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LEGAL MORTGAGES IN EQUITY.

1. **Mortgage regarded as security merely.**
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1. Mortgage regarded as security merely.—Although the courts of law construed a mortgage strictly as conferring upon the mortgagee a conditional estate in the land, they did not entirely lose sight of the fact that the substantial purpose of the transaction was merely to give a security to the mortgagee.

Littleton points out that if the mortgagor dies before the day fixed for payment, the duty to pay the debt may be discharged by his *executors*, and if the mortgagee dies before the day the money should be paid to his *executors*, and not to his heir, unless the heirs are named (*a*). Till the time fixed for redemption has expired the mortgagee's estate is clearly regarded as simply a security for money lent, which money can be paid by and should be received by the executors and not by the heir. This idea bore much fruit when, after the legal time for redemption had expired, the Court of Chancery recognized an equity of redemption (*b*).

In *Thornbrough* v. *Baker* (*c*), in Chancery, in 1677, it was held that if the mortgagor's estate had been forfeited at law and the

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(*a*) Litt. Ten. ss. 337, 339; Co. Litt. 208*a*, 209*b*. If both heirs and executors were named disjunctively and the mortgagor paid the money precisely on the day, he might elect to pay it to the heir or the executor as he pleased. *Thornbrough* v. *Baker*, 1677, 3 Swanst. 628, at. p. 629, 18 R.C. 231, at p. 232.

(*b*) Holdsworth, History of English Law, vol. 2, p. 491; *cf.* Strahan, Law of Mortgages, 2nd ed., 19, 20.

(*c*) 1 Cas. in Ch. 283, 2 W. & T.L.C. Eq. 1; S.C. *sub nom. Thornbrough* v. *Baker*, 3 Swanst. 628, 18 R.C. 231; 2 Freeman 143.

mortgagee was dead, the money was payable to the executor, not to the heir, even though the heirs were named in the contract. In such a case the contractual right of the mortgagor to pay the heir instead of the executor was forfeited. The mortgagee's right to the land was in essence merely a right to a security for money, and the money, when paid, was part of his personal estate. Consequently the heir was bound to reconvey on payment to the executor. It has long been settled that the mortgage security is personal estate (*d*).

2. Equitable right to redeem and the correlative right to foreclose.—Equity carried to its logical conclusion the principle that the mortgage transaction was in essence merely the giving of security, by incorporating in the contract certain inevitable terms which were not in accordance with the language of the contract and which the parties to the contract could neither dispense with nor modify (*e*). One of these terms was that after the mortgagor's estate had become forfeited at law, equity would relieve against the forfeiture and allow him to redeem (*f*), or, in other words, would give him an equitable right to redeem after his contractual right was gone. In substance it is obvious that this equitable rule is more just than the legal rule according to which, no matter how valuable the estate was in comparison with the debt secured, the estate was forfeited on default in payment exactly on the day (*g*). In point of form the equitable rule is objectionable because

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(*d*) 21 Halsbury, Laws of England. p. 182, note (*q*).

(*e*) Ashburner, Principles of Equity, 258*ff*. In a modern mortgage it is customary to insert special contractual provisions, such as a power of sale, a right to distrain, etc., and such provisions are binding in so far as they are consistent with the "inevitable terms" incorporated by equity in the mortgage transaction.

(*f*) *Cf. Kreglinger* v. *New Patagonia, etc., Co.*, [1914] A.C. 25, at p. 35.

(*g*) H. D. Hazeltine in *Die Geschichte des englischen Pfandrechts* (Breslau, 1907), 249, refers to some passages in the old dramatists as shewing that the harshness of the common law rule as to forfeiture on default was not in accord with the public sentiment as to what was just and that the mortgagee who took advantage of the forfeiture might have qualms of conscience. From Fletcher's *The Night Walker or Little Thief:*

Alathe. — Thou hast undone a faithful gentleman,
By taking forfeit of his land.

Algripe.—I do confess. I will henceforth practise repentance.
I will restore all mortgages, forswear abominable usury.

it contradicts the language of the mortgage, whereas the legal rule is in agreement with that language. "That is the worst of our mortgage deed—owing to the action of equity, it is one long *suppressio veri* and *suggestio falsi*" (*h*).

As always, the Court of Chancery recognized the legal title. In equity as well as at law the mortgagee became the absolute legal owner on the mortgagor's default in payment, but the Court of Chancery by a decree *in personam* would compel the mortgagee upon equitable terms to reconvey the land to the mortgagor, and, if the mortgagee had already taken possession, would compel him to account for rents and profits received.

It was only through intermediate stages that the Court of Chancery reached the final result, namely, that in every case forfeiture would be relieved against in equity unless there existed some equitable ground for refusing relief. Littleton, in the fifteenth century, has nothing to say about an equity of redemption, although in at least one case as early as 1456 Chancery gave relief under a feoffment by way of mortgage and a bond to secure payment where the mortgagee fraudulently sought to enforce the bond (*i*). Coke, likewise, in his Commentary upon Littleton, has nothing to say about an equity of redemption,

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From the *Three Ladies of London* (1584):

Simplicity.—O that vile Usury! he lent my father a little money; and for breaking one day,
He took the fee-simple of his house and mill quite away;
And yet he borrowed not half a quarter as much as it cost;
But I think if it had been a shilling, it had been loste;
So he killed my father with sorrow, and undoed me quite.

(*h*) Maitland, Equity and the Forms of Action, p. 269. "Of course, one knows in a general, if not in a critical way, what is an equity of redemption. It is a right not given by the terms of the agreement between the parties to it, but contrary to them, to have back securities given by a borrower to a lender. I suppose one may say by a debtor to a creditor, on payment of principal and interest at a day after that appointed for payment, when by the terms of the agreement between the parties the securities were to be the absolute property of the creditor. This is now a legal right in the debtor. Whether it would not have been better to have held people to their bargains, and taught them by experience not to make unwise ones, rather than relieve them when they have done so, may be doubtful. We should have been spared the double condition of things, legal rights and equitable rights, and a system of documents which do not mean what they say. But the piety or love of fees of those who administered equity has thought otherwise. And probably to undo this would be more costly and troublesome than to continue it." *Salt* v. *Marquess of Northampton*, [1892] A.C. 1, Lord Bramwell, at p. 18,19.

(*i*) Select Cases in Chancery (Selden Society, vol. 10, 1896), case 141.

but in his day, in the early part of the seventeenth century, it had become the practice in Chancery to allow a mortgagor to redeem after default in special circumstances, for instance, if the period of default was short and the default was occasioned by accident or fraud (*j*). So at a comparatively early date Chancery allowed redemption after default in the case of a person who had made a mortgage as surety merely, because in that case, until after the principal debtor had made default, the mortgagor would not know whether he would be called upon to pay at all (*k*).

In the reign of Charles I. the right to redeem in equity was fully recognized even in the absence of special circumstances (*l*).

Conversely, Chancery admitted the right of a mortgagee, after the mortgagor had made default at law, to come into a court of equity and insist that the mortgagor should either exercise his equitable right to redeem within a reasonable time or be forever precluded from exercising it (*m*).

"A bill of foreclosure (it is an action now) never gave and never was intended to give the mortgagee any active remedy. A bill of foreclosure in substance was this: 'You have a right to redeem and you may exercise that right at any time within twenty years (*n*) according to the usual practice of the court, but I do not want to be kept in a state of uncertainty as to whether I am or am not to be redeemed, and therefore if you want to redeem me, redeem me now;' and the mortgagee has a right to say: 'Redeem me upon those terms upon which you would be entitled to redeem if you filed your redemption suit.' That is all. If you do not redeem your equity of redemption is gone; the only result, therefore, of a bill for foreclosure is to deprive a man of his opportunity of filing a bill of redemption at some future time." (*o*).

3. A mortgage cannot be made irredeemable.—When the right of redemption after default became established, the Court of Chancery, in order to prevent its evasion, was obliged to hold that a

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(*j*) In *Courtman* v. *Conyers* (1650), Acta Cancellariæ, 764, the mortgagee was alleged to have purposely absented himself on the day fixed for redemption in order to avoid receiving payment. In other words, it was a case of fraud. Jenks, Short History of English Law, 219.

(*k*) Hazeltine, *op. cit.*, 252, 253; Spence, Equitable Jurisdiction, vol. 1, 602, 603; Williams, Real Property, 21st ed., 546, 547.

(*l*) *Emmanuel College* v. *Evans*, 1625-6, 1 Rep. in Ch. 18; *Welldon* v. *Rallison*, 1656, 1 Rep. in Ch. 171.

(*m*) *How* v. *Vigures*, 1628-9, 1 Rep. in Ch. 32.

(*n*) The period is now ten years in Ontario, twelve years in England.

(*o*) *Cummins* v. *Fletcher*, 1880, 14 Ch.D. 699, at p. 708. The passage quoted occurs in a judgment relating to the mortgagee's right of consolidation.

mortgagor could not by any agreement entered into at the time of the mortgage and as part of the mortgage transaction contract away his right of redemption or fetter it in any way by confining it to a particular time or to a particular class of persons (*p*). The principle upon which the court interfered with the contract of the parties was, however, not a rigid one. The equity judges looked, not at what was technically the form, but at what was really the substance of transactions, and confined the application of their rules to cases in which they thought that in its substance the transaction was oppressive. Thus, in *Howard* v. *Harris* (*q*), Lord Keeper North in 1683 set aside an agreement that a mortgage should be irredeemable after the death of the mortgagor and failure of the heirs of his body, on the ground that such a restriction of the right to redeem was void in equity, but he intimated that if the money had been borrowed by the mortgagor from his brother, and the former had agreed that if he had no issue the land should become irredeemable, equity would not have interfered with what would really have been a family arrangement. The exception thus made to the rule, in cases where the transaction includes a family arrangement as well as a mortgage, has been recognized in later authorities (*r*).

