cross-examiner he has been supreme. He entered the House of Commons, as Liberal Member for Reading, in 1904; six years later he became Solicitor-General, and soon afterwards Attorney-General. He was the first holder of the last-named office to be included in the Cabinet.

The *Law Times* criticises freely the proposal of the English Government to substitute a Ministry of Lands, with its officials, for the courts of law, and hopes that if any such measure is placed upon the statute book, the control of the Judiciary over the Executive will be maintained in its entirety. The writer very properly characterises as "monstrous" the suggestion that practically all disputes that might arise relating to land should be referred to a "Court" of departmental officials and be taken away from the ordinary courts of the land. It will certainly be a sorry day for England and would be for any other country if litigants were compelled to seek justice, not from impartial judges, but from men who hold their position at the beck and call of changing politicians and subject to influences which cannot come within the walls of a Court of Justice. This evil change from the old state of things which has so much conduced to British freedom and fair play has been too much in evidence lately and is greatly to be deplored.

REVIEW OF CURRENT ENGLISH CASES.

ADMIRALTY—SHIP—COLLISION—REGULATIONS FOR PREVENTING COLLISIONS, ART. 28—SUDDEN EMERGENCY—OMISSION TO GIVE SOUND SIGNAL.

The Tempus (1913) P. 166. In this case it was held by Evans, P.P.D., that where a ship in a sudden emergency, occasioned by the faulty navigation of another vessel, altered its course in an attempt to avoid a collision without giving the sound signal required by Art. 28 of the Regulations for Avoiding Collisions, which neither caused nor contributed to the collision which took place, such omission was not in the circumstances a breach of the rule.

ANCIENT LIGHTS—ALTERATION OF BUILDINGS ON SERVIENT TENEMENT—NO DIMINUTION IN TOTAL AMOUNT OF LIGHT—NO DAMAGE.

Davis v. *Marrable* (1913) 2 Ch. 421. This was an action to restrain interference with an ancient light. The servient tenement had been altered with the result that, although it was made higher in one part, it was lower in another, so that, in effect, there was in fact no diminution in the total amount of light coming to the dominant tenement. Joyce, J., was therefore of the opinion that the defendants were entitled to credit for the increased light occasioned by lowering the building as against the obstruction caused by the part of the building which had been heightened, but having received this credit it would not be open to the defendant hereafter to restore the lowered part of his building to its former height. That the right to ancient light enjoyed by the dominant tenement was a negative easement over the whole tenement, but did not give the plaintiff any property or right in any particular cones or pencils or rays of light coming in any particular direction and, therefore, the varying of the sky line of the servient tenement over which the ancient light came, gave no right of action provided the alteration did not occasion an actionable nuisance within the decision in *Colls* v. *Home & Colonial Stores*, 1904, A.C. 179. He therefore dismissed the action, but, having regard to the novelty and difficulty of the case, and the fact that the defendants had rushed on their building the moment

they had notice of the plaintiff's complaint, and got it completed on the Sunday before the plaintiff's application to the Court, he gave them no costs.

INJUNCTION—BUILDING IN STREET—BUILDING LINE—REFUSAL TO CONFORM TO BUILDING LINE—MANDATORY INJUNCTION.

Attorney-General v. *Parish* (1913) 2 Ch. 444. In this case the defendant owned a house on a street, and being desirous of pulling it down and erecting another on its site, deposited plans with the municipal authority for approval. He was notified that the municipal authority had adopted a general building line for the whole street which cut off a considerable slice off the defendant's house, and it therefore did not approve of the defendant's plan. Correspondence ensued in which the defendant insisted on rebuilding on the old site and completed the building. The municipal authority did not give him any notice of the particular section of the Act under which they were acting, nor did it tender compensation, but commenced this action to compel the defendant to pull down that part of the building which was in advance of the building line which had been adopted. Joyce, J., who tried the action, dismissed it with costs, but the Court of Appeal (Cozens-Hardy, M.R., Kennedy, and Eady, L.JJ.), held that the plaintiffs were entitled to the relief claim and ordered the defendant to pull down the part of the building as prayed, but having regard to "the ignorance and blunders" of the plaintiffs, which to a large extent occasioned the difficulty, while they gave them the costs of the appeal, they refused them the costs of the action.

ACTION BY LANDOWNER FOR TRESPASS—ALLEGED RIGHT OF WAY —RESOLUTION OF MUNICIPAL AUTHORITY TO DEFEND ACTION —MUNICIPAL AUTHORITY ACTED AS DEFENDANT—PLEADING —MOTION TO STRIKE OUT PLEADING AS EMBARRASSING.

