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EFFECT OF DISCHARGE OF A FIRST MORTGAGE.

The decision of Middleton, J., *Re Butterfield & Waugh*, 19 O.W.N. 42, is deserving of the attention of conveyancers. The application was under the Vendors and Purchasers Act and the facts were as follows:—The vendor bought the land on November 1, 1911, and gave a mortgage payable on January 1, 1912, for $200, part of the purchase money. This mortgage was paid off on January 1, 1912, and the mortgagee's receipt was produced. No discharge was registered and the mortgagee could not now be found. This was the objection to the title made by the purchaser. It appeared that there had been a prior mortgage and this first mortgage was paid off and discharged in July 1920. The learned Judge held that the effect of this discharge under sec. 67 of the Registry Act (R.S.O., ch. 124) was to convey the legal estate to the mortgagor who was the person entitled in equity, and therefore that the objection was fully answered. The section in question declares that a discharge when registered "shall be as valid and effectual in law as a release of the mortgage or of such lands and a conveyance to the mortgagor, his heirs or assigns of the original estate of the mortgagor."

It does not appear explicitly by the case whether or not the vendor was the original mortgagor. The facts stated would rather lead to the conclusion that he was not, and had bought the land in question subject to the prior mortgage. We are rather inclined to think that whenever a mortgage is paid off the true effect of section 67 is that the legal estate does not revest in the mortgagor wherever he has made a subsequent mortgage, but will vest in the mortgagee next in priority. The words of the section are "the mortgagor his heirs or assigns" and his subsequent mortgagees would be in the position of "his assigns." To compel a purchaser to accept a title with a registered mortgage undischarged, merely

on production of a receipt for the money, seems to be exposing him to undue risk. If our view of the meaning of sec. 67 be the correct one—then, on registration of the discharge of the first mortgage the legal estate vested not in the mortgagor, but in the second mortgagee and could only be got out of him by the discharge of his mortgage or a reconveyance.

RESTRAINTS ON ALIENATION.

(CONTRIBUTED.)

In late issues, you deal with Restraints on Alienation, referring particularly to two recent cases of *Re Goodhue Trusts*, 47 O.L.R. 178, and *Re Ferguson and Rowley*, 19 O.W.N. 16, both being decisions of single judges. As these cases deal with a somewhat confusing subject, it is worth while to try as shortly as possible to find out what they do decide.

Re Goodhue raises some difficult questions, and, taken by itself, the reasoning on which the judgment is founded is not an authority upon the subject of Restraints on Alienation, though the result may be. It deals first with the operation of a power of appointment, and considers whether the attempted exercise by the donee of the power is valid. There are two grounds on which its invalidity is fairly apparent.

1. Some of the objects named in the exercise of the power are not within the class prescribed by the instrument creating it. To that extent, the exercise of the power was obviously inoperative.

2. Some of the beneficiaries mentioned in the document exercising the power might by possibility fail to take vested interests within the period of a life in being when the power was *created* and twenty-one years thereafter. Obviously, therefore, under the decisions cited in the judgment, the appointees whose interests might not vest within the proper time, take nothing under the Rule against remoteness of vesting.

Those points being out of the way, the learned Judge then had to decide whether the beneficiaries who could take were entitled absolutely or were only life tenants. He held that they took absolutely. Having arrived at this result, it was then a proper

question for decision whether the provision that the interest appointed to them should be "disposed of by them respectively by last will but not otherwise" was a valid restraint on alienation. This is not a question of the Rule against remoteness of vesting a , but a question of the right to fetter the disposition of a vested estate. It is one of the questions propounded by the learned Judge at page 186 of the report, but he does not throughout his judgment deal with the cases usually cited on this branch of law. At page 193, however, he winds up his judgment by saying: "The result is that (the benficiaries) are entitled presently to receive their respective shares of the settled fund free from any conditions or limitations." While, therefore, the judgment deals principally with other matters, one must concede, as you say, that the result is a decision declaring void a restraint on alienation otherwise than by will.

Re Ferguson and Rowley is not so complicated. The point came up squarely for decision, the authorities bearing on it were discussed and it was squarely decided that such a restraint is void at law; and it is submitted, notwithstanding your JOURNAL'S doubts, that the decision is right.

The subject is a most perplexing one, owing, I venture to think, partly to the fact that so great a Judge as Sir George Jessel went wrong in *Re Macleay*, L.R. 20, Eq. 186, and the weight of his learning and authority accomplished more than most people could achieve by throwing the law into confusion. One of the consolations of mediocrity is that one's mistakes are not so serious. The decision itself is perhaps unimpeachable, though it has been criticized. He bases it upon quotations from Littleton and Sheppard's Touchstone, to the effect that a general restraint on alienation is void, and he continues the quotation as follows:—"If the condition be such that the feoffee shall not alien to such a one naming his name or to any of his heirs or to the issues of such a one, or the like, which do not take away all power of alienation from the feoffee, then such condition is good." He then goes on to say "So that according to Littleton, the test is, does it take away all power of alienation?" and at page 189, he further says: "You may restrict alienation by prohibiting a particular class of aliena-

tion, or you may restrict alienation by prohibiting it to a particular class of individuals, or you may restrict alienation *by restricting it to a particular time,"* and he implies that any such restrictions being partial, are valid.

Now, if you give an estate to a man but say he must not mortgage, he may at once make some disposition of it, or if you give it to him but say he must not sell to Japanese or Chinese or to any one but persons of the name of Smith, he may make some disposition of it at once. Such restraints are clearly partial, and are probably valid according to Littleton's exception. But if you give an estate to a man absolutely in fee simple, or for any other lawful freehold estate, and say he may not in any way dispose of it for ten years, then for ten years he is the absolute owner of property which he cannot alienate. Surely this is repugnant to the very nature of freehold interests in land or of any other vested interest in property (except perhaps a lease with a covenant not to assign, etc.), and while one will not say that there is no ancient authority to support it, it is pretty safe to say that it is not warranted by the examples from Littleton, Coke or the Touchstone cited by the learned Master of the Rolls. So, also, if you give a person a vested interest in property but say that he shall not dispose of it except by will, it may be quite true that his power of alienation is not entirely fettered, but a will only operates on death, and, therefore, for a time (the whole lifetime of the donee) he cannot part with his vested interest at all. It is a total, not a partial restraint on alienation, during the whole of the donee's life. It is perfectly true that in the last thirty years there are decisions in favour of restraints on alienation otherwise than by will. The leading case in Ontario holding this view is *Earls* v. *McAlpine*, 27 Gr. 161, 6 A.R. 145, where devisees were restrained from alienating during their mother's life except with her consent. This was held a partial restraint, although so long as she lived the vested estates of the sons were inalienable at the will of a stranger. This decision gave rise to many cases, some one way and some the other; many of them seeking to reconcile or distinguish earlier authorities and only ending in a worse mess than ever. *Re Wilkinson*, 6 O.R. 315, to which you

refer, was decided four years after *Earls* v. *McAlpine* and about ten years after *Re Macleay*, and is only one of a number of decisions which may be cited in support of the validity of such a restraint.

In 1902 *Blackburn* v. *McCallum*, 33 S.C.R. 65, was decided by the Supreme Court, and a restraint against any kind of alienation of a vested interest for twenty-five years was held to be a total restraint and so void, and it may be said that the authority of *Earls* v. *McAlpine* was greatly shaken by that judgment, though perhaps it was not overruled. This important decision perhaps lost some of its weight, because, while five judges sat and three wrote judgments, the judgments proceeded upon somewhat different lines of reasoning, and it is hard to state just what arguments convinced the Court. The result, however, is not in doubt, namely, that a restraint on alienation of any kind for even a limited period is nevertheless a total restraint while it lasts and so void.

Blackburn v. *McCallum* did not, however, set this matter at rest; cases still arose, to some of which you refer, but the subject again came before an Appellate Court in *Hutt* v. *Hutt* (1911), 24 O.L.R. 574. There lands were devised to George A. Hutt but were not to be sold to any one but J. E. Hutt for $1,400 during the latter's life; and so the power to dispose of a vested estate was made dependent solely on the caprice of J. E. Hutt during his life. He might not buy, and if so, the owner could not dispose of his own lands. The Court held the restraint void, and overruled *Earls* v. *McAlpine* in case the Supreme Court had not already done so. It is upon these authoritative cases of *Blackburn* v. *McCallum* and *Hutt* v. *Hutt* that the decision of *Re Ferguson and Rowley* is based, and it is submitted that notwithstanding the many earlier conflicting and irreconcileable decisions, it must now be considered as settled that a condition restraining the alienation of a vested estate otherwise than by will is void as being a total restraint on alienation.

SHIRLEY DENISON.

SUFFICIENCY OF SERVICE OF NOTICE TO VACATE BY LANDLORD.