4. Once a mortgage always a mortgage.—The principle that a mortgage could not be made irredeemable was thus limited in early days to the accomplishment of the end which was held to justify interference by equity with freedom of contract. It did not go further (*s*). As established, it was expressed in three ways. The first and most general rule was that if the transaction is one

(*p*) *Mellor* v. *Lees*, 1742, 2 Atk. 494. "It seems that a borrower was such a favourite with courts of equity that they would let him break his contract, and, perhaps, by disabling him from binding himself, disable him from contracting on the most advantageous terms to himself." *Salt* v. *Marquess of Northampton*, [1892] A.C. 1, Lord Bramwell, at p. 19.

(*q*) 1683, 1 Vern. 190, 2 W. & T.L.C. Eq. 11, 18 R.C. 358.

(*r*) *Kreglinger* v. *New Patagonia, etc. Co.*, [1914] A.C. 25, at p. 36; *Stapilton* v. *Stapilton*, 1739, 1 Atk. 2, 1 W. & T.L.C. Eq. 234; *cf.* 2 W. & T. L.C. Eq. 19.

(*s*) The leading case with regard to the principle under discussion is the case of *Kreglinger* v. *New Patagonia, etc. Co.*, [1914] A.C. 25; see, especially, the judgment of Lord Parker of Waddington. See also on the general subject the notes in 2 W. & T.L.C. Eq. 15*ff* to the case of *Howard* v. *Harris*, *supra*.

found to be a mortgage, it must be treated as always remaining a mortgage and nothing but a mortgage—"once a mortgage always a mortgage"—and is therefore redeemable notwithstanding any agreement to the contrary (*t*).

It was only a different application of the paramount principle to state in the form of a second rule that a mortgagee should not stipulate for a collateral advantage which would make his remuneration for the loan exceed a proper rate of interest (*u*). The third form in which the principle was stated was that any stipulation which restricts or clogs the equity of redemption is void (*v*).

5. Stipulation for a collateral advantage.—The second rule, which prohibited a mortgagee from stipulating for a collateral advantage, was founded upon the statutes against usury. A stipulation of this kind was in equity held void as being contrary to the spirit of these statutes (*w*). The rule was by its nature confined to mortgages to secure the repayment of borrowed money, and the stipulation was void *ab initio* on the ground of supposed public policy. The rule had nothing to do with an equity of redemption based on relief against forfeiture, because it was enforceable before as well as after default. Since the repeal of the usury laws there is no reason why mortgages to secure loans should be on any different footing from other mortgages or why

(*t*) A modern case in which it was attempted virtually to make a mortgage irredeemable is *Fairclough* v. *Swan Brewery Co.*, [1912] A.C. 565. A clause in a mortgage of a lease for twenty years provided that without the mortgagee's written consent the mortgage debt should not be wholly paid off till a date within six weeks of the expiration of the lease. It was held that the mortgagor was entitled to redeem. *Cf. Manitoba Lumber Co.* v. *Emmerson*, 1913, 18 B.C.R. 96, 14 D.L.R. 390.

(*u*) See heading number 5.

(*v*) See heading number 6.

(*w*) Throughout the period in which the Court of Chancery was formulating its doctrines in relation to mortgages there were in force in England statutes limiting the rate of interest which could be legally charged for money lent. The last of these usury laws was repealed in 1854 by the statute 17 & 18 Viet. c. 90. The leading case as to a stipulation for a collateral advantage was formerly that of *Jennings* v. *Ward*, 1705, 2 Vern. 520, 18 R.C. 365, in which Sir J. Trevor, M.R., said, "A man shall not have interest for his money and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement." *Cf.*, the notes in 2 W. & T.L.C. Eq. 23*ff*, to the case of *Howard* v. *Harris*, 1683, 1 Vern. 190.

the old rule against a mortgagee's stipulating for a collateral advantage should be maintained in any form or with any modification. The right (notwithstanding the stipulation) to redeem on payment merely of principal, interest and costs is a mere corollary of the rule and falls with it (*x*).

In every case in which a stipulation by a mortgagee for a collateral advantage has, since the repeal of the usury laws, been held invalid, the stipulation has been open to objection, either (1) because it was unconscionable, or (2) because it was in the nature of a penal clause clogging the equity arising on failure to exercise a contractual right to redeem, or (3) because it was in the nature of a condition repugnant as well to the contractual as to the equitable right (*y*).

In other words, a provision in favour of a mortgagee is not invalid merely because he thereby stipulates for a collateral advantage. Accordingly, if there is nothing unfair or oppressive in the bargain, in a mortgage of a hotel to a brewer the mortgagee may stipulate that the mortgagor shall during the continuance of the security deal exclusively with the mortgagee for all beer and malt liquors sold on the mortgaged premises (*z*); in a mortgage of the lease of a theatre—a notoriously risky security—the mortgagee may stipulate for a share in the profits of the theatre (*a*); and when money is lent on a security of a speculative or unsatisfactory nature, the mortgagee may, as part of the mortgage transaction, stipulate for the deduction by him from the amount of

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(*x*) Lord Parker of Waddington in *Kreglinger* v. *New Patagonia, etc., Co.*, [1914] A.C. 25, at pp. 54-55.

(*y*) S.C. [1914] A.C. at p. 56. See, *e.g.*, *James* v. *Kerr*, 1888 40 Ch.D. 449 (agreement for bonus voidable as an undue advantage obtained from mortgagor under the pressure of distress and in a position analogous to that of an expectant heir).

(*z*) *Biggs* v. *Hoddinott*, [1898] 2 Ch. 307; *Noakes & Co.* v. *Rice*, [1902] A.C. 24, at p. 33; *Kreglinger* v. *New Patagonia, etc., Co.*, [1914] A.C. 25, at p. 38.

(*a*) *Sandley* v. *Wilds*, [1899] 2 Ch. 474; 16 L.Q.R. 7, 113 (Jan., April, 1900). The correctness of this decision has been called in question because in the mortgage there in question it was provided that the share in the profits of the theatre was to be paid until the end of the leasehold term, and not merely during the existence of the mortgage: *Noakes & Co* v. *Rice*, [1902] A.C. 24, at pp. 31, 34. But see *Kreglinger* v. *New Patagonia, etc., Co.*, [1914] A.C. 25, at p. 56.

the advance or for the payment by the mortgagor of a bonus or commission in addition to the interest payable under the mortgage (*b*).

6. **Clogging the equity of redemption.**—There remains the third rule, that any stipulation which restricts or clogs the equity of redemption is void, or, as stated more broadly, that any provision which is repugnant either to the contractual or to the equitable right to redeem is void. A condition that if the contractual right is not exercised by the time specified the mortgagee shall have an option of purchasing the mortgaged property may properly be regarded as a penal clause and may be relieved against (*c*). It is repugnant only to the equitable and not to the contractual right. But a condition that the mortgagee is to have such an option for a period which begins before the time for the exercise of the equitable right has arrived, or which reserves to the mortgagee any interest in the property after the exercise of the contractual right, is inconsistent not only with the equitable but with the contractual right itself, and might perhaps be held invalid for repugnancy even in a court of law (*d*). "It is the right of a mortgagor on redemption, by reason of the very nature of a mortgage, to get back the subject of the mortgage, to hold and enjoy as he was entitled to hold and enjoy it before the mortgage. If he is prevented from doing so, that which he is entitled to on redemption is prevented, and to constitute such prevention it is not necessary that the subject of the mortgage should be directly charged with whatever causes the prevention. If he be so prevented in fact,

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(*b*) *Potter* v. *Edwards*, 1857, 26 L.J. Ch. 468; *Marquess of Northampton* v. *Pollock*, 1890, 45 Ch.D. 190, at p. 212 (S.C. *sub nom. Salt* v. *Marquess of Northampton*, [1892] A.C. 1); *Lyon* v. *Wynn-Mackenzie*, [1894] 1 Ch. 218, at p. 227; *Gardiner* v. *Munro*, 1896, 28 O.R. 375; *Farrell* v. *Caribou Gold Mining Co.*, 1897, 30 N.S.R. 199; *Buchanan* v. *Harvie* (No. 2), 3 N.B. Eq. 61. The distinction drawn in *Phillips* v. *Prout*, 1898, 12 M.R. 143, between a bonus or commission agreed to be paid and one which is deducted at the time of the advance or afterwards paid by the mortgagor does not seem to be well-founded.

(*c*) *Vernon* v. *Bethell*, 1762, 2 Eden 110, at p. 113; *Fallon* v. *Keeman*, 1866, 12 Gr. 388; *Arnold* v. *National Trust Co.*, 1912, 5 A.L.R. 214, 7 D.L.R. 754.

(*d*) *Kreglinger* v. *New Patagonia, etc., Co.*, [1914] A.C. 25, at p. 50.

the equity of redemption is affected by what, whether very aptly or not, has been always termed 'a clog' " (*e*).