Thornhill v. *Weeks* (1913) 2 Ch. 464. This was an action to strike out a pleading as embarrassing. The action was brought to restrain certain persons from passing over a certain premises, in the assertion of an alleged right of way. The municipal authority of the district in which the property was situate passed a resolution to defend the action and were made defendants. With a view to avoiding liability for costs they, by their defence, denied that they threatened or intended to exercise the right of way, and pleaded that they had neither asserted nor denied the existence of the right of way. It was held by Neville, J., that this

did not infringe any rule of pleading and the motion was refused, and with this decision the Court of Appeal (Cozens-Hardy, M.R., and Kennedy, L.J.), agreed, they being of the opinion that the pleading would not in any way save the defendants from a liability for costs if the plaintiff established his case.

INJUNCTION—DOCUMENTS—PRIVILEGE—RESTRAINT OF PUBLICATION—DOCUMENTS OBTAINED BY TRICK—COPIES OF DOCUMENTS IMPROPERLY OBTAINED.

Ashburton v. *Pape* (1913) 2 Ch. 469. In this case certain communications by the plaintiff to his solicitor were obtained by the defendant in the following circumstances:—The defendant, who was a bankrupt, issued a subpœna *duces tecum* to the plaintiff's solicitor's clerk to produce the letters in question in the bankruptcy proceedings. The clerk attended on the subpœna and took the documents with him, and whilst in attendance he complained of not feeling well, and handed over the letters to the defendant and left the Court. The defendant's solicitors then took copies of the letters and gave the originals back to the defendant. On the plaintiff's present solicitors hearing of what had taken place, an order was made, by Neville, J., on the plaintiff's application, requiring the delivery up of the originals, and restraining the defendant and his solicitors from publishing or making use of any copies of such letters, "except for the purpose of the pending proceedings in the defendant Pape's bankruptcy"; from this order the plaintiff appealed so far as the exception was concerned, and the Court of Appeal (Cozens-Hardy, M.R., and Kennedy and Eady, L.JJ.), allowed the appeal and ordered the exception to be struck out, holding that for no purpose whatever was the defendant entitled to use privileged documents obtained in such circumstances. And the fact that the copies might have been used as secondary evidence at a trial, though improperly obtained, was held to be no ground for refusing the plaintiff the relief he asked, and which would prevent their use as secondary evidence.

TRUSTEE AND CESTUI QUE TRUST—BREACH OF TRUST—APPROPRIATION OF SECURITY BY DEFAULTING TRUSTEE TO MEET BREACH OF TRUST—DECLARATION OF TRUST—EQUITABLE MORTGAGE—IRREVOCABLE DECLARATION—STATUTE OF FRAUDS (29 CAR. 2 C. 3) S. 7.

In re Cozens, Green v. *Brisley* (1913) 2 Ch. 478. This was a summary application to determine whether the estate of a de-

faulting trustee had been effectually charged by him with the payment of moneys misappropriated, belonging to the trust estate. The only evidence in favour of the contention was certain memoranda in the books of the deceased, which contained entries of the amounts misappropriated, and against which "Ecc." was set, which was admitted to mean "Ecclesbourne," the name of a house owned by the deceased. There were other similar entries in pencil, which appeared to have been changed. Neville, J., who tried the action, came to the conclusion that none of the entries relied on constituted a sufficient writing within the Statute of Frauds, s. 7, nor did they indicate any present and irrevocable intention on the part of the deceased to declare himself a trustee of the Ecclesbourne property in respect of the moneys misappropriated. In his opinion the entries indicated an intention to create a charge by deposit of deeds which was never fulfilled; and further that the entries were in the nature of trial entries subject to alteration as might suit the interest of the deceased. Therefore, he concluded no effectual charge had been created.

WILL—MISDESCRIPTION—FALSA DEMONSTRATIO.

In re Mayell Foley v. *Wood* (1913) 2 Ch. 488. In this case a testator had by his will devised "My two freehold cottages . . . Nos. 19 and 20, Castle St." He did not own and never had owned 19 and 20, Castle St., but he did own at the time of the will and at his death "Nos. 19 and 20, Thomas Street," and it was held by Warrington, J., that "Castle Street" ought to be rejected as *falsa demonstratio* merely, and that Nos. 19 and 20, Thomas Street, passed by the devise.

ADMINISTRATION—LEASE BY TESTATOR—COVENANT BY LESSOR —SPECIFIC DEVISE OF REVERSION—LIABILITY FOR PERFORMANCE OF COVENANT AFTER LESSOR'S DEATH.