Introductory.—At common law and by weight of authority in most States, under statutes relating to the subject, a notice by a landlord to a tenant terminating the tenancy need not of necessity be served personally on the tenant. Of course, if the statute prescribes the manner of service, its provisions must be complied with.

As a general rule, any mode of serving a notice to quit is sufficient, where it can be traced to the hands of the party for whom it was intended in due time. Whenever service upon the party in person is practicable, it should be the mode adopted; but in the absence of the tenant, the notice may and should be served in the manner best calculated to reach him.

It has been stated in a Missouri case: "Service by copy may be liberally viewed for certain purposes. But it is not so viewed in all cases. One may be presumed to remember that he has indorsed a note, and to expect notice about a certain time. But in proceedings to terminate a tenacy by notice, whilst to require personal service might put it in the power of the adverse party to make it impossible to terminate a tenancy in the absence of some statutory provision, the rule as to service by copy should be applied with some strictness, and it should appear that there has been reasonable diligence, and that the mode adopted is reasonably likely to give actual notice where there is no appearance of attempt on the part of the one to be served to evade notice."

If the tenant is personally served, service may be made on or off the premises.

Notice properly served on a tenant is binding on a sub-tenant coming in after the service of the notice.

By Mail.—In England it has been held that sending the notice to the tenant by registered mail is sufficient service.

Service of notice by mail, so as to cast upon the tenant the risk of receiving it, is not authorized. However, it is held in Minnesota, that if such mode of service is adopted, and the notice is actually received by the tenant within the required time, it is sufficient.

Reading Notice to Tenant.—When the notice is required to be in writing it must be delivered; a mere reading of it to the tenant being insufficient.

If the tenant receives the notice after it has been read to him, the service is sufficient. This is true although the notice is addressed to him and another.

Delivery to Person Other Than Tenant.—Leaving the notice at the lessee's house, off the demised premises, and calling the attention of a person, not an agent of the lessee nor a member of his family, to it, was held insufficient, unless it were shown that the lessee actually received the notice.

Delivery to Wife of Tenant.—By the weight of authority, it is a sufficient service of notice to quit to leave it at the tenant's home on the premises with his wife, in the absence of the tenant from home; it not being necessary that it should be served personally on him.

In justification of the rule that service on the tenant's wife constitutes service on him, it has been said:

"A wife is by reason of her relationship to her husband the keeper of his house and his agent to perform such duties relating to the domicile as are necessary in his absence. Among these may be reasonably included the reception of notices relating to the tenure of the premises. If personal notice upon the tenant were necessary it would be a difficult undertaking for a landlord to terminate a monthly tenancy if the tenant should wish to avoid service."

Where the wife was the tenant, service of notice on the husband was held to be good, although the notice was addressed to him.

Same—Absence of Tenant.—It seems very well settled, that where personal service cannot be effected, in the absence of a statute requiring the service of notice to be made in a specified manner, it is sufficient if left with the wife of the tenant.

So where the tenant is absent from the State, service of notice on his wife, in this instance at his place of business, is sufficient.

Service of notice on a tenant's wife, while he was absent at work, in the absence of a shewing that he was out of the city, or that he could not have been served without difficulty, or that

the notice was explained to the wife when served on her, or that she communicated the fact of its service or delivered it to her husband, was insufficient, unless she was his agent, or the person in possession, within the meaning of the statute.

Delivery to Servant or Employee.—Where it appeared that the officer whose duty it was to serve the notice, went to the house occupied by the tenant, and, in response to his ringing of the door bell, a woman opened a window and asked him what he wanted, to which he replied that he had a notice for the tenant, and she said she would give it to him, and he then handed her a copy of the notice, it was held that the jury were justified in finding that the woman was the wife or servant of the tenant; the Court further holding that if the woman was either servant or wife of the tenant, the service was good.

A salesman in the tenant's store, during the tenant's temporary absence, is not a proper person on whom to serve notice. The salesman, although exercising certain agency powers, is not deemed to be an agent of the tenant for this purpose.

Delivery to Servant of Boarding House Where Tenant Resides.—Service of notice by leaving a copy with a servant of the keeper of a boarding house at which the tenant had resided and where his wife yet remained, is held insufficient in Missouri; it appearing that by proper inquiry and reasonable diligence the tenant could have been found.

Agent of Tenant.—Notice served on one who, as agent of the tenant, has charge and management of his business with reference to the tenancy, is sufficient.

This is more especially true if it is impracticable to serve the tenant personally, and it appears that the notice was timely delivered to the tenant by his agent.

"*Person in Possession.*"—Some statutes require that notice be served on the tenant or person in possession of the premises.

Under this provision, possession by a person who merely happens to be on the premises, or, for instance, a lodger, is not such possession contemplated by the statute.

A notice addressed to the original tenant, and served on the father of the person in possession of the premises, was held to be

sufficient compliance with a provision requiring service by leaving a copy with a person residing on or in possession of the premises.

The mere fact that the wife of the tenant paid the rent at the instance of her husband, does not make her the person in possession for the purpose of receiving such notice.

Two or More Joint Tenants.—Where there are two or more persons in possession of premises as joint tenants or in common, serving the notice on one of them, on the premises, has been held to be sufficient service as to all.

Service of notice on the partner of the tenant, on the premises, during the temporary absence from the State of the tenant, was held sufficient as to the tenant.

Service on Corporation.—The manner of serving notice on a corporation is largely controlled by statute, and what is sufficient service depends upon the provisions of the statutes in the State in which notice is given.

Service of notice on the bailiffs or head officers of a corporation, has been held by an English case to be sufficient.

It has been held that service of notice on its treasurer is good service on the corporation, both at common law and under the statutes of Minnesota.—*Central Law Journal.*

CANADIAN LEGAL HISTORY.

We always welcome any information bringing to the notice of the profession historical reminiscences connected with the Bar of Canada, and our columns are always open to items of interest in this connection. We therefore are glad to publish the following circular of the Historical Association of Annapolis Royal, N.S., received from its President Mr. L. M. Foster, and addressed to the Judges and Barristers of Canada. It speaks for itself. We are told that:—

Next year (1921) will mark the Bi-Centenary of British Civil Law in Canada, the first Court of Judicature having been assembled within the walls of the old fort of Annapolis Royal in 1721.

The Historical Association of Annapolis Royal has undertaken to see that this important historical event is fittingly celebrated and a permanent memorial of it erected. The latter will probably

take the form of a bronze tablet of dignified proportions, suitably inscribed, and placed in the officers' quarters building in Fort Anne, the formal unveiling to take place on a date agreeable to the Canadian Bar Association.

The circular hopes that the Bar Association will hold its annual meeting in Annapolis Royal next year, or if this cannot be arranged that it will at least be represented by a deputation at the unveiling.

An appeal is now made to the Bench and Bar of Canada for funds to pay for the proposed memorial. It is estimated that the cost will be $1,500, and the subscription list has been opened by a contribution of $300 from the Chief Justice of Nova Scotia, Hon. R. E. Harris.

Subscriptions may be sent to H. J. Armstrong, Esq., Manager, Royal Bank of Canada, Annapolis Royal, N.S., who is Secretary-Treasurer of the Historical Association of Annapolis Royal and Treasurer of the Bi-Centenary Memorial Fund.

It is hoped that there will be a prompt and generous response to this appeal. It is necessary to know what funds are available before a design for the memorial can be called for, or steps taken to carry it into effect.

Any further information desired may be obtained by writing the President or to the Secretary-Treasurer.

DIVORCE STATISTICS.

If any argument were necessary to shew that the providing facilities for divorce has a tendency to multiply the cases in which such relief is sought, the following statistics of the English Divorce Court seem to supply all that is needed. The total cases were as follows:—

1914	389
1915	515
1916	495
1917	708
1918	935
1919	2,025
1920	2,628

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act,)

HUSBAND AND WIFE—GOODS SUPPLIED ON ORDER OF WIFE—ACTION AGAINST HUSBAND AND WIFE JOINTLY—LEAVE TO SIGN JUDGMENT ON SPECIALLY INDORSED WRIT AGAINST BOTH DEFENDANTS—APPEAL BY HUSBAND—JUDGMENT AGAINST HUSBAND SET ASIDE—NO JOINT LIABILITY ESTABLISHED—PRINCIPAL AND AGENT—ELECTION.

Moore v. *Flanagan* (1920) 1 K.B. 919. This was an action by a milliner against husband and wife to recover the price of goods supplied on the order of the wife. The writ was specially indorsed claiming that defendants were jointly liable. The plaintiff obtained leave to sign judgment against both defendants and signed judgment accordingly. The husband appealed and the judgment was set aside as against him, and he obtained leave to defend. On the trial the plaintiff failed to prove any joint liability, but Lush, J., gave judgment for the plaintiff against the husband. The husband appealed and the Court of Appeal (Bankes, Scrutton, and Atkin, L.JJ.) held that the plaintiff's remedy against the parties was alternative and not joint, and, having obtained judgment against the wife who, on the facts proved, was merely the agent of the husband, she was not entitled to judgment also against the principal. The appeal was therefore allowed and the action dismissed as against the husband. Atkin, L.J., however, felt some misgiving as to the justice of the decision. Scrutton, L.J., suggests that if the plaintiff did not wish to elect to take judgment against the wife so as to release the husband, she might, on the husband's application to set aside the judgment, have notified the wife and had the whole order re-opened.