In *Noakes & Co.* v. *Rice* (*f*) a mortgage of a leasehold public-house by a licensed victualler to brewers contained a covenant by the mortgagor that he and all persons deriving title under him should not, during the continuance of the leasehold term, and whether any money should or should not be owing on the mortgage, use or sell in the house any malt liquors except such as should be purchased from the mortgagees. It was held that this covenant was a "clog" on the equity of redemption, and that the mortgagor, on payment of all that was owing on the security, was entitled to have a reconveyance of the property, or at his option a transfer of the security, free in either case from the tie (*g*).

In *Bradley* v. *Carritt* (*h*), the holder of the majority of the shares of a company mortgaged his shares as security for an advance of money and at the same time covenanted that he would always thereafter use his best endeavours to secure that the mortgagee should be employed as a broker for the sale of the company's teas and that, in the event of any of such teas being sold otherwise than through the mortgagee, the mortgagor should pay to the mortgagee the commission which the mortgagee would have earned if the teas had been sold through him. The mortgage was paid off and the company changed its broker. The quondam mortgagee brought an action against the mortgagor for breach of the covenant. The House of Lords held, by a majority of three to two, reversing the Court of Appeal, that the covenant was invalid because, although it did not operate *in rem* or as a

(*e*) *Browne* v. *Ryan*, [1901] 2 I.R. 655, Andrews, J., at pp. 667, 668, quoted with approval and adopted by Collins, M.R., in *Jarrah Timber and Wood Paving Corporation* v. *Samuel*, [1903] 2 Ch. 1, at p. 7 (S.C. [1904] A.C. 323, *sub nom. Samuel* v. *Jarrah, etc.*); *cf.* Strahan, Law of Mortgages, 2nd ed., 29*ff*; notes in 2 W. & T.L.C. Eq. 20*ff*, to *Howard* v. *Harris*, 1683, 1 Vern. 190.

(*f*) [1902] A.C. 24.

(*g*) But the opinion of Lord Davey, at p. 34, that the mortgagee cannot stipulate for any payment which is to fall due after the principal is repaid is dissented from by Lord Parker of Waddington in *Kreglinger* v. *New Patagonia, etc., Co.*, [1914] A.C. 25, at p. 58, as being the reassertion in a modified form of the rule against stipulating for a collateral advantage which prevailed prior to the repeal of the usury laws. See also Pollock's observations in 16 L.Q.R. 113, 322 (April, Oct., 1900).

(*h*) [1903] A.C. 253.

charge on the shares, its effect was permanently to fetter mortgagor in the free enjoyment and disposition of the sh . The true ground of the decision was that the covenant was repugnant to the contractual as well as to the equitable right of the mortgagor on redemption to get his property back intact (*i*).

In *Samuel* v. *Jarrah Timber and Wood Paving Corporation* (*j*), certain debenture stock was transferred as security for an advance. The loan was repayable on thirty days' notice on either part, and the mortgagor agreed that the mortgagee at any time within twelve months of the date of the advance should have the privilege of purchasing the stock at 40% of the face value. The option being inconsistent with both the co tractual and equitable right of redemption was held to be invalid (*k*).

The decision in *De Beers Consolidated Mines* v. *British South Africa Co.* (*l*) really turned on the facts. It was held that the stipulation for the mining license there in question was not part of the mortgage transaction and therefore was not a clog on the equity of redemption. The further question was raised, but not decided, whether the general principles of equity with regard to the right to redeem apply in their integrity to mortgages by way of floating charge. A similar question was raised, but not decided, in the important case of *Kreglinger* v. *New Patagonia Meat and Cold Storage Co.* (*m*). In this case the paramount doctrine that a mortgagor cannot at the time of the mortgage and as part of the mortgage transaction contract away his right to redeem and the subsidiary rules in which that doctrine has been

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(*i*) There was room for difference of opinion on the question whether the repugnancy existed in fact, but the dicta expressed by Lord Macnaghten and Lord Davey, that a stipulation for a collateral advantage to endure after redemption is necessarily invalid, are dissented from in *Kreglinger* v. *New Patagonia, etc., Co.*, [1914] A.C. 25, at pp. 43, 60.

(*j*) [1904] A.C. 323.

(*k*) See *Kreglinger* v. *New Patagonia, etc., Co.*, [1914] A.C. 25, at p. 60. Although the case was a clearer one than either *Noakes & Co.* v. *Rice* or *Bradley* v. *Carritt*, it was an extreme one in that a company with a board of directors composed of experienced men of business, advised by a competent solicitor, after it had invited a loan and settled considered terms, was permitted to repudiate its own bargain deliberately entered into in its own interests. See Pollock in 19 L.Q.R. 359 (Oct., 1903).

(*l*) [1912] A.C. 52.

(*m*) [1914] A.C. 25.

expressed were subjected to a fresh and illuminating discussion by Lord Haldane and Lord Parker of Waddington (*n*). By an agreement dated the 24th of August, 1910, a firm of wool brokers agreed to lend to a company carrying on the business of meat preservers a sum of £10,000 at 6%. If the interest was punctually paid the loan was not to be called in until the 30th of September, 1915, but the company might pay off at any time on giving one calendar month's notice. The loan was secured by a floating charge on the undertaking of the company. The agreement provided that for a period of five years from the date thereof the company should not sell sheepskins to any person other than the lenders so long as the latter were willing to buy at the best price offered by any other person and that the company should pay to the lenders a commission on all sheepskins sold by the company to any other person. The loan having been paid off by the company in January, 1913, in accordance with the agreement, the lenders claimed the right to exercise their option of pre-emption notwithstanding the payment of the loan. The House of Lords, reversing the Court of Appeal, held that the stipulation for the option of pre-emption formed no part of the mortgage transaction, but was a collateral contract entered into as a condition of the obtaining of the loan by the company; that it was not a clog on the equity of redemption or repugnant to the right to redeem; and that the lenders were entitled to an injunction restraining the company from selling sheepskins, in breach of the agreement, to any person other than the lenders.

(*n*) As the judgments in this case have been made the chief basis for the discussion of the doctrine contained in the foregoing pages, it is sufficient here simply to state the decision.

JOHN D. FALCONBRIDGE.

THE ATTORNEY-GENERAL OF ENGLAND.

Osgoode Hall, Toronto, was honoured on the 21st inst. by a visit from the Right Hon. Sir Frederick Edwin Smith, Bart., K.C., M.P., Attorney-General of England. Convocation Hall at Osgoode Hall was filled with a large number of Judges and members of the Bar desirous of meeting and greeting the distinguished stranger, though not as he said a stranger to all as some of those present had met him at the little room in Downing St. where sits that august body known as the Judicial Committee of the Privy Council, which so often hears the voice of this prominent advocate who holds so many briefs from outlying possessions of the British Empire.

Dr. Hoskin, K.C., LL.D., Treasurer of the Upper Canada Law Society, together with Mr. E. F. B. Johnston, K.C., representing the Canadian Bar Association, the Presidents of the Ontario Bar Association and the County of York Bar Association received the guest and conducted him to the Hall where the Treasurer made some observations appropriate to the occasion, congratulating the Bar on having with them one so distinguished and occupying so high a position in the profession.

We give our readers a full report of the answering speech of Sir Frederick. Without any attempt at oratory and speaking quietly, as though dictating to a stenographer, he spoke in the manner which has become traditional with those holding high positions in the British House of Commons. After some introductory observations, he said:—

"I suppose in one sense this is a lawyer's war. People who do not understand law often throw sneers at lawyers and they often, in desiring to make the sneer more cutting, prefix the adjective political. Those same people when in difficulties of their own, however, are the first to seek advice from the lawyers they previously attacked. Moreover, wherever democratic conditions obtain lawyers are running the countries.

"As I understand it this war is on behalf of democracy and with the object, in the words of President Wilson, of keeping the world free for democracy." The growth of democracy was due in large measure to the power attained by lawyers.

"There are many points in which the common law and public law are similar. International treaties and such documents as The Hague Convention are the work of lawyers. The foundations were first laid after one of the most devastating wars in history. The weakness of their efforts was, that if ever a nation was wicked enough and ambitious enough to tear up and destroy the flimsy foundation upon which the superstructure had been erected, it fell. The moment you find a nation wicked enough and ambitious enough to challenge the world and say this is no law at all, and because it is no law we will tear it up there is no punishment.

"The moment a nation is found prepared to make that challenge, from that moment there is no remedy but war. There is no means of cutting that cancer out of the system except by the sword, and that is why I say, in a more important sense, that this war is really a lawyer's war, because upon its thoroughness depends the answer to the question whether or not puclic law is to survive in the world.

"With reference to Germany, at every stage of the war she has shewn contempt of the whole force which hereto had been attributed to the law of nations. If that is to be done then we might as well throw away our books on international law. The question at stake is whether public law is to survive the war.

"It is important to the future of the world; it is necessary if we are to avoid a reoccurrence of the horrible violence, such as is defying humanity to-day; it is as necessary if these things are to be avoided that we should plant public law on an unassailable foundation as private law. How it can be done I do not know. If you can muster sufficient unselfishness in the senses of the nation, and sufficient control of the material forces, then it will be so much the better. As to this probability I express no opinion.