In re Hughes Ellis v. *Hughes* (1913) 2 Ch. 491. The facts in this case were as follows. A testator had in 1901, demised certain freehold premises for pottery works, for fourteen years at a rent of £120, and he covenanted in the lease that he would, if required by the lessees during the term, build an additional oven, etc., according to a plan to be made, the lessees paying therefor an additional rent of £10 per cent. per annum on the gross outlay. Part of the new works were erected in the testator's lifetime, but disputes having arisen, nothing further was done. The testator died in 1909, having, by his will, specifically

devised the demised premises. In 1911, the lessees required the executors to complete the works, and on a reference to arbitration, the arbitrator awarded that the executors should erect the works on part of the demised premises. The question on the present proceeding was, whether the cost of erecting the works must be borne by the specific devisee or by the general estate of the testator. Warrington, J., held that the obligation imposed by the covenant was not one in its nature incident to the relation of landlord and tenant, but was preparatory to the complete establishment of that relation and, therefore, according to the law laid down in *Eccles* v. *Mills* (1898) A.C. 360, was one which as between the specific devisee and the general estate, must be borne by the latter.

SETTLEMENT—LIMITATION TO SETTLOR FOR LIFE WITH ULTIMATE LIMITATION TO HIS "HEIR AT LAW"—CONSTRUCTION—RULE IN SHELLEY'S CASE.

In re Davison, Davison v. *Munby* (1913) 2 Ch. 498. In this case the construction of a marriage settlement was in question, whereby the settlor conveyed certain freehold property to trustees to hold in trust for her during her life and, after her death, in trust for such person as she should by will appoint, and in default of appointment, in trust for "the heir at law" of the settlor. It was contended that the rule in *Shelley's* case applied, and that the settlor took a fee, but Warrington, J., held that the limitation to the "heir at law" was not equivalent to a limitation to heirs, and therefore the rule in *Shelley's* case did not apply, and that under the limitation, the person who, at the death of the settlor, answered the description of her heir at law, took an estate for life, and that there was a resulting trust in favour of the settlor. In considering this case the provisions of The Conveyancing and Property Act (1 Geo. V. c. 25, s. 5 Ont.) have to be taken into account.

TENANT FOR LIFE AND REMAINDERMAN—WILL—TRUST FOR CONVERSION—POWER TO POSTPONE CONVERSION—RESIDUE—ESTATE PUR AUTRE VIE—POLICIES ON LIFE OF CESTUI QUE VIE—PREMIUMS, WHETHER PAYABLE OUT OF CAPITAL.

In re Sherry, Sherry v. *Sherry* (1913) 2 Ch. 508. In this case a testator had devised his residuary real and personal estate to trustees upon trust for conversion (but with power to postpone conversion), and to pay the income thereof to his widow for life, and

after her death to divide his estate among his six children. Part of the residuary estate consisted of an estate *pur autre vie* in a certain fund which produced £244 a year; and also two policies for £1,000 and £750 on the life of the *cestui que vie*. The premiums on these policies amounted to £60. The whereabouts of the *cestui que vie* were unknown and it was not certain whether he was alive, he having disappeared some years ago. The question was, whether the trustees could, in the circumstances, postpone conversion of the estate *pur autre vie*, and the policies. The present surrender value of the latter was £380, and to offer the estate *pur autre vie* for sale in the absence of being able to prove that the *cestue que vie* was alive, would, as the judge found, be ruinous. Warrington, J., in these circumstances, held that the trustees were justified in postponing conversion, and that the widow was entitled to the full amount of the income from the estate *pur autre vie*, and that the life policies were reversionary interests, which, when they fell in, would form capital, and that the premiums for keeping them alive must be paid out of capital.

BUILDING SCHEME—RESTRICTIVE COVENANT—ALTERATION OF CHARACTER OF DISTRICT—BREACH OF COVENANT—INJUNCTION.

Sobey v. *Sainsbury* (1913) 2 Ch. 513, was an action to enforce by injunction, a restrictive covenant made by a purchaser of land laid out as a building scheme. The deed was made to a society which purchased part of the land included in the scheme, and contained a covenant by the grantees against the erection or use of buildings on the estate other than as private dwellings, professional premises, or lodging houses. This deed was made in 1888, and the vendor bound himself in like manner not to erect, or suffer to be erected, buildings on the rest of the estate other than of the character above-mentioned. Between 1888 and the commencement of the action, beginning about 1890, there had been an enormous increase of population, and a corresponding change had taken place in the character of the road on which the property in question fronted; and a hotel and many shops had been erected, and what had previously been private houses had been turned into shops, and the character of the neighbourhood had been changed, and it had ceased to be residential. The defendant proposed to erect a shop on the property in question and the plaintiff refused to consent to his doing so, except on the terms of his paying £100, which the defendant refused to pay, whereupon the plaintiff brought the present action to restrain

him from erecting a shop. The defendant, by his defence, set up that there had been such a change in the character of the neighbourhood that the object for which the covenant had been entered into had completely disappeared and that such change had been to a great extent brought about by the acts and omissions of the plaintiff and his predecessors in title. Sargant, J., who tried the action, was of the opinion that the plaintiff's own breaches of the agreement as to building were sufficient to disentitle him to an injunction against the defendant, and, moreover, that the changed condition of the neighbourhood was also a sufficient ground for denying him the equitable relief he claimed and he dismissed the action with costs.