SALE OF GOODS—C.I.F. CONTRACT—PAYMENT ON TENDER OF SHIPPING DOCUMENTS—POLICY OF INSURANCE—BROKER'S CERTIFICATE OF INSURANCE—SUFFICIENCY OF TENDER.

Wilson v. *Belgian Grain and Produce Co.* (1920), 2 K.B. 1. The simple point involved in this case was whether under a c.i.f. contract it is a sufficient tender of shipping documents, to tender, instead of a policy of insurance, a broker's certificate that insurance has been effected, indorsed to the buyer. Bailhache, J., held that it was not as the remedy if any of the buyers on such a certificate would be quite different to that under a policy. Witnesses were called by the sellers who proved that it is a common practice

nowadays for sellers to tender instead of a policy a broker's certificate, but they also testified that the buyer was not bound to accept such a certificate; he therefore held no custom of trade could be relied on. It may be remarked that the learned Judge is careful to say that his decision does not apply to American certificates of insurance, which are in effect policies of insurance.

CONTRACT—SALE OF GOODS—BREACH OF WARRANTY—MEASURE OF DAMAGES—MITIGATION OF DAMAGES—SALE OF GOODS ACT, 1893 (56-57 Vict. c. 71) s. 53 (3)—(10-11 GEO. 5, c. 40, s. 52 (3) ONT.).

Slater v. *Hoyle* (1920) 2 K.B. 11. In this case the plaintiffs were manufacturers of cotton cloth and contracted to sell 3,000 pieces of unbleached cloth of a specified quality to the defendants. The plaintiffs had delivered and the defendants had accepted 1,625 pieces: but refused to accept any more on the ground that the pieces delivered were not according to the contract. The action was brought for damages for not accepting the balance of the goods; and the defendants counterclaimed for damages for breach of warranty in respect of the goods delivered, and also for damages for non-delivery of the balance of the goods. It appeared that the defendants had made a contract for the sale of 691 pieces of bleached cloth; and in fulfilment of that contract had used part of the cloth received from the plaintiffs and as to these pieces had sustained no loss. Grier, J., who tried the action, found that the plaintiffs had committed a breach of the contract and had repudiated their obligations under it, and dismissed the action: and on the defendants' counterclaim he held they were entitled to damages for the breach of warranty and that the measure of such damages was the difference between the market price at the time of the delivery of the goods contracted for and the goods actually delivered; and that no deduction should be made in respect of the 691 pieces, and as regards the claim for non-delivery, the market price having fallen below the contract price, no damages were recoverable. The plaintiffs appealed, but the Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.). agreed with Grier, J., and with what was said by Lord Esher, M.R., in *Rodocanachi* v. *Milburn*, 18 Q.B.D. 67, 77, and approved by the House of Lords in *Williams* v. *Agnis* (1914), A.C. 570, viz., that: "It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods."

INSURANCE (MARINE)—PARTIAL LOSS—DAMAGE UNREPAIRED—SUBSEQUENT TOTAL LOSS—MERGER.

Wilson Shipping Co. v. *British & Foreign Insurance Co.* (1920) 2 K.B. 25. This was an appeal from the decision of Bailhache, J. (1919), 2 K.B. 643 (noted *ante* p. 113). The question was whether a partial loss unrepaired, followed by a total loss, could be recovered under a policy of marine insurance. Bailhache, J., held that the partial loss became merged in the total loss and was not recoverable, but the Court of Appeal (Bankes, Warrington, and Scrutton, L.JJ.), held that there was no merger and that the plaintiffs were entitled to recover for the partial loss notwithstanding the subsequent total loss.

PRACTICE—COSTS—JUDICIAL DISCRETION—SUCCESSFUL DEFENDANT—DEPRIVATION OF COSTS—RULES OF SUPREME COURT, ORD. XV. R. 1, (ONT. JUD. ACT, S. 74).

Ritter v. *Godfrey* (1920) 2 K.B. 47. This was an appeal on the question of costs by a successful defendant, who had been refused his costs. The action was against the defendant, a medical practitioner, for alleged malpractice. Prior to the action a correspondence had taken place between the parties in which the defendant had adopted a tone of levity and used somewhat insulting terms. At the trial the Judge found in favour of the defendant on the merits, but refused to give him costs mainly for the attitude taken by him in the correspondence before action. The Court of Appeal (Lord Sterndale, M.R., Atkin, L.J., and Eve, J.), however, considered that this was not a sufficient ground for refusing the defendant his costs, although at the same time considering the defendant's letters were offensive and lacking in good feeling, yet as they had not provoked the action, they constituted no ground judicially for depriving him of his costs. The observations of Buckley, J., were quoted with approval, viz.: "The facts upon which a Judge could exercise his discretion in depriving a successful litigant of costs, must be facts relevant to the question to be adjudicated upon as between the plaintiff and the defendant. The Judge had no power to deprive the successful litigant of costs because in some matters, not material, he might think that the party should have behaved with more courtesy or consideration. These were not matters on which the Court could act."

INSURANCE—PEACE, WHEN CONCLUDED—SIGNING OF TREATY—EXCHANGE OF RATIFICATIONS—"TERMINATION OF THE PRESENT WAR."

Kotzias v. *Tyser* (1920) 2 K.B. 69. This was an action on a policy of insurance whereby the insurers agreed to pay to the

insured a certain sum "in the event of peace between Great Britain and Germany not being concluded on or before the 30th July, 1919." A treaty of peace was signed between these nations on 28th June, 1919, but they did not exchange and deposit ratifications of the treaty until January, 1920. Roche, J., who tried the action, held that peace was not concluded until the exchange of ratifications of the treaty, and therefore that the plaintiff was entitled to judgment.

LANDLORD AND TENANT—LEASE—EXPIRATION OF TERM—NEW TENANCY—IMPLIED TERMS OF NEW TENANCY—COVENANT TO REPAIR—ASSIGNMENT OF PART OF REVERSION—RIGHT OF ASSIGNEE OF REVERSION TO SUE FOR BREACHES OF IMPLIED COVENANT—CHOSE IN ACTION.

Cole v. *Kelly* (1920) 2 K.B. 106. In this case the contest was between an assignee of a reversion of a lease and the tenant, as to the liability of the latter on implied covenants to repair. The facts were somewhat involved. Miss Hammond, who was the lessee of certain premises sub-let them to the defendant for five years from December 25, 1912, this sub-lease contained covenants by the sub-lessee to repair. On October 29, 1914, Miss Hammond died intestate and by agreement between her administrator and the defendant, it was arranged in November, 1917, that the defendant should continue in occupation on a quarterly tenancy terminable on a quarter's notice at any quarter day. Subsequently the administrator sub-let his reversion to the plaintiff less three days. The defendant gave notice to quit and gave up possession, and the present action was brought for breach of her covenant to repair. By the Conveyancing Act, 1881 (44-45 Viet. c. 41), s. 10 (1), an assignee of a lease is entitled to enforce the covenants "therein contained" and it was objected on the part of the defendant that as the quarterly tenancy had been affected by correspondence, although the tenant might be impliedly bound by the covenants in her original lease, yet they were not "contained" in the lease of the reversion of which the plaintiff was assignee, and Lush, J., so held; but the Court of Appeal (Bankes, Scrutton, and Atkin, JJ.), held that the defendant's covenants on her original lease were implied as part of the terms of the renewal lease, and were "contained" therein within the meaning of the statute; and that the plaintiff, though only an assignee of part of the reversion was entitled to recover; but they intimate that without an assignment of the right of action in respect of breaches committed before the sub-lease to the plaintiff, and notice to the defendant, the plaintiff might not be entitled to recover damages in respect of such breaches.

NEGLIGENCE—INJURY TO CONSTABLE IN SERVICE OF MUNICIPAL CORPORATION—ACTION BY CORPORATION AGAINST TORT-FEASOR —LOSS OF SERVICE—MEASURE OF DAMAGES—WAGES DURING INCAPACITY—PENSION.