"This is the first time since the Declaration of Independence that the great Anglo-Saxon nations are engaged in a war together and this war has not only at stake the material but the moral basis upon which civilization depends, and, without the maintainnance of which civilization cannot survive. If the solution of this war is, as we are entitled to hope it may be, if that solution is favourable to those who have supported the law

then truly we may find that it is not an idealistic dream to hope that there will be a better fate for our sons and grandsons than would be otherwise possible."

PUNISHMENT OF JUVENILE OFFENDERS.

A very sensible letter appears in a recent issue of the *Solicitors' Journal* on the subject of "Juvenile Crime and Birching." The writer is, we are told, a magistrate of long experience and a very competent authority. In these days of foolish sentimentalism it is refreshing to have such common-sense talk in the line of the boiled-down pronouncement of the wisest of men, who affirm,s and it may be said to have divine approval: "Spare the rod and spoil the child." We commend this letter to the attention of those in authority in the premises:—

"My knowledge of the subject was gained by observing the results of a practice we adopted as magistrates of a provincial borough, and which was suggested to us by the recorder of that borough, who set us an example by his mode of dealing with a juvenile delinquent at the borough quarter sessions.

"There are many occasions in which the result of allowing juvenile crime to go unpunished is merely to encourage the boy to repeat the offence, and to boast of the result of his experience before the magistrates. To send him to prison, however, would, we felt, be no punishment. To a certain class of boys a term of imprisonment is something to be proud of, and the boy comes out of gaol regarded as a kind of hero by his fellows. We could not, of course, order a boy of this class to be birched, but we sent for his parents and told them we should be bound to send the boy to gaol unless we were satisfied that he had been properly birched. If he were so dealt with we would inflict no further punishment, but we must be satisfied that a real punishment had been inflicted. The result almost invariably was that the father elected that the boy should be birched, and the boy and his father adjourned to the police-station, where the father requested the constable, as his deputy and in his presence, to administer the whipping—four, six, or eight strokes with a birch, according

to the age of the boy and the nature of the offence. This course was not adopted in the case of first or trivial offences, but in cases of shoplifting or bad assaults, often persevered in after the first offence that had been detected had been condoned, and the results were excellent. I never recollect a boy who had been properly birched appearing before the magistrates again, whereas boys who had either been discharged with a caution or sent to gaol very often had soon to be dealt with again. I recollect mentioning our practice to a nobleman who had been a member of one of Lord Salisbury's Cabinets, and he told me that it had been in contemplation at one time to introduce a Bill which, among other provisions, would have enabled magistrates to inflict corporal punishment of a mild character in cases such as I have referred to, but that the idea was abandoned because the Ministry learnt that the classes known as the workingmen would resent any such legislation

"The fact, sir, is that the namby-pamby sentimentalism of the present day is responsible for a great deal of the crime and mischief which we deplore. Young scoundrels must not be punished, and if older criminals are to be sent to gaol the prison must be made so comfortable that some vagabonds choose them for winter quarters."

THE TRUE VALUE OF AMERICAN CASES.

It is not sufficiently borne in mind that all study, and all daily work, has two values, a utilitarian value and a priceless culture value. The student of promise does not accept the statements in his text-book as inspired, or allow points to slip by uncriticised and unverified; the conveyancer does not copy, copy, copy the precedent in the book before him, or wish it was shorter; nor is an advocate content to get together, with the aid of a digest, all the reported cases nearest the point in dispute and cite them one after another, little digested, to the patient Bench. He who has acquired such a distinctive appellation recognises critical excellence too readily to rest content with practical mediocrity, and still less with workaday makeshift.

The eligibility for our use of the judgments delivered by accomplished and experienced judges in the United States (which, for brevity, may be called American decisions) has naturally been much canvassed. To us it appears they are for men, but not for boys—for those who have been as ambitious to obtain the culture value as the utilitarian value of their various daily tasks, and have striven throughout life to obtain some learned leisure. We fully sympathise with Lord Esher when he remarked on the very great assistance which, over and over again, he had derived from the decisions of American judges dealing with that which is very much the same law as our own (*Reg.* v. *Castro*, 5 Q.B.D. 490, 516); and we venture to think that some advanced students are inclined somewhat to undervalue in appropriate cases such assistance.

Every educated lawyer differentiates a decision from an authority. It is, we continue to think, a neglect of any such differentiation, by some young and too zealous advocates, that led two or three English judges to protest against the citation of American cases, such advocates pressing them forward as of the quality and character of binding precedents rather than of illustrative, guiding or influential opinions. If an advocate finds among the American reports views and opinions upon the administration or development of the law which, in his opinion, are enlightened, and are sound according to the law of England, it is perfectly legitimate for him to address to a Court an argument founded on these views or opinions. And should the point in controversy not be covered by English authorities, it seems equally allowable for him, if he pleads, to ornament and influence his argument by a reference to the American decisions. Indeed, such a reference may be helpful to the Court, and will, at any rate, insure the decision being read with respect, and as a guide or an apt illustration of a legal principle: *Bradlaugh* v. *Reg.*, 3 Q.B.D. 607, 620; *Scaramanga* v. *Stamp*, 5 C.P.D. 295, 303; *The Bernina*, 12 P.D. 58. He will, moreover, be entitled to do so with greater confidence in cases relative to marine insurance and the like international subjects, because on such subjects we are allies, and clearly it is the more advisable

that English lawyers should sink unessential singularities, and our law, if possible, conform with that of other civilized nations. In consequence, in such cases, American decisions ought to be considered with a greater desire to endeavour to agree with them: *Cory* v. *Burr*, 9 Q.B.D. 462, 469. But to advance and cite an American case in the sense of a co-ordinate authority, binding an English court, is absurd and a sad waste of time, and when it is done a protest is deserved, and justifiable, or we are greatly mistaken: *Re The Missouri Steamship Co.*, 42 C.D. 321, 330, and cases already cited.

Then, it may be asked, how should American cases be read for the purpose either of their culture value or of the presentation of a case in court? We may reasonably assume that the better trained will have already made himself perfectly acquainted with the new combination of circumstances brought to his attention, and will have attentively applied to those circumstances the rules of law derivable from legal principles; and that he will thereupon have formed his preliminary opinion, and have fortified, or revised, that opinion by a careful consultation of any English authorities or *dicta*. It is of supreme importance to keep the principle of decision steadily in view, and to remember, as Lord Mansfield says, that precedents only serve to illustrate and explain general principles, and to give them a fixed certainty. Until this spade work has been done, it is difficult quite to see how a reader is to derive the full benefit of the American examples. If, however, it have been thoroughly done, he may advantageously, in the first place—if he wish to economize his time—ascertain if the American Court was acting on decisions or statutes subsequent to the Declaration of Independence. Having satisfied himself that the Court was dealing with matters and with principles of law common to the jurisdiction of their and our Courts, he may proceed, in the next place, to consider the decision both with reference to legal principles and also to the authorities cited. And then, in the third place, he will have to determine whether the decision reached is consistent with English law, and, possibly also, whether he is able to appreciate the principle pursuant to which, and understand the reasoning by which, it is

reached, and the soundness of such reasoning. In one celebrated case, for instance, where, by force of an American decision, learned counsel endeavoured to get an important limitation grafted on to an old principle, James, L.J., confessed himself startled by the mode in which the American judges dealt with the case before them, both with reference to the authorities and with reference to legal principle: *Reg.* v. *Castro, ubi sup.*, at p. 502. Should the reader come to the conclusion that the case he is reading does not proceed on English law, or that the reasoning is not impervious to criticism, then the only thing for him to do is to put it on one side. We all must recognize that, among the voluminous mass of English reports, there is much, both in the law and the reporting, which is commonplace and mediocre, and even some judgments which would be regarded in an Appeal Court as of little or no consequence; and it would be too much to expect always to find perfection in a decision of the overseas judges.

Some persons, and not all of them incumbered with an inert habit of mind, therefore advance the objection that, as American decisions cannot all be of equal value, a seeker after truth in England is under an obvious disadvantage, not being acquainted with the position of the judges or the standing of the Courts in appraising their value. For ourselves, we should appreciate this objection better if the American decision bound our judges, and best if it were to be used indiscriminately by the competent and incompetent reader. The works of Sir Walter Scott are not of equal merit, nor would every piece in a collection of china reach the highest standard; yet is there any doubt that a man of letters in the one case, and an experienced collector in the other, would have little difficulty in discerning the true quality and in making an enlightening classification? It was said—we need not stay here to inquire with what justification—of an old and disused collection of conveyancing precedents that they were of very various merit, but as a body too hetreogeneous and dissimilar in their frame and composition to be habitually used by a scientific draftsman. Although then, it would not have been expedient for a copyist to use this work, was there any reason to hinder a

conveyancer from winnowing the grain from the chaff, and, on occasion, referring to the work with advantage to himself and his clients?