INSURANCE (MARINE)—CONSTRUCTION — COLLISION CLAUSE IN POLICY—"COLLISION . . . WITH SHIP OR VESSEL"—COLLISION WITH NETS OF FISHING VESSEL.

Bennett SS. Co. v. *Hull Mutual SS. Protecting Co.* (1913) 3 K.B. 372. In this case the construction of a clause in a Lloyds' policy, issued by the defendants, was in question. The clause in question covered "collision with any other ship or vessel." The anchor of the plaintiff's ship, which was the subject of the policy, and its propeller became entangled in the nets of a fishing vessel, which was a mile away, but the plaintiffs' vessel did not at any time come into contact with the fishing vessel. The plaintiffs, with the consent of the defendants, paid the owners of the nets for the damage caused by the plaintiffs' vessel thereto, without prejudice to the question whether the defendants were liable to indemnify the plaintiffs therefor under the policy. Pickford, J., who tried the action, held that there had been no collision with a ship or vessel within the meaning of the policy, and, therefore, that the defendants were not liable to indemnify the plaintiffs for the moneys paid by them to the owners of the nets.

MARINE INSURANCE—INSURANCE OF CARGO AGAINST CAPTURE—ANTICIPATED CAPTURE—NOTICE OF ABANDONMENT—SALE OF CARGO BY ASSURED—LOSS ARISING ON SALE.

Kacianoff v. *China Traders Insurance Co.* (1913) 3 K.B. 407. This was an action on a policy of marine insurance to recover as for a constructive total loss. The plaintiffs were Russian subjects and they insured with the defendants a cargo of salt meat

from San Francisco to Vladivostok. During the currency of the policy, war broke out between Russia and Japan, and the Japanese fleet in the Pacific were capturing vessels, and they were also blockading Vladivostok. The defendants telegraphed to the plaintiffs that if the cargo were sent to Vladivostok via Nagasaki they would take up the position that the plaintiffs had deliberately caused any loss occasioned by the perils insured which were *inter alia* loss by capture. The cargo was therefore not sent and the plaintiffs proposed that the cargo should be discharged at San Francisco and sold elsewhere, and ultimately notice of abandonment was given to the defendants who refused to accept. The cargo was ultimately discharged at San Francisco for sale and delivery at Shanghai. The plaintiffs claimed to recover the value of the cargo after deducting what was realized by the sale at Shanghai, on the ground that there had been a constructive total loss. The defendants contended that there had been no loss by a peril insured against. Pickford, J., who tried the action, came to the conclusion that it was impossible to say that the cargo had been constructively totally lost because if it had been sent to the destination intended it might have been captured, and he therefore held that the action failed.

INSURANCE—PLATE GLASS—DAMAGE "CAUSED DIRECTLY BY OR ARISING FROM CIVIL COMMOTION OR RIOTING"—BREAKING WINDOWS BY DISORDERLY WOMEN.

London & Manchester Plate Glass Co. v. *Heath* (1913) 3 K.B. 411, is a case arising out of the disorderly behaviour of a class of women called "Suffragettes." The plaintiffs were insurers of plate glass windows and had re-insured some of their risks with the defendant, the insurance was against damage caused directly by, or arising from, civil commotion or rioting. In March, 1912, a large number of suffragettes simultaneously broke plate glass windows in different quarters of London and among them the subjects of the insurance. The plaintiffs claimed that this outbreak of disorder was a civil commotion or rioting within the meaning of the policy. Bucknill, J., who tried the action, held that there was no evidence that the damage was caused directly by, or arose from, civil commotion or rioting, and dismissed the action, and with this conclusion the Court of Appeal (Williams, Buckley, and Hamilton, L.JJ.) agreed. The Court adopted Lord Mansfield's definition of a "civil commotion" as being "an insurrection of the people for general purposes, though it may not amount to a rebellion, where there is usurped power."

The damage in question having been done quietly and deliberately as appeared by the evidence and without any commotion, the loss was not within the peril insured against.

PARISH COUNCIL—CHAIRMAN—DURATION OF OFFICE—NEW COUNCIL—ANNUAL MEETING—RIGHT OF CHAIRMAN TO VOTE AT ELECTION OF HIS SUCCESSOR.