Bradford v. *Webster* (1920) 2 K.B. 135. This was an action by a municipal corporation to recover damages for injury inflicted on a constable in the employment of the plaintiffs through the negligence of a servant of the defendant. By the contract between the plaintiff and the constable he was entitled to full pay during incapacity arising from injury in the course of his duty. By the Police Act, 1890, and regulations thereunder the constable would have been entitled to retire on an annual pension of £67 if he had been able to serve until 1926, but if at any time he was permanently injured in the execution of his duty, he was entitled to a special pension at a higher rate. Pensions were paid out of a fund, about one-third of which was provided by the plaintiffs, the rest of the fund being derived from other sources. In September, 1917, the constable in question while in discharge of his duty was injured by a steam waggon in charge of the defendants' employee. From the date of his injury until October, 1918, when it was first found that the constable was permanently incapacitated, he was paid full pay, amounting to £185.0.10; and as from the latter day he was awarded a special pension of £99 per annum. Lawrence, J., who tried the action, held that the plaintiffs were entitled to recover as damages the £185.0.10, so paid, and also a further sum in respect of the acceleration and increase of the pension, which he fixed at £150.

RESTRAINT OF TRADE—CONTRACT OF SERVICE—RESTRAINT TOO WIDE—SEVERABILITY.

Atwood v. *Lamont* (1920) 2 K.B. 146. This was an action to enforce a covenant in restraint of trade. The plaintiff carried on business at Kidderminster as a draper, tailor, and general outfitter. By a contract for the employment of the defendant by the plaintiff in his tailoring department, the defendant agreed that he would not any time thereafter "either on his own account, or on that of any wife of his, or in partnership with, or as assistant servant or agent to any other person or persons or company carry on or be in any way directly or indirectly concerned in any of the following trades or businesses that is to say, the trade or business of a tailor, dressmaker, general draper, milliner, hatter, haberdasher, gentlemen's, ladies' or children's outfitter at any place within the radius of 10 miles of Kidderminster." The defendant subsequently set up business as a tailor at Worcester outside the ten miles limit,

but obtained and executed tailoring orders in Kidderminster. The County Court Judge, who tried the action, held that the covenant was wider than was reasonably necessary for the protection of the plaintiff's business, and that it was not severable, and he dismissed the action; but a Divisional Court (Bailhache and Sankey, JJ.) reversed his decision, being of the opinion that though the covenant was too wide it was nevertheless severable and confined to the trade or business of a tailor, it might be enforced, and an injunction was accordingly granted restricted to the tailoring trade. The observations of Lord Moulton in *Mason* v. *Provident Clothing & S. Co.* (1913), A.C. 724, 745, as to the non-severability of such covenants were considered but not concurred in.

LANDLORD AND TENANT—TENANCY DETERMINED BY NOTICE TO QUIT—SUBSEQUENT TENDER OF RENT—ACCEPTANCE BY LANDLORD OTHERWISE THAN AS RENT—WAIVER OF NOTICE.

Hartell v. *Blackler* (1920) 2 K.B. 161. This was an action by a landlord to recover possession from an alleged overholding tenant. The defendant had been served with notice to quit, but had refused to leave on the expiry of the notice but tendered to the landlord rent. This the plaintiff refused to accept it as rent, but retained the money for defendant's occupation of the premises, and insisted that he should go out. The County Court Judge held that the retention by the landlord of the amount tendered as rent operated as a waiver of the notice to quit and dismissed the action, and on appeal a Divisional Court (Bailhache and Sankey, JJ.) affirmed his decision considering the point conclusively settled by *Croft* v. *Lumley* (1855) 5 E. & B. 648, 680, where it was held by the House of Lords that a landlord in such circumstances could not retain money tendered as rent for any other purpose without waiving a notice to quit.

BUILDING CONTRACT—CONSTRUCTION—CERTIFICATE OF ARCHITECT—CONDITION PRECEDENT TO RIGHT OF ACTION—ARBITRATION CLAUSE.

Eaglesham v. *McMaster* (1920) 2 K.B. 169. This was an action on a building contract, which *inter alia* provided that "the certificate of the architect is a condition precedent to the contractor's right of action against the employer" and also that "the architect is to be sole arbitrator or umpire between the employer and the contractor, and is to determine any question, dispute, or difference that may arise either during the progress of the work, or in determining the value of any variation that may be made in the work contracted for, and the certificate of the architect's

decision upon such question, or difference, shall be final and binding between the employer and contractor without any appeal whatever." The plaintiff who was the contractor had been paid the whole of the amounts which had been certified by the architect to be due to him, but he alleged that he was entitled to a further sum which he claimed to recover in this action. He made no application for arbitration. Lord Reading, C.J., who tried the action, held that in the absence of the architect's certificate that the claim made by plaintiff was unaffected by the arbitration clause, or of any evidence of any improper dealing between the architect and the employer, the action could not be maintained.

CRIMINAL LAW—EVIDENCE—PREVIOUS CONVICTION—ADMISSIBILITY—CRIMINAL EVIDENCE ACT, 1898, 61-62 VICT. C. 36, S. 1 (f) (ii)—(R.S.C. c. 145, s. 12).

The King v. *Wood* (1920) 2 K.B. 179. In this case the question was raised whether it was open to the prosecutor to give in evidence a previous conviction of the accused where the same related to an offence committed subsequent to that for which he was being tried; the Court of Criminal Appeal (Lord Reading, C.J., and Darling and Sankey, JJ.) held that he could.

CRIMINAL LAW—EVIDENCE—PRISONERS JOINTLY INDICTED—EVIDENCE OF ONE PRISONER—CROSS-EXAMINATION TO INCRIMINATE ANOTHER PRISONER.

The King v. *Paul* (1920) 2 K.B. 183. The point decided in this case is that where two persons are together indicted for an offence and one of them offers himself as a witness it is competent for the prosecuting counsel to cross-examine him with the view of incriminating his co-prisoner, even though his evidence-in-chief was simply a confession of his own guilt.

RAILWAY COMPANY—GOODS DELIVERED FOR CARRIAGE IMPROPERLY PACKED—KNOWLEDGE OF COMPANY OF INSUFFCIENCY OF PACKING—DEFENCE THAT DAMAGE DUE TO IMPROPER PACKING.

Gould v. *South Eastern and Chatham Ry.* (1920) 2 K.B. 186. This was an action against a railway company for damage to goods entrusted to it to be carried. The goods in question were insufficiently packed and this was known to the defendants' servants when they received them for carriage; but they contested the plaintiff's claim on the ground that the damage was due to the insufficient packing. The County Court Judge who tried the action was of the opinion that the defendants having knowledge

of the insufficient packing could not set it up as a defence, and he gave judgment in favour of the plaintiff; but the Divisional Court (Atkin and Younger, L.JJ.) reversed his decision, holding that the carrier of goods is not liable for any loss to goods due to the fact that the shippers had negligently and insufficiently packed them.

MUNICIPALITY—NEGLIGENCE—STREET INSUFFICIENTLY LIGHTED —LIABILITY OF LOCAL AUTHORITY.

Carpenter v. *Finsbury Borough Council* (1920) 2 K.B. 195. By statute the defendants were required to cause the streets within its borders to be well and sufficiently lighted, and for that purpose to set up and maintain a sufficient number of lamps in every such street, and cause them to be lighted with gas or otherwise, and to continue lighted during such times as the defendants might think necessary or proper. The plaintiff claimed to recover damages for the death of her husband which she alleged was due to the insufficient lighting of a street on which he was driving a vehicle. It was contended on the part of the defendant that under the statute the amount of light in each street was in the discretion of the defendants; but Sherman, J., who tried the action, held that the defendants were obliged to furnish a sufficient light, and whether or not they had done so, was a fact to be determined by a legal tribunal of fact; and in this case he found that fact against the defendants.

BANKRUPTCY—DEED OF ARRANGEMENT—INVALIDITY—UNAUTHORIZED TRUST FOR BENEFIT OF CREDITORS—MONEY RECEIVED BY TRUSTEE—RIGHT OF OFFICIAL RECEIVER TO MONEY IN HANDS OF TRUSTEE OF VOID INSTRUMENT—ESTOPPEL—STATUTE OF LIMITATIONS—(BANKRUPTCY ACT, 9-10 GEO. V. (D), c. 36, ss 3, 9, 11).

In re Lee (1920) 2 K.B. 200. Now that the Canadian Bankruptcy Act has come into force the English bankruptcy decisions become important to consider, as the Canadian Act is mainly founded on the English Act. In this case in 1904 a debtor executed a deed of arrangement with his creditors under which he assigned to a trustee a certain part of his annual income to be applied after making certain deductions in payment of the claims of his creditors and in consideration of the arrangement the creditors agreed that all proceedings in bankruptcy or otherwise were to be stayed. The arrangement was carried out until the debtor died in 1918, the applicant receiving *pro rata* payments on his debt between August, 1905, and July, 1917. The debt carried interest at four per cent. per annum and the amounts received were not sufficient to cover the

annual interest so that, with arrears of interest, his claim now exceeded the original amount of the debt. In February, 1919, an administration order was made against the estate of the deceased insolvent debtor which had the effect of making the deed of 1904 null and void. The trustee under that deed had in his hands £465.8.3, which the applicant now claimed should be declared to be held by the trustee in trust for the applicant and other creditors entitled under the deed of 1904 and to be divisible amongst them; and also that the applicant was entitled to prove for the balance of his claim in the administration of the estate of the deceased debtor. Horridge, J., who heard the motion, dismissed it, holding that the Official Receiver was entitled to the money: because the deed of 1904 was an act of bankruptcy and was null and void, and being void no valid trust was created thereby; and as the only direction to apply the money received under the deed of 1904 was contained in that deed, which all parties to it knew to be void, the deceased debtor would not have been, nor was the official representative estopped from setting up its invalidity; and though the applicant was also not estopped from setting up its invalidity and proving his claim in bankruptcy, and though the release of debts contained in the deed of 1904 was also void; yet, as the instrument only provided for the payment to the creditors of a portion of the debtor's income as long as he lived, no promise to pay the balance could be implied from the payments made thereunder, so as to prevent the running of the Statute of Limitations; and therefore the debt of the applicant was barred as against the debtor's estate.