To make effective use of American cases something more substantial and serviceable is required than proceeds from a mind inadequately disciplined with legal rules, or severely rationed on text-books. Past generations were under no illusion as to what was necessary to such a liberal education as we deem requisite for the purpose, and we fear the following noteworthy and admirably expressed passage is as true to-day as it was at the commencement of the Victorian era:—"It is an opinion very generally entertained (and one more pernicious could hardly have taken root) that a correct and comprehensive knowledge of principles can be best acquired from the study of dogmatical or elementary treatises; and, accordingly, such works have superseded, in many instances, all inductive inquiry into the original sources of our law. The student may rest assured that a procedure of this sort, in which the mind is a mere passive recipient, can only serve to make what Lord Bacon significantly calls 'lawyers in haste,' who, for the most part, may be truly likened to those blades of corn that grow yellow before the harvest, but have empty ears.' So much, indeed, is the current idea as to learning rudimentary law a reversal of the truth, that we should not be surprised if this admirable statement came, to many in their pupilage, as a flood of bright sunlight and a sharp note of warning. Should such peradventure happen to be the case, may this quotation seminate, as many another has in past time, a higher standard of attainment and a more worthy ambition, and so fructify into a most successful use of the harvest—a good selection of leading cases, whether they happen to be of home or transatlantic origin.—*Solicitors' Journal.*

Reports and Notes of Cases.

England.

JUDICIAL COMMITTEE OF PRIVY COUNCIL.

Viscount Haldane, Lords Dunedin, Shaw, Sir A. Channell.] [Law Times Rep. Dec. 15, 1917.

FIDELITY AND CASUALTY CO. OF NEW YORK v. MITCHELL.

Appeal from the Supreme Court of Ontario.

Canada—Insurance (accident)—Sprained wrist—Bodily injury—Exclusively of all other causes—Latent tuberculosis—Infection—Total disablement.

By a policy dated the 10th Feb., 1913, the appellants insured the respondent, a medical man, against "bodily injury sustained . . . through accidental means . . . and resulting directly, independently, and exclusively of all other causes in (*a*) immediate, continuous, and total disability that prevents the assured from performing any and every kind of duty pertaining to his occupation." By clause 11 blood poisoning resulting directly from a bodily injury was to be deemed to be included in the term "bodily injury." The policy also provided that in the case of partial disability so resulting, their liability was not to extend beyond twenty-six weeks. In the case of total disability resulting from an accident while in a railway train, the assured was to be paid quarterly a sum of $150 weekly. A statement by the respondent that he was sound "mentally and physically" was made a warranty.

On the 30th May 1913 the respondent, while travelling in a train, met with an accident to his wrist. He was paid for seven quarters at the rate of $150 a week. The wrist was found to be tuberculous and payments were stopped. There was evidence that some years before the date of the policy the assured had suffered from a slight tuberculous affection of the left lung, which had caused a lesion which had not healed. The disease had then become latent, and would have remained so in all probability but for the accident.

Held, agreeing with the findings of fact arrived at by both Courts below, that there was no breach of warranty. The dis-

ablement resulting from the tubercular condition of the wrist was not a fresh intervening cause, but was itself caused "directly, independently, and exclusively of all other causes" from the accident, and therefore the respondent was entitled to recover under the policy.

Decision of the Supreme Court of Ontario (reported 37 Ont. L. Rep. 335) affirmed.

Sir John Simon, K.C. and *D. L. McCarthy* K.C., for appellants; *P. O. Lawrence* K.C. and *J. D. Montgomery*, for respondent.

Dominion of Canada.

SUPREME COURT.

Alta.] [Oct. 9, 1917.

TORONTO GENERAL TRUSTS v. THE KING.

Taxation—Succession duties—Property in province—Mortgage—Foreign mortgage.

The debt secured by a mortgage on lands in Alberta, registered under the provisions of The Land Titles Act, is "property in the province" within the meaning of section seven of the Succession Duties Act (5 Geo. V. c. 5 [Alta.]) though the domicile of the mortgagee is out of the province and the debt is a specialty debt. Anglin, J., dissenting. Though a seal is not essential to the validity of a mortgage in Alberta if it is executed under seal the debt is a specialty. Idington, J., *dubitante*.

Held, per Duff, J. In the sense of international law a mortgage on land is an immovable.

Held, per Anglin, J. The mortgage executed under the seal of the mortgagor is the evidence of the debt independently of registration and is conspicuous in the domicile of the mortgagee.

Ford, K.C., for appellant.

Lafleur, K.C., for respondent.

Alta.] GRACE v. KUEBLER. [Oct. 9, 1917.

Sale of land—Payment by instalments—Assignment of purchase moneys—Notice—Payment by purchaser to vendor—Caveat.

Under the provisions of the Land Titles Act of Alberta, the payment by a purchaser to his vendor of the purchase moneys

without notice of any assignment from the vendor to a third person, is valid, and the registration of a caveat by the transferee does not amount to such notice.

Armour, K.C., and *Clarke*, K.C., for appellant.

Bennett, K.C., and *Sinclair*, K.C., for respondent.

B.C.] [Oct. 15, 1917.

GEALL v. DOMINION CREOSOTING CO.

Negligence—Findings of jury—Railway company—Cars left on tracks—Extraneous interference, anticipation of.

The respondent was engaged in delivering creosoted paving blocks brought in freight cars over the British Columbia Electric Railway's tracks. The employees of the railway company, after having placed the cars so loaded at points indicated by the servants of the respondent, had taken care to have the brakes applied by the air compressor and to have blocks put in front of the wheels. Later on, the respondent's men, for their convenience, moved the cars further down the grade, put back the blocks and applied the brakes by such simple contrivances as they found available in the absence of a shunter. Then some school boys unloosened the brakes on the car furthest uphill which being propelled by its own gravity against the lower ones, had all the cars so moved on that a collision took place at the foot of the hill between these freight cars and a passenger coach of the Electric Railway.

Held, Davies and Duff, JJ., dissenting, that, upon the evidence, the employees of the respondent should have anticipated that the school boys might release the cars and that the respondent was liable for having taken no steps to guard against such interference.

Per Idington, J.—The question as to whether or not this interference was such an occurrence as ought to have been foreseen and provided against is not a question of law, but a question of fact within the province of the jury.

Per Davies and Duff, JJ., dissenting.—The proximate and effective cause of the accident was the interference of the school boys, which the respondent had no reason to anticipate.

Jarvis, for appellant.

Tilley, K.C., for respondent.

Que.] BROUSSEAU v. THE KING. [Nov. 15, 1917.

Criminal law—Counselling to commit offence—Crim. Code, sec. 69.

Everyone is guilty of an offence who counsels or procures another to commit it, whether the person so counselled actually commits the offence he is counselled to commit or not. Demanding money from a contractor for aid in securing contracts from a municipal corporation is counselling the contractor to commit the offence mentioned in sec. 69 of the Criminal Code. The criminal common law of England is still in force in Canada, except in so far as repealed either expressly or by implication.

Laflamme, K.C., for appellant.

Walsh, K.C., for respondent.

Man.] [Nov. 28, 1917.

ARCHIEPISCOPALE CATHOLIQUE ROMAINE DE SAINT BONIFACE v. TRANSCONA.

Statute—Construction—Assessment—Rate—Value—Assessment Act, R.S.M. (1913) c. 134 s. 29.

The Manitoba Assessment Act, R.S.M. (1913) c. 134, s. 29, provides that "in cities, towns and villages all real and personal property may be assessed at less than actual value or in some uniform and equitable proportion of actual value, so that the rate of taxation shall fall equally upon the same."

Held, that this legislation does not authorise the assessment of property at more than its actual value.

Chrysler, K.C., for appellant.

W. F. Hull, for respondent.

Province of New Brunswick.

SUPREME COURT.

McKeown, C.J.K.B., White and Barry, JJ.] [37 D.L.R. 235.

JOHN PALMER CO. v. PALMER-MCLENNAN SHOE PACK CO.

1. Trademark—Surname—Secondary meaning.

A surname which has acquired a secondary meaning as a trademark cannot be used as a trademark by another person without the latter clearly distinguishing his goods.

[See *Re Horlick's Malted Milk* (1917), 35 D.L.R. 516, and annotation thereto at p. 519.]

2. Companies—Corporate names—Conflict—Declaratory order.

The use of a corporate name, as chartered, cannot be restrained merely because it resembles in part the name of another corporation and its trademark; it is no ground for a declaratory order.

3. Estoppel—Laches—Infringement of trademark—Injunction.

A delay of several months in bringing an action for injunction, after the discovery of the infringement of a trademark, does not amount to such laches or acquiescence as will deprive the plaintiff of his remedy.

Teed, K.C., and *Gregory*, K.C. for plaintiff. *Powell* and *Hughes*, for defendant.

ANNOTATION ON ABOVE CASE FROM 37 D.L.R.

Distinction between trademark and trade name and rights arising therefrom.

BY RUSSEL S. SMART, B.A., M.E., OF THE OTTAWA BAR.

Sections 5 and 11 of the Trade-Mark and Design Act (R.S.C. 1906, c. 71) read:—

5. All marks, names, labels, brands, packages or other business devices, which are adopted for use by any person in his trade, business, occupation or calling for the purpose of distinguishing any manufacture, product or article of any description, manufactured, produced, compounded, packed or offered for sale by him, applied in any manner whatever either to such manufacture, product or article, or to any package, parcel, case, box or other vessel or receptacle of any description whatsoever containing the same shall, for the purposes of this Act, be considered and known as trade-marks. R.S., c. 63, s. 3.