The King v. *Jackson* (1913) 3 K.B. 436 involves a simple question. By statute it was provided that a parish council was to consist of chairman and councillors and that at the annual meeting the parish council shall elect from councillors or persons qualified to be councillors, a chairman "who shall . . . . continue in office until his successor is appointed." A parish council elected a chairman who at the next election of parish councillors was not re-elected. At the annual meeting of the new council, however, he presided as chairman. A qualified person was proposed for chairman of the new council. The chairman voted for him and on there being a tie he was elected on the chairman's casting vote. On an application to set aside the election the Divisional Court (Ridley, Pickford and Atkin, JJ.) held that the chairman of the old council continued in office under the statute until his successor was appointed and he was entitled to vote as he had done. The election was therefore upheld.

NUISANCE—VARIOUS COMPANIES HAVING MAINS UNDER STREETS—DAMAGE TO ELECTRIC CABLES BY BURSTING OF HYDRAULIC MAINS—STATUTE—CONSTRUCTION—TWO ACTS TO BE CONSTRUED AS ONE ACT.

Charing Cross W.E. & C. Electricity Supply Co. v. *London Hydraulic Power Co.* (1913) 3 K.B. 442. In this case the plaintiffs by virtue of statutory powers had laid electric cables under certain public streets and the defendants, also by virtue of statutory powers, had laid hydraulic mains under the same streets. The defendants' mains burst and damaged the plaintiffs' cables and this action was brought to recover for the damage so occasioned. Some of the defendants' mains had been laid under an Act which did not contain the usual clause that nothing in the Act should exempt the defendants from liability for nuisance, the other mains had been laid down under the authority of a later Act which did contain that clause and which provided that the two Acts should be read and construed together as one Act. The bursting of the

mains was not due to any negligence of the defendants, but was due to a subsidence of the soil which the judge found could not by any reasonable care have been detected before the mains burst. Scrutton, J., however, who tried the case, held that, notwithstanding these findings, the defendants were, on the principle established by *Fletcher* v. *Rylands*, L.R. 3 H.L. 330, liable to the plaintiffs for the damage they had sustained; because the two Acts being read as one Act, the clause above referred to applied to both Acts and prevented the defendant from claiming statutory authority for causing the damage complained of, and the gradual subsidence of the soil by wear and tear of heavy traffic was not "an act of God," nor was it occasioned by the plaintiffs, nor by the malicious act of any third person, and therefore, none of the exceptions to the case of *Fletcher* v. *Rylands* existed.

TELEGRAPH—PLACING POSTS AND WIRES IN OR ACROSS PUBLIC STREETS—CONSENT OF BODY HAVING CONTROL OF STREET.

Postmaster-General v. *Hendon* (1913) 3 K.B. 451. By a statute it was provided that a company shall not place telegraph over, along or across a public street "except with the consent of the body having the control of such street." It was held in this case by the Railway and Canal Commission, (Bankes, J., and Sir Jas. Woodhouse) that an urban district council not being liable to repair a road over which it was proposed to place telegraph posts, was not the body "having the control thereof."

CRIMINAL LAW—EVIDENCE—BREAKING INTO A HOUSE WITH INTENT TO RAVISH—EVIDENCE THAT SHORTLY AFTERWARDS ACCUSED BROKE INTO ANOTHER HOUSE AND HAD CARNAL INTERCOURSE WITH ANOTHER WOMAN.

The King v. *Rodley* (1913) 3 K.B. 468. This was an appeal from a conviction for breaking into a house with intent to ravish a woman. Evidence was tendered that after the accused had been repulsed from the house in question, he had gone to another house about three miles from the prosecutrix's house and had broken in and had carnal knowledge of another woman there, with her consent. It was claimed that this evidence was admissible as showing the state of mind and purpose for which he had entered the prosecutrix's house, but the Court of Criminal Appeal (Laurence, Bankes and Atkin, JJ.) held it to be inadmissible and quashed the conviction.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

From Gov.-Gen. in Council.] [Oct. 14.

IN RE SECTIONS 4 AND 70 OF CANADIAN INSURANCE ACT, 1910.

Constitutional law—Insurance—Foreign company doing business in Canada—Dominion license.

Held, per Fitzpatrick, C.J. and Davies, J.—That ss. 4 and 70 of 9 & 10 Edw. VII. c. 32 (the Insurance Act, 1910) are not *ultra vires* of the Parliament of Canada, Idington, Duff, Anglin and Brodeur, JJ., *contra.*

Held, per Fitzpatrick, C.J., and Davies, J.—That s. 4 of Act operates to prohibit an insurance company incorporated by a foreign state from carrying on its business within Canada if it does not hold a license from the Minister under the said Act and if such carrying on of the business is confined to a single province.