PRACTICE—ARBITRATION—PETITION OF RIGHT—STAY OF PROCEEDINGS—FIAT—STEP IN THE PROCEEDINGS—ARBITRATION ACT, 1889 (52-53 VICT. c. 49), ss. 4, 22—(R.S.O., c. 65, s. 8).

Anglo-Newfoundland Development Co. v. *The King* (1920) 2 K.B. 214. This was a petition of right for which a fiat had been granted in due course. The present application was made on behalf of the Crown to stay the proceedings on the ground that the charterparty on which the petition was based contained a provision that any dispute arising thereunder should be referred to arbitration. It was argued that the King's fiat was a step in the proceedings and therefore the application was too late, but the Court overruled that objection, but while of the opinion that where there is an agreement for arbitration proceedings by way of petition of right may be stayed, they nevertheless found that in the present case there was no such agreement, and Warrington, L.J., held that even if such an agreement was proved in the present

case sufficient reasons were shewn why the petition should be allowed to proceed to trial, because the petitioners disputed the constitutional power of the Crown to impose the condition of submitting their claim to arbitration.

ADMIRALTY — PRACTICE — COLLISION — BAIL — STATUTORY LIMIT OF LIABILITY—AMOUNT OF BAIL.

The Charlotte (1920) P. 78. This was an Admiralty action for damages occasioned by a collision, in which the plaintiffs applied for leave to arrest the vessel alleged to be responsible for the collision, the owners of which opposed the application on the ground that they had put in bail for an amount equal to the statutory limit of liability under s. 503 of the Merchant Shipping Act, 1894. The plaintiffs did not admit, but disputed, the facts which entitled the defendants to limited liability. Hill, J., therefore held that the plaintiffs were entitled to arrest the vessel in question unless bail for its full value was put in.

ADMIRALTY—TENDER IN CONSOLIDATED SALVAGE ACTIONS—LUMP SUM TENDER TO SEPARATE SALVORS—COSTS—SEPARATE REPRESENTATION OF MASTER AND CREW.

The Creteforest (1920), P. 111. In this case two actions for salvage had been brought, one by the masters of two tugs, and the other by the crews of the same two tugs. The actions were consolidated and the conduct of the consolidated action was given to the masters. The defendants tendered a lump sum in satisfaction of all claims but their affidavit of values was only handed to the plaintiffs on the day of trial. Although Hill, J., held the tender to be sufficient, he also held that, according to *The Lee* (1893), P. 233, where, as in this case, a lump sum is tendered to answer several consolidated claims, the defendant runs the risk that the Judge may say it was reasonable for the plaintiffs to go to trial, even though the tender is held to be sufficient, and the lateness of the delivery of the affidavit as to values he considered justified him in adopting that view in the present case. He therefore awarded to the tug owners their costs of action, but considered the crews were not entitled to separate representation and made no order as to their costs.

ADMIRALTY—LIMITATION OF ACTION—UNCONDITIONAL APPEARANCE—WAIVER.

The *Llandovery Castle* (1920) P. 119. This was a salvage action, and the simple question involved was, whether or not the defendants, by entering an unconditional appearance, waive the right to set up the defence of the Statute of Limitations. Hill, J., decided that they did not.

ADULTERY—CONDONATION—RENEWAL OF INTERCOURSE AFTER KNOWLEDGE OF OFFENCE.

Cramp v. *Cramp* (1920) P. 158. Though a divorce case, deserves notice for the fact that McCardie, J., held that condonation of adultery on the part of a wife arises where the husband renews connubial intercourse after knowledge of the offence, even though there be, as the wife admits, no actual forgiveness. It may be noted that Mr. Justice Horridge arrived at a contrary conclusion: see 149 L. T. Jour., p. 178.

VENDOR AND PURCHASER—CONTRACT FOR SALE OF LAND—PURCHASER NOT NAMED—CHEQUE FOR DEPOSIT—CONNECTING DOCUMENTS—STATUTE OF FRAUDS (29 CAR. 2, c. 3) s. 4 (R.S.O., c. 102, s. 5).

Stokes v. *Whicher* (1920) 1 Ch. 411. This was an action by a purchaser for specific performance of a contract for the sale of land in which the question was whether there was a sufficient memorandum within the Statute of Frauds, s. 4 (R.S.O., c. 102, s. 5). The contract, "I agree to purchase, etc.", did not specify the purchaser's name, but one copy was signed by one Cross, as agent for the defendant "vendor," and another copy was signed by the plaintiff. The plaintiff gave a cheque for the deposit, £50. Russell, J., who tried the action, said the documents taken together constituted a sufficient memorandum within the statute and that the signature of the agreement to purchase by the agent of the defendant as vendor necessarily implied that the defendant agreed to sell: and that the name of the purchaser was established by the cheque for the payment on account. He therefore gave judgment in favour of the plaintiff.

ADMINISTRATION — ACCOUNT — EXECUTOR — ACTION BY BENEFICIARY—SHARE OF RESIDUE—ACTION TO RECOVER LEGACY—LAPSE OF TIME—REAL PROPERTY LIMITATION ACT 1874 (37-38 VICT. CH. 57) SEC. 8—TRUSTEE ACT (51-52 VICT. CH. 59) SEC. 8 (1) (*a*) (*b*)—(R.S.O. CH. 75, SECS. 24, 47 (2) (*a*) (*b*)).

In re Richardson, Pole v. *Pattenden* (1920), 1 Ch. 423. This was an action for administration. The testator died in 1909 and his estate was administered by his widow and the defendant and their functions came to an end in 1910. Under the will the widow was entitled to the whole of the residuary estate. No formal accounts were delivered to the widow by the defendant, who was a solicitor, but he informed her of all that was done, and about

the end of 1910 prepared and gave her a book containing all the particulars of her property. She died in 1917 and in 1918 the plaintiffs who were beneficiaries under her will of which the defendant was also executor brought this action for the administration of the original testator's estate for an account of his dealings therewith, but did not allege any misapplication. The defendant claimed the benefit of the Trustee Act, 50-52 Vict. ch. 59, sec. 8 (1) (*a*) (*b*), (see R.S.O. ch. 75, sec. 47 (2) (*a*) (*b*)). Peterson, J., who tried the action held that the action was one to recover a legacy within sec. 8 of the Real Property Limitation Act 1874 (see R.S.O. ch. 75, sec. 24), and therefore the Trustee Act, sec. 8, did not apply and the period limited by the Limitation Act not having elapsed the action was in time, and with this the Court of Appeal (Lord Sterndale, M.R., and Warrington and Younger, L.JJ.), agreed. Peterson, J., however held that sec. 8 (1) (*a*) of the Trustee Act (see R.S.O. ch. 75, sec. 24) applied to an action against an executor for an account, and had the effect of barring all items not within any of the exceptions mentioned in that sub-section, but he had nevertheless directed the usual accounts against the defendant for the purpose of ascertaining the facts. The Court of Appeal however disagreed with him on that point and held that the Trustee Act had no application to the case.

WILL—CONSTRUCTION—GIFTS TO "WIFE," "DAUGHTERS," "SONS" AND "CHILD OR CHILDREN"—LEGITIMATE SON AND TWO DAUGHTERS—UNION WITH DECEASED WIFE'S SISTER—ILLEGITIMATE DAUGHTER AND TWO SONS.

In re Bleckly, Sidebotham v. *Bleckly* (1920), 1 Ch. 450. The point in question in this case was whether illegitimate children could take under a bequest to "daughters" "Sons" "child or children." The facts were that the testator had married and had a legitimate son and two daughters. After his wife's death he had gone through the form of marriage with his deceased wife's sister, and by this union he had one daughter and two sons. By his will he refered to his deceased wife's sister by name as his "wife" and made bequests in favour of his "sons" and his "daughters." Eve, J., held that these bequests were confined to the legitimate children and that the illegitimate children took nothing, but the Court of Appeal (Lord Sterndale, M.R., and Warrington and Younger, L.JJ.), held that the will was so worded as to come within the second exception laid down by Lord Cairns in *Hill* v. *Crook*, L.R. 6 H.L. 265, *viz.*, where there is on the face of the will itself, upon a just and proper construction and inter-

pretation of the words used in it, an expression of the intention of the testator to use the term "children" not merely according to its *primâ facie* meaning of legitimate children, but according to a meaning which will apply to and include illegitimate children." The decision of Eve, J., was therefor reversed.