11. The Minister may refuse to register any trade-mark:—

(a) If he is not satisfied that the applicant is undoubtedly entitled to the exclusive use of such trade mark;

(b) If the trade-mark proposed for registration is identical with or resembles a trade-mark already registered;

(c) If it appears that the trade-mark is calculated to deceive or mislead the public;

(d) If the trade-mark contains any immorality or scandalous figure;

(e) If the so-called trade-mark does not contain the essentials necessary to constitute a trade-mark properly speaking. 54-55 V., c. 35, s. 1.

REFER TO ENGLISH LAW FOR DEFINITION OF TRADE-MARK.—The classification of sec. 5 does not constitute a definition of trade-marks. For this purpose, reference must be had to English Law (*Standard Ideal Co.* v. *Standard Sanitary Manufacturing Co.*, [1911] A.C. 78).

It is necessary, however, to use the English decisions with care, especially those since 1875, which are generally limited to interpretation of the definition of registrable trade-marks found in the Trade-Marks Registration Act of 1875 and subsequent Acts.

Lord Cranworth in *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H.L.C. 523, 11 E.R. 1435, 35 L.J., Ch. 61, gives the following definition:—

"A trade-mark, properly so-called, may be described as a particular mark or symbol, used by a person for the purpose of denoting that the article to which it is affixed is sold or manufactured by him or by his authority or that he carries on business at a particular place."

Clifford, J., in *McLean* v. *Fleming*, 69 U.S. 245, 254, said: "A trade-mark may consist of a name, symbol, letter, form or device, if adapted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells, to distinguish the same from those manufactured or sold by another, to the end that the goods may be known in the market as his and to enable him to secure such profits as result from his reputation for skill, industry, and fidelity."

ENGLISH ACT OF 1905.—Sec. 9 of the present English Act. that of 1905, reads in part:—

9. A registrable trade-mark must contain or consist of at least one of the following essential particulars:—

(1) The name of a company, individual or firm represented in a special or particular manner;

(2) The signature of the applicant for registration or some predecessor in business;

(3) An invented word or invented words;

(4) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification, a geographical name or a surname;

(5) Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the description in the above paragraphs 1, 2, 3. and 4 shall not, except by order of the Board of Trade, or the Court, be deemed a distinctive mark.

DISTINCTIONS BETWEEN ENGLISH AND CANADIAN ACTS.—It is clear that the above definition imposes limitations not in the Canadian statute. In the Supreme Court in *New York Herald* v. *Ottawa Citizen* (1908), 41 Can. S.C.R. 229, affirming 12 Can. Ex. 229, Idington, J., said: "Our statutes and the English Acts are so different that, except for the fundamental purpose of determining whether any device used, may in its manner of use, be or not be a subject of such property as exists in law in trade-mark, the English cases are not very helpful."

Distinctions between the Canadian and English statutes have been pointed out in *Smith* v. *Fair*, 14 O.R. 729; *Provident Chemical Works* v. *Canadian Chemical Co.*, 4 O.L.R., at p. 549; *Fruitatives* v. *La Compagnie Pharmaceutique de La Croix Rouge* (1912), 8 D.L.R. 917, 14 Can. Ex. 30.

The more important distinctions are:—

(1) The Canadian Act makes all marks, names, labels, brands, packages, or other business devices "which contain the essentials necessary to constitute a trade-mark" registrable. The English Registration Acts define what trade-marks are registrable. Most of the English decisions are concerned with the interpretation of the definition of the Act and not with the broad question of what constitutes the essentials of a trade-mark. Unregistered

trade-marks only come into Court in England in "passing off" and "unfair competition" actions where other facts than the character of the trade-mark influence the decision.

(2) The Canadian Act not merely makes the registration *prima facie* evidence of ownership and right to use but states (sec. 13), that after registration the proprietor "shall have the exclusive right to use the trade-mark to designate articles manufactured or sold by him."

(3) The Canadian statute provides no statutory classification. It provides a general division, however, between "general" and "specific" trade-marks. The former endure perpetually.

(4) The provisions of the Canadian statute with respect to assignments do not require the assignment to be only made in connection with the good-will as under the English enactments.

The Province of Quebec derives considerable of its common law from France, and it is necessary to give consideration to this point as affecting cases within that province.

Cross, J., in *Lambert Pharmacal Co.* v. *Palmer & Sons, Ltd.*, 2 D.L.R. 358, has pointed out that Canadian trade-mark law is a development from both French and English law.

"With reference to the authorities cited to us from the law of France, it may be opportune, that, speaking for myself, a few observations be added: The law of France upon the subject of trade-marks and designs is a creation of modern legislation which was not extended to this country. As the law of France stood when it prevailed in this part of Canada, it was possible to say of it, in the words of the treatise in Dalloz, Rep.:—

Industrie et Commerce No. 252: "Mais jusqu' à cette époque c'est-a-dire la réorganisation du régime industriel les noms et les marques de fabrique réstèrent, malgré leur importance, sans protection et en quelque sorte a la merci des usurpateurs."

That would indicate a statement of our law much like the English common law, under which it could be said: "A man cannot give to his own wares a name which has been adopted by a rival manufacturer, so as to make his wares pass as being manufactured by the other. But there is nothing to prevent him giving his own house the same name as his neighbour's house, though the result may be to cause inconvenience and loss to the latter": Mayne, Damages, 8th ed., p. 9, citing *Johnston* v. *Orr Ewing*, 7 App. Cas. 219; *Day* v. *Brownrigg*, 10 Ch. D. 294; *Keeble* v. *Hickeringill*, 11 East 574n., 103 E.R. 1127.

And I take it that in England to this day, a trader who is put in peril of ruin by a supplanter in the way indicated can publish his feeble protest of "no connection with the establishment of the name next door." When it is realized that this peculiarity of English common law or case law lies at the very foundation of trade-mark or trade-name law, another reason can be seen why we should hesitate to be guided by decisions given in England otherwise than as mere illustrations of the statutory construction. Civil law responsibility for wrongful interference with the plaintiff's trade is to be determined by our law and not by English law, except in so far as it depends upon statutory construction. The same peculiarity of English law above referred to would seem to constitute the ground of decision in the *Lea &*

McEwan Applications case (or perhaps one should say of the statutory rule there applied: L.J. Weekly, 1912, p. 142 and 28 T.L.R. 258), where marks in use for half a century were refused registration, a case which under our law would be decided in the opposite sense. But why, it may be asked, call attention to such a peculiarity, if the old French law as introduced in Canada is the same? The reason is that our law has developed and broadened and a defendant who has caused damage to a plaintiff by introducing confusion into his trade subjects himself to responsibility in damages just as he would by commission of any other tort (art. 1053, C.C.). It is upon that footing that the decision in *La Nationale* v. *La Societte Nationale*, cited to us from 3 Couhin, p. 493, and the citations from Pouillet and from Fuzier-Herman, Rep. "Concurrence Déloyale," No. 459, and Sirey, 91-1-165, in so far as not affected by statutory legislation are seen to be reasonable."

When it becomes necessary to consider "the essentials necessary to constitute a trade-mark," as called for in sec. 11 of the Canadian Act, many of the English cases are valuable.

TRADE NAMES.—Actions to restrain imitations of trade names used as such, and not as trade-marks on goods, differ from trade-mark cases proper. A trader has much the same right in respect of his tradename as he has to his trade-mark, or to his get-up and other distinctive badges. The representation made is, usually, that a certain firm or undertaking is a certain other firm or undertaking with a view to the one firm obtaining the custom of the other. The principle upon which the Court acts in protecting a trade name was stated by James, L.J., in *Levy* v. *Walker* (1879), 10 Ch. D., p. 447:

"It should never be forgotten that in those cases the sole right to restrain anybody from using any name he likes in the course of any business he chooses to carry on is a right in the nature of a trade-mark, that is to say a man has a right to say: 'You must not use a name—whether fictitious or real—you must not use a description, whether true or not, which is to represent or calculated to represent, to the world that your business is my business, and so by a fraudulent misstatement deprive me of the profits of the business which otherwise come to me.' An individual plaintiff can only proceed on the ground that, having established a business reputation under a particular name, he has a right to restrain anyone else from injuring his business by using that name."

NO RIGHT TO NAME APART FROM BUSINESS.—There can be no absolute right in a trade name apart from a trade or business. The right to the exclusive use of a name in connection with a trade or business is recognized, and an invasion of that right by another is good ground for an action for an injunction. But the name must have been actually adopted and used by the plaintiff. *Du Boulay* v. *Du Boulay* (1869), L.R. 2 P.C. 441; *Beasley* v. *Soares* (1882), 22 Ch. D. 660; and Canadian cases: *Robinson* v. *Bogle*, 18 O.R. 387; *Love* v. *Latimer*, 32 O.R. 231; *Carey* v. *Goss*, 11 O.R. 619.

TRADE NAME AS APPLIED TO GOODS.—Another kind of a trade name is that which is applied to the goods themselves, instances of which are to be found in the Canadian cases of *Pabst* v. *Ekers*, 20 Que. S.C. 20; *Boston Rubber Shoe Co.* v. *Boston Rubber Co.*, 7 Can. Ex. 9; and *Thompson* v. *McKinnon*, 21 L.C.J. 305. Dealing with this class, Lord Blackburn, in *Singer Mfg. Co.* v. *Loog* (1882), 8 App. Cas., said:

"There is another way in which goods not the plaintiff's may be sold as and for the plaintiff's. A name may be so appropriated by user as to come to mean the goods of the plaintiff, though it is not, and never was, impressed on the goods . . . so as to be a trade-mark properly so-called. Where it is established that such a trade name bears that meaning, I think the use of that name or one so nearly resembling it as to be likely to deceive, may be the means of passing off those goods as and for the plaintiff's. . . . And I think it is settled by a series of cases that both trade-marks and trade names are in a certain sense property, and the right to use them passes with the goodwill of the business to the successors of the firm which originally established them, even though the name of that firm be changed so that they are no longer strictly correct." *Robin* v. *Hart*, 23 N.S. 316; *Reddaway* v. *Banham*, [1896] A.C. 199.