Per Idington, J.—Sec. 4 does so prohibit if, and so far as it may be possible to give any operative effect to a clause bearing upon the alien foreign companies as well as others within the terms of which is embraced so much that is clearly *intra vires.*

Per Duff, Anglin and Brodeur, JJ.—The section would effect such prohibition if it were *intra vires.*

Newcombe, K.C., and *Lafleur,* K.C., for Attorney-General of Canada.

Nesbitt, K.C., *Aimé Geoffrion,* K.C., *Bayly,* K.C., and *Christopher C. Robinson,* for Ontario, Quebec, New Brunswick and Manitoba.

S. B. Woods, K.C., for Alberta and Saskatchewan. *Wagenest,* for the Manufacturers' Association of Canada. *Gandel,* for the Canadian Insurance Federation.

From Gov.-Gen. in Council] [Oct. 14.

IN RE INCORPORATION OF COMPANIES.

Constitutional Law—Incorporation of companies—B.N.A. Act—Provincial objects—Limitation—Doing business beyond the Province—Insurance company—9 & 10 Edw. VII. c. 32, s. 3, s.s. 3—Enlargement of company's powers—Federal company—Provincial license—Trading companies.

By sub-s. 11, s. 92, of The British North America Act, 1867, the legislature of any province in Canada has exclusive juris-

diction for "The Incorporation of Companies with Provincial Objects."

Held, per Fitzpatrick, C.J. and Davies, J.—That the limitation defined in the expression "Provincial Objects" is territorial and also has regard to the character of the powers which may be conferred on companies locally incorporated.

Per Idington, Duff, Anglin and Brodeur, JJ.—That such limitation is not territorial but has regard to the character of the powers only.

Per Fitzpatrick and Davies, J.—That a company incorporated by a Provincial legislature has no power or capacity to do business outside of the limits of the incorporating Province but it may contract with parties residing outside those limits as to matters ancillary to the exercise of its powers.

Per Idington, Anglin and Brodeur, JJ.—Such company has, inherently, unless prohibited by its charter, the capacity to carry on the business for which it was created, in any foreign state or Province whose laws permit it to do so.

Per Duff, J.—A provincial company may conduct its operations outside the limits of the Province creating it so long as its business as a whole remains provincial.

Per Fitzpatrick, C.J. and Davies, J.—That a corporation constituted by a provincial legislature with power to carry on a fire insurance business with no limitation as to locality has no power or capacity to make and execute contracts for insurance outside of the incorporating province or for insuring property situate outside thereof.

Per Idington, Duff, Anglin and Brodeur, JJ.—Such a company has power to insure property situate within or without the incorporating province and to make contracts within or without the same to effect any such insurance. In respect to all such contracts it is not material whether the owner of the property insured is, or is not, a citizen or resident of the incorporating Province.

Per Fitzpatrick, C.J. and Davies, J.—A provincial fire insurance company may make contracts and insure property throughout Canada by availing itself of the provisions of s. 3, sub-s. 3, of 9 & 10 Edw. VII. c. 32 ("The Insurance Act, 1910") which is *intra vires* of the Parliament of Canada.

Per Duff and Brodeur, JJ.—Such enactment is *ultra vires* of Parliament.

Per Idington, J.—Part of said sub-section may be *intra vires* but the last part providing for a Dominion license to local companies is not.

Per Anglin, J.—The said enactment is *ultra vires* except in

so far as it deals with companies incorporated by or under Acts of the legislature of the late Province of Canada.

Held, that the powers of a company incorporated by a provincial legislature cannot be enlarged either as to locality or objects, by the Dominion Parliament nor by the legislature of another Province.

Per Fitzpatrick, C.J. and Davies, J.—The legislature of a province has no power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province without obtaining a license so to do from the provincial authorities and paying fees therefor unless such license is imposed in exercise of the taxing power of the province. And only in the same way can the legislature restrict a company incorporated for the purpose of trading throughout the Dominion in the exercise of its special trading powers or limit the exercise of such powers within the province. Duff and Brodeur, JJ., *contra*.

Per Idington, J.—A company incorporated by the Dominion Parliament in carrying out any of the enumerated powers contained in s. 91, and a company incorporated for the purpose of trading throughout the Dominion cannot be prohibited by a provincial legislature from carrying on business, or restricted in the exercise of its powers, within the province except by exercise of the exclusive jurisdiction to make laws in relation to "direct taxation within the Province." But a company incorporated under the general powers of Parliament must conform to all the laws of a Province in which it seeks to do business.

Per Anglin, J.—The provincial legislature may impose a license and exact fees from any Dominion company if the object be the raising of revenue, or obtaining of information, "for provincial, local or municipal purposes" but not if it is to require the company to obtain provincial sanction or authority for the exercise of its corporate powers. And the legislature cannot restrict a company incorporated for the purpose of trading throughout the Dominion in the exercise of its special powers nor limit the exercise of such powers within the province, nor subject such company to legislation limiting the nature or kind of business which corporations not incorporated by it may carry on or the powers which they may exercise within the province.