COMPANY — PRIVATE COMPANY — SALE TO COMPANY — SALE APPROVED BY ALL THE SHAREHOLDERS—ISSUE OF DEBENTURES —DIRECTORS NOT ENTITLED UNDER ARTICLES TO VOTE— POWER TO WAIVE TECHNICALITIES—VALIDITY.

In re Express Engineering Works (1920), 1 Ch. 466. In this case the question was whether certain debentures issued by a company in payment for certain property sold to the company were valid. The company was a private company composed of five persons. The articles provided that no director should vote on any question in which he was personally interested. The five members met together at what was described in the minutes as a board meeting, and agreed to sell to the company for £15,000 of debentures of the company property which they had a few days before acquired for £7,000. This sale they agreed to on behalf of the company, and at a subsequent meeting of the five the seal of the company was affixed to the debentures. The company having gone into liquidation, the liquidator contended that the debentures were invalid and were not binding on the company. There was no suggestion of fraud and Astbury, J., held that the transaction was one within the powers of the members of the company, and although the meeting was styled a directors meeting, yet as all of the five shareholders were present, it was in substance and effect a general meeting, and having received the unaminous assent of all the shareholders the debentures were valid: and the Court of Appeal (Lord Sterndale, M.R., and Warrington and Younger, L.JJ.), affirmed his decision.

ALIEN—NATURAL BORN GERMAN SUBJECT—NATURALIZATION IN AUSTRALIA—OATH OF ALLEGIANCE—STATUS IN UNITED KINGDOM—NATURALIZATION ACT, 1870 (33-34 VICT. c. 14) ss. 7, 10 —AUSTRALIAN CONSTITUTION ACT, 1900 (63-64 VICT. c. 12) SCHED. ART. 51 (XIX.)—AUSTRALIAN NATURALIZATION ACT 1903 (No. 11 OF 1903) ss. 5, 7, 8—BRITISH NATIONALITY AND STATUS OF ALIENS ACT, 1914 (4-5 GEO. V., c. 17) s. 27(1).— (4-5 GEO. V. c. 44, s. 8 (D.))

Markwald v. *Attorney-General* (1920) 1 Ch. 348. This case reveals the somewhat curious condition of affairs that a man may be a British subject and entitled to the rights and privileges of a

British subject in one part of His Majesty's dominions, and at the same time, be an alien in other parts of His dominions. This is somewhat contrary to the view expressed in *Garvin* v. *Gibson*, 109 L.T. 444 where it was held that a British subject is a subject of the Empire and not of any particular locality of the Empire. In this case a natural born German subject left Germany in 1878 and went to reside in Australia where, in 1908, he took the oath of allegiance to His Majesty and was granted a certificate of naturalization under the Australian Naturalization Act, 1903, whereby he became entitled to all political and other rights, powers and privileges to which a natural born British subject is entitled in the Commonwealth. He subsequently became a resident in London, and was charged and convicted for that, being an alien, he had failed to furnish a registration officer the particulars required by the Aliens Restriction Act and his conviction was upheld by a Divisional Court, *Rex* v. *Francis* (1918), 1 K.B. 617. The present action was brought for the purpose of obtaining a declaration that he was no alien in England, but a liege subject of the King in all parts of His dominions. Astbury, J., who tried the action, dismissed it and the Court of Appeal (Lord Sterndale, M.R., and Warrington and Younger, L.JJ.) affirmed his decision that the Australian naturalization was ineffectual to give the plaintiff the status of a British subject in the United Kingdom. It may be remarked that by virtue of the Imperial Statute, 4-5 Geo. V., c. 17, overseas dominions of the Crown which choose to adopt that Act, may now, by naturalization, confer the rights of a British subject throughout the Empire. Canada has adopted the Act. See 4-5 Geo. V., c. 44, s. 8.

WILL—CONSTRUCTION—OPTION "TO OCCUPY AND ENJOY THE USE OF" A HOUSE AND FURNITURE—TENANCY FOR LIFE—RIGHT TO EXERCISE POWERS OF TENANT FOR LIFE—SETTLED LAND ACT, 1882 (45-46 VICT. c. 38) s. 58(1) (VI.), (R.S.O. c. 74, s. 33(1)(*k*)).

Re Gibbons, Gibbons v. *Gibbons* (1920) 1 Ch. 372. This was an appeal from the judgment of Eve, J. (1919) 2 Ch. 99 (noted *ante* vol. 55, p. 349). The case turns upon the construction of a will whereby the testator, after providing for the upkeep of his house, grounds and furniture as a residence for his family until the youngest of his children should come of age, gave to his eldest as soon as that event happened the option of occupying using and enjoying the use of the house and furniture without payment of rent during his life, such option to be exercised by a written notice to the trustees within three months from the time when the right to exercise it arose. Subject to this similar options were given to

the other two children in succession. The youngest child attained twenty-one in 1913 and the eldest son thereupon gave notice to the trustees of his exercise of his option. He resided in the house until 1919, when he let it unfurnished and removed the furniture. Eve, J., was of the opinion that he had thereby forfeited his rights, but the Court of Appeal (Lord Sterndale M.R., and Warrington and Younger, L.JJ.) were unanimously of the opinion that he had not, but on the contrary was tenant for life and as such had under the Settled Land Act (45-46 Vict. c. 38) s. 58(1) (vi.) (see R.S.O. c. 74, s. 33 (1) (g)), the power to lease the property.

LANDLORD AND TENANT—LEASE—COVENANTS—CULTIVATION IN HUSBANDLIKE MANNER—COVENANT NOT TO PLOW UP "GRASS LAND"—INTERIM INJUNCTION—DAMAGES.

Clarke-Jervoise v. *Scutt* (1920) 1 Ch. 382. This was an action to restrain a tenant from committing an alleged breach of his covenants. The demised premises consisted of 130 acres, 1 r., 31 p. of arable land and 8 acres of grass land. The lease made in 1894 contained covenants by the lessee to manage and cultivate the land in a husbandlike manner, and also that he would not plow or otherwise break up any "grass land." In 1898 the tenant laid down 40 acres more to permanent grass. On notice to quit being given to him in 1919 he claimed the right to plow up the 40 acres of grass which had been arable at the commencement of the tenancy. The action was brought to restrain him from so doing. An interim injunction was granted on the usual undertaking as to damages. Pending the action the term expired and the only question was whether the interim injunction had been rightly granted and whether the defendant was entitled to damages. Eve, J., who tried the action, held that the covenant not to break up grass was not confined to the grass existing at the commencement of the term as the defendant contended, and further on the evidence it would be an unhusbandlike management of the land to have broken up the 40 acres as the defendant threatened to do, and therefore on both grounds the plaintiff was entitled to succeed. The counterclaim for damages he held was not necessary, as, without such claim, the defendant would have been entitled to an inquiry on the plaintiff's undertaking, and he dismissed it with costs.

POWER OF APPOINTMENT—SPECIAL POWER—APPOINTMENT BY WILL—SUBSEQUENT APPOINTMENT BY DEED IN FAVOUR OF THE SAME APPOINTEE—ADEMPTION—MOTHER AND CHILD—RULE AGAINST DOUBLE PORTION.

In re Eardley, Simeon v. *Freemantle* (1920) 1 Ch. 397. The question in this case was whether an appointment by will, followed

by an appointment by deed in favour of the same appointee, was operative, or whether the appointment by deed was by way of ademption of the appointment by will. The testatrix under her father's will had power, with the consent of her husband, to appoint by deed or will a sum of £40,000 between her seven children. On the marriage of three of them she appointed an equal share in favour of each of them. She then made her will appointing the residue between the other four children, one of whom subsequently married, and on his marriage she by deed appointed one-seventh share to him. Sargant, J., on the evidence, was clearly of the opinion that the intention of the appointor was to give by the appointment by deed, the share which she had previously appointed to him by will, and that the latter appointment was in effect adeemed by the appointment by deed.

VENDOR AND PURCHASER—SALE OF FREEHOLD HOUSE "IN POSSESSION"—PROPERTY ON LEASE—COMPLETION FIXED FOR DATE OF EXPIRATION OF LEASE—DILAPIDATION BY LESSEE—COMPENSATION FOR DILAPIDATIONS—CLAIM OF PURCHASER.