In *Pabst* v. *Ekers*, above referred to, it was held, by the Superior Court for Quebec, reversing the decision of Davidson, J., that protection would be granted against a competitor using the same or some similar name only upon proof either of fraud or deception as regards such use and of prejudice resulting therefrom. It may be doubted in view of the authorities cited below whether this is good law. In the court below, Davidson, J. granted an injunction on the ground that a rival has no right to use a similar name in such a way as is calculated to mislead purchasers into the belief that his goods are another's. This appears to us to be the correct view of the law. Fraud need not be proved. *Cf. Reddaway* v. *Banham* (1896), A.C. 199; *Powell* v. *Birmingham, etc., Co.*, [1896] 2 Ch. 54, [1897] A.C. 710. The Superior Court's decision could, however, be supported on another ground; that the plaintiffs had no right to the trade name in question as it was a name *publici juris* when adopted by them.

DECEPTION MUST BE PROBABLE.—Though fraud need not be shewn, it is however, necessary that deception of the public is probable before relief will be granted. *Goodfellow* v. *Prince* (1887), 35 Ch. D. 9; *California Fig Syrup Co.* v. *Taylor* (1897), 14 R.P.C. 564. Moreover, where the goods are clearly so alike as to be calculated to deceive "no evidence is required to prove the intention to deceive. . . . The sound rule is that a man must be taken to have intended the reasonable and natural consequences of his acts and no more is wanted. If, on the other hand, a mere comparison of the goods, having regard to the surrounding circumstances, is not sufficient, then it is allowable to prove from other sources that what is or may be apparent innocence was really intended to deceive." *Saxlehner* v. *Apollinaris Co.*, [1897] 1 Ch. 893, per Kekewich, J.; *cf. Watson* v. *Westlake*, 12 O.R. 449.

NAME OF COMPANY.—As to cases where the name imitated is that of a company, it is laid down that very clear evidence of probability of deception will be required. *London Assurance Co.* v. *London and Westminister Assurance Co.* (1863), 32 L.J. Ch. 664; *Lee* v. *Haley* (1869), L.R. 5 Ch. 155; *Colonial Life Assurance Co.* v. *Home & Colonial Assurance Co.* (1864), 33 Beav. 548. In British Columbia it has been decided that the name "British Columbia Permanent Loan & Savings Company" is not so similar to "The Canada Permanent Loan and Savings Company" as to be calculated to deceive the public. *Canada Permanent* v. *B.C. Permanent* (1898), 6 B.C.R. 377.

The various Companies Acts in Canada contain various regulations regarding the use of similar names. In Ontario, the Companies Act, R.S.O. 1914, ch. 178, sec. 37, provides that the proposed name shall not be identical with that of any known company, or so nearly resembling the same as to deceive, and similar provisions are to be found in the Acts of the Dominion, and other provinces. Sec. 39 of the Ontario Act provides for changing the name of any company incorporated under the Act if it is made to appear that such name is the same as, or so similar to any existing company, partnership, or any name under which any existing business is being carried on so as to deceive. A similar power exists in Quebec, art. 6015, *et. seq.*

CANADIAN CASES ON TRADE NAMES.—In Canada, there are several decisions on this point. In *Canada Publishing Co.* v. *Gage*, 6 O.R. 68. 11 A.R. 402, 11 Can. S.C.R. 306, an injunction was granted restraining the defendants from using the name Beatty's New and Improved Headline Copy Book, which was considered to be an imitation of Beatty's Headline Copy Book calculated to deceive the public.

In *Rose* v. *McLean*, 24 A.R. 240, the name "The Canadian Bookseller and Stationer" was condemned as an infringement of "The Canadian Bookseller and Library Journal," commonly known as "The Canadian Bookseller," and the plaintiff was granted an injunction restraining the defendants from using the word "Canada" or "Canadian" conjointly with the word "Bookseller," as a title to their journal.

In the *Montreal Lithographing Co.* v. *Sabiston*, 3 Rev. de Jur. 403, affirmed, (1889) A.C. 610, the plaintiffs were refused an injunction restraining the defendant from carrying on business under the name Sabiston Lithographing and Publishing Company. They were the transferees of the assets and good will of the dissolved Sabiston Lithographic and Publishing Company and claimed that the name adopted by the defendants was a colourable imitation of their trade-name, and calculated to prejudice the rights of the plaintiffs. The Court of Queen's Bench for Quebec held that the appellants (plaintiffs) did not derive by purchase from the dissolved company any right to use its corporate name (a right which could only be granted by the Crown) or to continue its business. They were incorporated and registered, and had since done business under a quite different name and did not allege any intention of using, and had no right to use the old company's name as their trade or firm name. But the respondent, their Lordships held, had no right to represent himself as the successor in business to the dissolved company. This was as far as they would go.

SURNAME AS TRADE NAMES.—The use of a surname as a trade-mark is objectionable because "No person can acquire the right to use his surname as a trade-mark or trade name, to the exclusion of others bearing the same surname." Matteson, J., in *Harson v. Halkyard*, 22 R.I. 102.

Where a surname has enjoyed extended and exclusive use, for a long period of time, a secondary meaning may be acquired by it, the benefit of which will be supported by Courts of Equity. Lord Parker, in *Registrar* v. *Du Cros, Ltd.*, 83 L.J. Ch. 1, said:—

"Independent of any trade-mark legislation, whenever a person uses upon or in connection with his goods some mark which has become generally known

to the trade or to the public as his mark and thus operates to distinguish his goods from the goods of other persons, he is entitled in equity to an injunction against the user of the same or any colourable imitation of the same which is in any manner calculated to deceive the trade or the public. Equity has never imposed any limitation on the kind of word entitled to this protection. but in every case it has to be proved that the mark has by user become in fact distinctive of the plaintiff's goods."

In some instances, as where a secondary meaning has been acquired by a surname, the use of it, even by one of the same name would deceive and would be restrained by Court of Equity. *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Holloway* v. *Holloway*, 13 Beav. 209; *Tussaud* v. *Tussaud*, 44 Ch. D. 678; *Christie* v. *Christie*, L.R. 8 Ch. 422.

The mere fact that confusion is likely to result is not sufficient. "If all that a man does is to carry on the same business (as another trader), and to state how he is carrying it on, that statement being the simple truth, and he does nothing more with regard to the respective names he is doing no wrong. He is doing what he has an absolute right by the law of England to do and you cannot restrain a man from doing that which he has an absolute right by the law of England to do." (*Per* Lord Esher, M.R., in *Turton & Sons, Ltd.* v. *Turton*, 42 Ch. D. 128.) In the same case, Cotton, L.J., said:—

"The court cannot stop a man from carrying on his own business in his own name, although it may be the name of a better-known manufacturer, when he does nothing at all in any way to try and represent that he is that better known and successful manufacture."

[See *Re Horlick's Malted Milk* (1917), 35 D.L.R. 516, and annotations thereto at p. 519.]

ACQUIESCENCE IN USE OF NAME BY ANOTHER.—Where, however, a person has allowed another to use his name, and acquire a reputation under it, he will not afterwards be allowed to himself use his name so as to deceive, nor to empower others to use it so as to produce that result. *Birmingham Vinegar Brewing Co., Ltd.* v. *Liverpool Vinegar Co., Ltd.*, 4 T.L.R. 613.

RIGHT OF VENDOR OF BUSINESS TO USE NAME.—The vendor of a business and goodwill, when there is no convention to the contrary, may establish a similar business in the neighborhood and may deal with his former customers, although he may be enjoined from soliciting business from them. *Leggott* v. *Barrett* (1880), L.R. 15 Ch. 306; *Cruttwell* v. *Lye* (1810), 17 Ves. 346, 34 E.R. 129; *Labouchere* v. *Dawson* (1872), L.R. 13 Eq. 322. In *Thompson* v. *McKinnon*, 21 L.C.J. 355, a biscuit manufacturer was held to have conveyed with the sale of the business and goodwill, the exclusive right to use the name "McKinnon's" as well as the device of a boar's head grasping in its jaws a bone, and he was restrained from subsequently making use of the name and device. The Court of Review in this case referred with approval to the rule laid down by the foregoing English cases.

LOAN OF NAME FOR PURPOSES OF DECEPTION.—It is not permissible for a man to lend his name to a third person and induce that third person to start in business in opposition to someone else who is using that name and has an established business under it. *Rendle* v. *Rendle & Co.*, 63 L.T.N.S. 94; *Brinsmead* v. *Brinsmead*, 12 T.L.R. 631; *Mappin & Webb* v. *Leapman*, 22 R.P.C. 398.

The use of a partnership name gotten up for the purpose of fraud will not be permitted. *Croft* v. *Day*, 2 Beav. 84; *Dunlop Pneumatic Tyre Co., Ltd.* v. *Dunlop Lubricant Co.*, 16 R.P.C. 12.