Newcombe, K.C., and *Atwater*, K.C., for Attorney-General of Canada.

Nesbitt, K.C., *Lafleur*, K.C., *Aimé Geoffrion*, K.C., and *Christopher C. Robinson*, for Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island and Manitoba.

S. B. Woods, K.C., for Alberta and Saskatchewan.

Chrysler, K.C., for Manufacturers' Association of Canada.

EXCHEQUER COURT.

Cassels, J.] [Oct 11.

IN RE LEONARD.

Patent of invention—Feeds for grain, ore and mineral separators—Appeal from decision of Commissioner under 3-4 Geo. V. c. 17—Grounds for refusal to grant patent.

This was an appeal by William Leonard, from a decision of the Commissioner of Patents, refusing an application for a patent of invention.

More than two years before the application for the patent in question on the appeal, the applicant had obtained Canadian letters-patent No. 110156 for feeds for grain, ore and mineral separators. The specification of the former patent after declaring that the old method of separating materials, such as gold and ore, cereals and seeds, by delivering them into a vertical spout from a connecting inclined spout and forcing a current of air upward through the vertical spout was ineffective, disclosed the nature of his invention as follows:—

"I have found that, by delivering the materials in a horizontal plane or directly across the vertical spout and therefore at right angles to the ascending air current, they are spread out in a thinner sheet so that the air current acts thereon more effectively, or, in other words, forces upward and separates the lighter materials from the heavier in a more perfect manner than is practicable when the materials are discharged in a downward direction."

The substance of the invention claimed in the former patent was the delivering of the materials in a horizontal plane, or directly across the vertical spout, and therefore at right angles to the ascending current of air.

Held (affirming the decision of the Commissioner), that by the specification to his former patent the applicant had disclosed the invention now claimed, and the same must be taken to have been abandoned and dedicated to the public.

(2) A former patent, while in force, operates as a bar to the application for a new patent, and the only remedy open to the applicant, if he is in a position to invoke it, is to apply for a reissue of the former patent.

Observations on desirability of Commissioner being represented by counsel on appeals from his decisions refusing to grant patents.

Barnett-McQueen Co. v. *Canadian Stewart Co.* (13 Ex. C.R. 186), distinguished.

R. S. Smart, for appellant.

Nem. con.

EXCHEQUER COURT.

Cassels, J.] [Oct. 23.

IN RE GEBR NOELLE, A GENERAL TRADEMARK.

Trademark and Design Act (R.S. 1906, c. 71), s. 4 (a) and (b) —Interpretation—General and specific trademarks—Definition.

This was an application for general trademark.

Under the language of s. 4, sub-s. (*a*) of the Trademark and Design Act (R.S. 1906, c. 71), a general trademark means a trademark used in connection with the various articles in which the proprietor deals in this trade, and may cover several classes of merchandise of the proprietor is trading in their several classes.

On the other hand, under sub-s. (*b*), a specific trademark is limited to a class of merchandise of a particular description, so if the applicant deals in two different classes of merchandise, he must apply for two specific trademarks, one applicable to each class.

While a general trademark would cover all the classes of merchandise in which the applicant deals, it would not confer an unlimited right to the mark the world over as against anyone carrying on an entirely different business who applies for a specific trademark consisting of the same mark as applied to goods not manufactured by the owner of the general trademark.

W. L. Scott, for applicant; *R. V. Sinclair,* for Minister of Agriculture.

Book Reviews.

The Law Quarterly Review. Edited by RT. HON. SIR FREDERICK POLLOCK, Bart., D.C.L., LL.D., October. London: Stevens & Sons, Limited, 119 and 120 Chancery Lane.

The contents of this number are as interesting as usual. In addition to the notes there are papers upon the following sub-

jects: The laws of the Anglo-Saxons, Powers and the rule against perpetuities, Legal education: academical and professional, The Chief Clerks in Chancery and their predecessors, Notice and fraud in land registries, The origin of the law of sale, English and Scottish bankruptcies, A law reform movement in Germany, and Book Reviews.

The Lawyers' Reports, Annotated. N.S. Book 43. Rochester, N.Y.: The Lawyers' Co-Operative Publishing Co. 1913.

This excellent mine of legal information, up-to-date and complete, comes with unfailing promptitude. We commend it to the practising lawyer.

Outlines of the law of Landlord and Tenant. By EDGAR FOA, Barrister-at-law. London: Stevens & Sons, Bellyard. 1913.

The author is a lecturer of the Council of Legal Education in England and thoroughly competent to give these outlines, which are designed especially for the use of students.

Bench and Bar

THE LATE SIR ÆMELIUS IRVING, K.C., LL.D., TREASURER OF THE LAW SOCIETY OF UPPER CANADA.