In re Lyne-Stephens & Scott-Miller (1920), 1 Ch. 472. This was an application under the Vendors' and Purchasers' Act to determine the question whether the purchaser was entitled to be paid certain moneys payable to the vendor by a lessee of the premises in respect of dilapidations. The contract was for the sale of a freehold house "in possession." At the date of the contract the property was under a lease, which would expire at the date fixed for completion; and under the lease a sum became payable for dilapidation which the vendor and the tenant agreed amounted to £2,060. The purchaser claimed to be entitled to this sum. But Sargant, J., who heard the application, held that what was sold was not the house subject to the lease, but the house with possession altogether apart from, and independent of the lease, the obligation and rights under which, were as he held, matters between the vendor and lessee; and that therefore the purchaser had no right to the moneys payable by the lessee under his covenant for dilapidations. With this conclusion the Court of Appeal (Lord Sterndale, M.R., and Warrington and Younger, L.JJ.) unanimously agreed.

WILL—DEVISE OF FREEHOLD RENT CHARGE—SUBSEQUENT PURCHASE OF PROPERTY SUBJECT TO RENT CHARGE—MERGER—ADEMPTION—WILLS ACT, 1837 (1 VICT. CH. 26), SECS. 23, 24—(R.S.O. c. 120, ss. 26, 27).

In re Bick, Eawards v. *Bush* (1920), 1 Ch. 488. The point involved in this case was whether or not, having regard to the

Wills Act, 1837, secs. 23, 24 (sec. R.S.O. ch. 120, secs. 26, 27), a devise of a rent charge had been adeemed, in the following circumstances. The testator by his will made in 1894 devised a rent charge of £15 per annum issuing out of a freehold house to his daughter. He subsequently purchased the fee simple of the house and the conveyance expressly stated that the rent charge should merge in the fee simple. Lawrence, J., held that the devise of the rent charge was adeemed and that the daughter took no estate or interest in the house.

WILL—CONSTRUCTION—LIFE ESTATE TO HUSBAND "KNOWING THAT HE WILL CARRY OUT MY WISHES"—SUBSEQUENT UNATTESTED MEMORANDUM—NO ENFORCEABLE TRUST—INTESTACY.

In re Gardner Huey v. *Cunnington* (1920), 1 Ch. 501. The question in controversy in this case arose out of a will whereby the testatrix devised and bequeathed all her real and personal estate to her husband for his use and benefit during his life "knowing that he will carry out my wishes." Four days after the date of the will she signed an unattested memorandum expressing her wishes that the money she left to her husband should be divided equally among certain named beneficiaries. There was no evidence that this memorandum or its contents were communicated to the husband at or before the execution of the will; but there was evidence that after the testatrix's death the memorandum was found in her husband's safe, and that in her lifetime the testatrix had said in the presence of her husband that her property after her husband's death was to be divided between her two nieces and nephew, to which the husband signified his assent; and this disposition was in accordance with the memorandum which however, made a further provision in the event of one of the nieces dying. Eve, J., on an originating summons to determine the rights of the parties named in the memorandum—held that the memorandum was inoperative inasmuch as it purported to deal with property left to her husband and nothing had been left to him except his life estate; but even assuming that there was an implied gift of the residue to the husband, inasmuch as the trust appeared on the face of the will it was necessary to shew that at or before the execution of the will its terms had been made known to the legatee, and as this had not been done; following *Johnston* v. *Ball* (1857), 5 D.G. & Son 85, the trust failed; and the residue passed to the husband as next of kin, and on his death intestate, to his next of kin.

MORTGAGE—SALE BY FIRST MORTGAGEE—SURPLUS PROCEEDS OF SALE—CLAIM BY SECOND MORTGAGEE—MORE THAN SIX YEARS' ARREARS OF INTEREST DUE SECOND MORTGAGEE—REAL PROPERTY LIMITATIONS ACT, 1833 (3-4 W. 4, c. 27), s. 42 (R.S.O., c. 75, s. 18).

In re Thomson Thomson v. *Bruty* (1920), 1 Ch. 508. In this case a first mortgagee had sold the mortgaged premises and, after the satisfaction of his claim, a surplus remained in his hands, and the question at issue was as to the rights of a second mortgagee to whom there was due more than six years' arrears of interest. The second mortgagee claimed as much of the surplus as was necessary to satisfy his claim including the arrears of interest; and the first mortgagee contended that he was only entitled to six years' arrears of interest, under the Real Property Limitations Act, 1833 (3-4 W. 4, ch. 27), sec. 42 (R.S.O., ch. 75, sec. 18). Eve, J., who heard the application held that it was not in the nature of an action to recover money charged on land, and was therefore not within sec. 42 (R.S.O., ch. 75, sec. 18); and though the second mortgagee's right to recover more than six years' arrears of interest by action might be barred, yet his claim was not extinguished, and that the application was a proceeding to compel the execution of a trust, and he held that the second mortgagee was entitled to the surplus.

WILL—DEVISE WITHOUT WORDS OF LIMITATION—GIFT OVER AT DEATH OF DEVISEE "WITHOUT AN HEIR"—GIFT OVER TO POSSIBLE COLLATERAL HEIR—ESTATE IN FEE SIMPLE WITH EXECUTORY GIFT OVER—WILLS ACT 1837 (1 VICT. c. 26) ss. 28, 29—(R.S.O. c. 120, ss. 31, 33.)

In re Thomas Vivian v. *Vivian* (1920), 1 Ch. 515. By the will in question in this case the testator devised lands to "Walter Vivian and at his death without an heir to Anthony Vivian and his heirs." Anthony being a nephew of Walter. Eve, J., who was called on to construe this will held that under the Wills Act, 1837, sec. 28 the devise to Walter without words of limitation, had the effect of giving him a fee simple, and that the effect of the gift over to a person who might be his collateral heir, was to create an executory gift over in the event of Walter dying without an heir of his body, otherwise no effect could be given to the gift over. And he held that sec. 29 (R.S.O. ch. 75, sec. 33) had not the effect of making the estate devised to Walter an estate tail, as was claimed on his behalf.

EJECTMENT—DEFENDANT IN POSSESSION—INTERIM RECEIVER—DISCRETION—JUDICATURE ACT 1873 (36-37 Vict. c. 66) s. 25 (R.S.O. c. 56, s. 17).

Marshall v. *Charteris* (1920), 1 Ch. 520. This was an action of ejectment against a defendant in actual occupation in which the plaintiff made an interlocutory application for the appointment of a receiver of the rents and profits, and for an order requiring the defendant to give possession to the receiver. Eve, J., refused the motion, which he said was one "of a very unusual character."

POWER—POWER OF REVOCATION AND NEW APPOINTMENT "EXPRESSLY REFERRING TO POWER"—CONSENT OF TRUSTEES—EXERCISE OF POWER BY WILL—"GIVE, DEVISE AND BEQUEATH AND APPOINT."

In *Re Barker Knocker* v. *Vernon Jones* (1920), 1 Ch. 527. In this case a voluntary settlement was under consideration. By it the settlor settled a fund in trust for the settlor for life with remainder for other persons therein named. The settlement reserved a power to the settlor with the consent of the trustees by deed or will expressly referring to the power to revoke the trusts of the settlement and declare other trusts thereof for her own benefit. By deeds in 1906 and 1909 the settlor exercised this power as to two sums part of the settled fund. She died in 1918 having made a will without the consent of the trustees whereby she gave, devised, bequeathed and appointed all of her residuary estate, both real and personal to trustees for sale and conversion and declared trusts of the proceeds. Three questions were submitted to the judgment of the Court. (1) Was the consent of the trustees necessary to the execution of the power by will? This first point was not contested by the beneficiaries, and Sargant, J., who heard the case, decided that on the true construction of the settlement the consent of the trustees was only necessary to an execution of the power by deed. (2) Did the will "expressly refer" to the power within the meaning of the settlement. The learned Judge held that by the use of the word "appoint" that provision was sufficiently complied with, inasmuch as the testatrix had no other power than that contained in the settlement. (3) Whether the words used in the will were sufficient to effect a revocation and new appointment of the fund? And this question the learned Judge answered affirmatively. And he therefore held that the remaining balance of the settled fund passed under the appointment contained in the will.

Correspondence

LATERAL SUPPORT—EXCAVATION.

THE EDITOR, CANADA LAW JOURNAL:

Dear Sir:—In connection with *Foster* v. *Brown*, Hal. L.C. 1920, 48 O.L.R., p. 1, there is a New Zealand case which it is interesting to note. This case is *Byrne* v. *Judd* 1908, 27 New Zealand Law Reports 1106. The facts are as follows:—O'Brien, the owner of land in the City of Wellington, excavated land in such a manner as to remove the lateral support of the adjoining land. To prevent a subsidence he erected a wooden breastwork which he kept in repair. On his death, in 1896, the land passed, by devise, to Judd. After O'Brien's death the breastwork was not repaired. in 1903 heavy rains caused the breastwork to give way, and the plaintiff's land to slip into the excavation. To save his land, the plaintiff erected a concrete wall, and sued Judd for the cost of the wall.