A notable figure at Osgoode Hall, Toronto, has passed off the scene. Sir Æmelius Irving had been Treasurer of the Law Society of Upper Canada since 1893, succeeding the Hon. Edward Blake, who in that year entered the British House of Commons.

The late Treasurer was born in 1823, being the son of Hon. Jacob Æmelius Irving, an officer of the 13th Light Dragoons. He was born at Leamington, England, his mother being a daughter of Sir Jere Homfray of Glamorganshire, Wales. The family came to Canada in 1834.

Sir Æmelius was educated at Upper Canada College, called to the Bar in 1849, made a Q.C. in 1863, and elected a Bencher of the Law Society in 1874, becoming Treasurer in 1893. He was for some years Clerk of the Peace of the County of Waterloo, subsequently removing to Hamilton, where he practised his profession, afterwards coming to Toronto. In 1874 he was

elected to the House of Commons as a member of the Liberal Party, but losing his seat at the next election. He received the honour of Knighthood in 1906.

Sir Æmelius was a sound and well-read lawyer, especially in constitutional matters, being engaged in many important cases, though his general counsel business was not very extensive. He was Counsel for the Province of Ontario in many of these, such as the arbitration over disputed accounts between the Dominion and Provinces of Ontario and Quebec, the Ontario Fisheries case before the Privy Council, etc. For many years he was often called upon to act for the Crown in criminal matters.

As Treasurer of the Law Society he was unremitting in his labours, and his strong common sense, business capacity and precise method of conducting matters which came before him was fully recognized by his colleagues of the Bench.

The weight of years rested lightly upon his vigorous frame and his well-known figure, passing away at the ripe age of 90 years, his kindly face, his courteous manner and his dignified, gentlemanly bearing will long be remembered at Osgoode Hall. He was a fine specimen of an English gentleman, high minded, exact in all his business relations, always courteous and considerate to others, a scholar and of high culture; with a love for out-door sports, and an expert horseman.

As a lawyer and counsel he was the soul of fairness and of conscientious accuracy, never taking advantage of any slip of his opponents, and in the presentation of evidence concealing nothing, simply seeking to aid the court in arriving at a righteous judgment. In the words of one of our judges, he was "a sound and well-read lawyer, he did not limit himself to the text of the law, but diligently sought the underlying reasons. His eminent fairness was conspicuous and his scorn of petty trickery and undue advantage was in accord with the best traditions of the Bar.

Judicial Appointments.

Edward Lindsey Elwood, of Moosomin, Province of Saskatchewan, Barrister-at-Law: to be a Judge of the Supreme Court of Saskatchewan. (Sept. 20.)

Hon. Albert Edward McPhillips, of the city of Victoria, Province of British Columbia, K.C.: to be a Puisne Justice of the Court of Appeal for British Columbia. (Sept. 20.)

Walter Genge Fisher, of Alliston, Province of Ontario, Barrister-

at-Law: to be Judge of the County Court of the County of Dufferin, in the said Province. (Sept. 20.)

LAW SOCIETY OF ALBERTA.

A meeting of the Bar of Alberta will be held at Calgary on the 18th and 19th inst. to afford further opportunity to the members of the profession throughout the province of coming together and discussing matters of general interest to the profession and of listening to addresses from distinguished members of the Bench and Bar. It is desired that the attendance at this meeting be as large and representative as possible. A special committee has been appointed by the benchers charged to prepare a programme for this occasion and the committee has already given considerable thought to this matter. Further particulars will be given later. Important questions of interest to the profession, such as Legal Education in the province, the creation of a Law School, the admission of practitioners from other countries, the matter of unlicensed conveyancers and other questions of general interest will be discussed. Some distinguished members of the profession from outside the province will be present to deliver addresses. The evenings will be devoted to entertainment at the hands of the Calgary Bar Association, closing with a dinner.

It was incorrectly stated (ante p. 599) that Sir John Simon was of the Hebrew race. Though many of his name belong to that ancient people, the Solicitor-General of England does not.

Flotsam and Jetsam.

"Meester liar, I bote some land of Gunder Larson and I vant a mortgage."

"A mortgage!" asked the lawyer in astonishment.

"Yah, yah."

"No, no," replied the lawyer. "You want a deed."

"No, no," insisted the simple Swede. "I vant no deet. I bote land from Pader Paderson sum yahr ago and got a deet and anoder fellar coom long mit a mortgage and took the lant, so I dink a mortgage bin besser than a deet."

Moral: Have a lawyer examine the title before you buy.

ANALYTICAL INDEX

[Note—The cross references of this index carry the mind instantly to the particular item in a subject which is numbered for that purpose. This saves time in searching.]