The case was appealed twice and on the final appeal it was held that the injured land owner had a right only against the former owner who had actively removed the lateral support, and not against the person who happened to be the owner at the time when the support, then remaining, gave way, following *Greenwell* v. *Low Beechburn Coal Co.*, and *Hall* v. *Norfolk*. The owner of land may excavate as much as he pleases so long as he does not cause a subsidence of the adjoining land. If he causes a subsidence of the adjoining land he is liable therefor, but he is under no obligation to erect a breastwork. In his judgment, Edwards, J., says "If O'Brien was under no obligation to erect a breastwork he was under no obligation to keep it in repair, and if he was under neither of these obligations, the appellant (Judd) certainly could not be held liable."

The facts in *Foster* v. *Brown* are practically the same as in *Byrne v. Judd*.

From the judgment of the learned Chief Justice in *Foster* v. *Brown*, at p. 6, it could be inferred that the removal of lateral support imposes the duty on the remover of building a retaining wall. It is submitted that the opinion of the New Zealand Court of Appeal is the more correct. The duty is to refrain from causing a subsidence by removing support, otherwise a man in excavating rock would be required by law to revet it. This idea is untenable—see *Birmingham* v. *Allen* (1877) 2 ch. 284. "There might be land of

so solid a character that a foot of it would be enough to support the land and again there might be land so pliable that you would need a quarter of a mile of it."

The right to natural support is a natural right. It does not impose a duty on the adjoining owner to refrain from excavating nor if he excavates to build a retaining wall. He is merely liable in damages if the soil falls in as a result of his excavation. Accordingly it would seem impossible to fix on his successor in title, a duty which was not imposed on the person who excavated. The American case *Cavanaugh* v. *Thorton*, therefore, would not seem to be good law.

Greenwell v. *Low Beechburn Coal Co.*, *Hall* v. *Norfolk* and *Byrne* v. *Judd* hold that the right of action lies against the person who actively removes the support only, and not against his successor in title, when the natural support then remaining gives way. The learned Chief Justice puts great weight on *Attorney-General* v. *Roe*, where the excavation was near a highway. With deference to his opinion it would seem that there is a difference between the duty imposed upon any occupant of land to abate a public nuisance, whether that nuisance is caused by himself or another, and the duty imposed upon an occupant of land to refrain from injuring his neighbour's land. There seems to be no logical connection between a breach of the first duty and a breach by a predecessor in title of the second.

One might note that the New Zealand case was not cited to the Ontario Court of Appeal.

CHAS. WEIR.

SARNIA, ONT., NOV. 18, 1920.

Book Reviews.

Life Insurance Contracts in Canada. By HARVEY JAMES SIMS, LL.B., B.C.L., Barrister-at-law. Toronto: R. G. McLean, Ltd. 1920.

An examination of this work shews that it will afford practical assistance to the Canadian lawyer when called upon to determine the rights of the parties under a life insurance contract. The Dominion and Provincial Acts respecting life insurance with all amendments to date have been reviewed at some length. The author points out the differences which exist between the various Provincial Insurance Acts and emphasizes the desirability of

having uniform legislation on the subject and particularly in regard to the rights and status of beneficiaries. The volume includes references to all the important decisions in the Canadian Courts on life insurance contracts. The author has been for many years Counsel to the Mutual Life Insurance Co. of Canada. His large experience has qualified him in writing this excellent compendium of the law of life insurance. The arrangement as well as the printing and style of the book are exceedingly good.

Bench and Bar.

The Lord Chancellor.

We have noticed in some quarters a disposition to speak somewhat disparagingly of the present Lord Chancellor of England. His Lordship we regret to hear is suffering from ill health, and his illness has called forth the following from the English *Law Times*:—

"Universal regret will be felt at the illness of Lord Birkenhead and one sincerely hopes that a change to a warmer climate will speedily restore him to health. Lord Salisbury truly said that the Lord Chancellor's great abilities, courtesy, and industry had done an immense deal to improve in every way the efficiency and success of the legislative work of the House of Lords, and we would also add that he has proved a tower of strength to that body when sitting in a judicial capacity."

Death of Alexander Bruce, K.C.

We have to record the death of Mr. Alexander Bruce, K.C., formerly of Hamilton, Ontario, and more recently of Toronto, in his 84th year. Mr. Bruce was one of the oldest practising solicitors in this Province. He was called to the Bar in 1859. In 1886 he was elected a Bencher of the Law Society of Upper Canada; and was a most useful member of that body. He had a large practice in Hamilton where he was most highly respected as an able and conscientious lawyer, enjoying the confidence and esteem of his many clients. He left Hamilton for Toronto in 1905 to take the position of General Counsel and Solicitor of the Canada Life Assurance Co. A most worthy citizen, and a high-minded courteous gentleman of the old school, he will be greatly missed.

JUDICIAL APPOINTMENTS.

Hon. Edmund W. P. Guerin, Hon. Eratus E. Howard, Hon. Charles E. Dorion, Hon. Victor Allard, Hon. Joseph M. Tellier and Hon. Edmund J. Flynn, all Judges of the Superior Court for the Province of Quebec, to be Puisne Judges of the Court of King's Bench for the said Province. (July 26.)

C. D. White, of the City of Sherbrooke, K.C., to be a Puisne Judge of the Superior Court for the Province of Quebec.

Philimon Cousineau, of the City of Montreal, K.C., to be a Puisne Judge of the Superior Court for the Province of Quebec. (Nov. 4.)

Mr. Holmested, K.C., the Senior Registrar of the High Court Division, was, on the 1st October, 1910, appointed to act as Registrar in Bankruptcy till further direction, by the Hon. the Chief Justice of Ontario under sec. 64 (4) of the Bankruptcy Act.

His Honour Edward Peel McNeill, Judge of the District Court of Macleod, Province of Alberta, to be Junior Judge of the District Court of Calgary, vice Judge Winter promoted.

Lucien Dubuc, of the City of Edmonton, Alberta, Barrister-at-law, to be Judge of the District Court of Peace River in the said Province (October 6).

Flotsam and Jetsam.

THE PEOPLE'S ANCIENT AND JUST LIBERTIES.

The above is the title of a book printed in the year 1670. It gives an account of the trial of William Penn and William Mead at the Old Baily, in London. This trial was one of the most important of English criminal trials; and is especially interesting as it refers to the subject of a personal liberty so dear to the British people, and shews the sturdy determination of the Anglo-Saxon to maintain his constitutional rights; and, incidentally, the value of a jury in criminal cases.

In 1670 Penn fell into trouble by preaching in the street in violation of the Conventicle Act. He was promptly arrested with Captain William Mead and taken before the Lord Mayor who sent them to the Old Baily. In the remarkable trial that followed the jury, who were kept two days and two nights without food, fire or water brought in a verdict of not guilty, for which each juryman was fined forty marks and sent to Newgate, while Penn and Mead were also fined and imprisoned for contempt in

wearing their hats in presence of the Court. They appealed to the Court of Common Pleas where the decision of the lower Court was reversed and the great principle of the English Law was established, that it is the right of the jury to judge of the evidence independently of the dictation or direction of the Court.

THE OLD INNS OF CHANCERY.

It is to be hoped that Clifford's Inn, which is to be sold shortly, will not disappear entirely before the operations of the modern builder as Clement's Inn and New Inn and other Inns of Chancery have done. Furnivall's Inn, where Dickens lived until 1837, has been absorbed by a large insurance company, but, fortunately, Barnard's Inn, on the opposite side of Holborn, has provided a dining hall for the Mercers' School, and Staple Inn, almost next door, is preserved with a beautiful rock garden. The dining halls of these Inns are famous for their oak panelling, and some of them for their stained glass windows, containing the arms of the sergeants and the benchers. It was the practice, too, to place the escutcheons of the successive treasurers on the walls.—*The Times.*

Our Georgian ancestors dealt drastically with "lightning strikes," in one case with a comic result.

About 100 years ago Lord Mayor Wood sent a city sugar baker to prison for leaving his work without notice, but humanely omitted to order the man also to be flogged, as the statute prescribed.

When the sugar baker came out of jail he sued Alderman Wood for not conforming with the law, and the jury were compelled to award him some nominal damages for being illegally deprived of his flogging.—*London Chronicle.*

The jury system has now but little hold in this country, according to the Daily Chronicle. The law Courts re-opened with record lists. Yet of 266 defended divorce cases (out of a total of 2,597) only eight are to be tried by juries; of 765 King's Bench cases all but 62 are to be tried by Judges sitting alone.

Police Magistrate to prisoner: "What's your name?"
Prisoner (who stutters): "S-s-s-s-s."
Magistrate (impatiently): "What are you charged with?"
Prisoner: "S-s-s-s-s."
Amicus Curiæ: "Soda water, I should think, your Honour."

ANALYTICAL INDEX.