In *Melachrino* v. *Melachrino Egyptian Cigarette Co.*, 4 R.P.C. 45, the defendant took a brother of the plaintiff into his service under an agreement by which the defendant was to have the right to use the brother's name. The defendant then opened a business close to the plaintiffs under the name "The Melachrino Egyptian Cigarette Co," and used the name "Melachrino" in various ways calculated to deceive. An injunction was granted.

RIGHTS TO NAME ON DISSOLUTION OF PARTNERSHIP.—Upon dissolution of a partnership, if the whole business and goodwill is sold the trade name goes with them. (*Banks* v. *Gibson*, 33 Beav. 566.) If the partnership assets are merely divided without stipulation as to the partnership name then each partner is free to use the name. *Clark* v. *Leach*, 22 Beav. 141; *Condy* v. *Mitchell*, 37 L.T.N.S. 268, 766; *Levy* v. *Walker*, 10 Ch. D. 436.

EMPLOYER AND EMPLOYEE.—A person who has been a member or employee of a firm, and later sets up in business for himself may derive what benefit he may from a fair statement of the fact of his former employment as by the use of the phrase "late of" followed by the name of his former employer or firm. *Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 H. & M. 271; *Clark* v. *Leach*, 32 Beav. 14; *Cundy* v. *Lerwill*, 99 L.T.N.S. 273. Such statement must, however, not be made in such a way as to induce the belief that the former employee is selling the goods of his former employer. *Worcester Royal Porcelain Co., Ltd.* v. *Locke & Co.*, 19 R.P.C. 479, 490; *Jefferson, Dodd & Co.* v. *Dodd's Drug Stores*, 25 R.P.C. 16.

NAME OF ESTABLISHMENT.—The name of an establishment or place of business if sufficiently distinctive may be protected, *e.g.*, "The Carriage Bazaar," *Boulnois* v. *Peake*, 13 Ch. D. 513; "The Bodega," *Bodega Co., Ltd.* v. *Owens*, 7 R.P.C. 31.

In *Walker* v. *Alley*, 13 Gr. 366, it was found that the name and sign of "The Golden Lion" was so connected with the plaintiff's dry goods business that it could not be taken by another trader. The Chancellor in his judgment said:—

"Where it is clear to the court that the defendant himself intended an advantage by the use of a particular sign or mark in use by another, and believes he has obtained it, or, in other words, that the defendant himself thought the use of it was calculated to advertise him at the expense of the plaintiff, and this was his object in using it, and where such has been the effect of the user, I think the court should say to him: 'Remove that sign; its use by you may, as you intend, damage the plaintiff. It cannot be necessary or valuable to you for any other purpose, you have your choice of many signs which, as a mere attraction or to give your store a marked designation must answer a fair business purpose equally well.'"

TRADE LIBEL.—Sometimes the misuse of a man's name may amount to a libel, or disparaging statements may be made sufficiently damaging to sustain a suit for libel. The law in such cases is far from clear, and must be considered in connection with the general law of libel. As illustrative cases,

see *Fleming* v. *Newton*, 1 H.L.C. 376; *Gee* v. *Pritchard*, 2 Swanst. 413; *Martin* v. *Wright*, 6 Sim. 297; *Clark* v. *Freeman*, 11 Beav. 112; *Thorley's Cattle Food Co.* v. *Massam*, 6 Ch. D. 582; *Halsey* v. *Brotherhood*, 15 Ch. D. 514; *Colley* v. *Hart*, 6 R.P.C. 17; *Dunlop Pneumatic Tyre Co.* v. *Maison Talbot*, 52 W.R. 254; *Lee* v. *Gibbings*, 67 L.T.N.S. 263.

Province of Alberta.

SUPREME COURT.

Hyndman, J.] [37 D.L.R. 126.

REX v. YOUNG KEE.

Criminal law—Quashing of first conviction—Former jeopardy—Summary trial—Cr. Code secs. 228, 773, 774.

An order discharging the accused on *habeas corpus* and quashing on *certiorari* his conviction made by a magistrate on a summary trial upon the ground that the defendant was not properly before the magistrate as he had been arrested without warrant for keeping a disorderly house and that consequently the magistrate was entirely without jurisdiction to try him, will not constitute a bar to a subsequent prosecution for the same offence to answer which the accused was regularly brought before the magistrate by warrant.

[*R.* v. *Weiss and Williams*, 22 Can. Cr. Cas. 42, 13 D.L.R. 632, and *Atty.-General* v. *Kwok-a-Sing* (1873), L.R. 5 P.C. 179, referred to; and see Annotation at end of this case.]

F. E. Eaton, for accused. *J. J. Trainor*, for Crown.

ANNOTATION ON ABOVE CASE FROM 37 D.L.R.

A defendant, pleading a former acquittal in answer to a summary proceeding for an offence, must show that the two charges are identical and where the offence is that of keeping liquor for sale between certain dates, the mere fact that the prior charge was for keeping liquor for sale between the same dates will not alone prove the identity of the offences. *The King* v. *Johnson*, 17 Can., Cr. Cas. 172.

The test is whether the same evidence would be required on both occasions. If fresh evidence is adduced and the charge is different there is no bar. *Bollard* v. *Spring* (1887) 51 J.P. 501.

Section 907 of the Criminal Code, 1906, is as follows:

"On the trial of an issue on a plea of *autrefois acquit* or *autrefois convict* to any count or counts, if it appear that the matter on

which the accused was given in charge on the former trial is the same in whole or in part as that on which it is proposed to give him in charge, and that he might on the former trial, if all proper amendments had been made which might then have been made, have been convicted of all the offences of which he may be convicted on the count or counts to which such plea is pleaded, the court shall give judgment that he be discharged from such count or counts.

"(2) If it appear that the accused might on the former trial have been convicted of any offence of which he might be convicted on the count or counts to which such plea is pleaded, but that he may be convicted on any such count or counts of some offence or offences of which he could not have been convicted on the former trial, the court shall direct that he shall not be convicted on any such count or counts of any offence of which he might have been convicted on the former trial, but that he shall plead over as to the other offence or offences charged."

Where a person has been acquitted on the merits by a Court of competent jurisdiction the acquittal is a bar to all further proceedings to punish him for the same matter, although a plea of *autrefois acquit* may not be allowed because of the different nature of the charges. *R.* v. *Quinn*, 10 Can. Cr., Cas. 412, 11 O.L.R. 242, but see *R.* v. *Weiss and Williams* (No. 1), 21 Can. Cr. Cas. 438 at 441, 13 D.L.R. 166, where it is said that the rule was extended too far in Quinn's case.

The rule is also that, when a prisoner has been discharged *upon the merits* of the charge laid against him, by reason of the conviction or order of detention founded on the charge being set aside as unfounded in law, the prisoner thus discharged cannot lawfully be arrested and imprisoned again for the same offence upon the same state of facts, but that, when the prisoner is discharged merely by reason of a defect in the commitment or in consequence of the want or excess of jurisdiction in the committing court, or in the committing magistrate, he can be again arrested and tried for the same cause before a competent magistrate. *Ex parte Seitz* (1899), 3 Can. Cr. Cas. 127, 131, 8 Que. Q.B. 392; *Attorney-General for Hong Kong* v. *Kwok a Sing*, L.R. 5 P.C. 179, 42 L.J.P.C. 64, 12 Cox C.C. 565; *R.* v. *Young Lee* (No. 2), 28 Can. Cr. Cas. 236; Tremeear's Criminal Code, sec. 906.

If on the previous occasion the information or complaint was dismissed merely upon a point of form and not adjudicated upon, the plea will not avail. *R.* v. *Ridgway* (1822), 5 B. & Ald. 527; *R.* v. *Harrington* (1864), 28 J.P. 485. So, too, where an information was laid by a person not entitled to lay it and was dismissed on that ground it was held no bar to an information subsequently laid by a qualified person. *Foster* v. *Hull* (1869), 20 L.T. 482; 19 Hals. 598.

A plea of *autrefois acquit* or *autrefois convict*, or both pleaded together, shall be disposed of before the accused is called on to plead further; and if such plea is disposed of against the accused he shall be allowed to plead not guilty. Code sec. 900. This is commonly termed pleading "over." By sec. 1079 of the Code, it is provided that, when any person convicted of any offence has paid the sum adjudged to be paid, together with costs, if any, under such conviction, or has received a remission thereof from the Crown, or has suffered the imprisonment awarded for non-payment thereof, or the imprisonment awarded in the first instance, or has been discharged from his conviction by the justice in any case in which such justice may discharge such person, he shall be "released from all further or other criminal proceedings for the same cause."

There is the further statutory provision of sec. 909 of the Code, that wher an indictment charges substantially the same offence as that charged in the indictment on which the accused was given in charge on a former trial, but adds a statement of intention or circumstances of aggravation tending if proved to increase the punishment, the previous acquittal or conviction shall be a bar to such subsequent indictment.

A previous conviction or acquittal on an indictment for murder shall be a bar to a second indictment for the same homicide charging it as manslaughter; and a previous conviction or acquittal on an indictment for manslaughter shall be a bar to a second indictment for the same homicide charging it as murder, sec. 909 (2).

It is not open to the Crown to proceed on a second charge in which a conviction could only be had by the second jury overruling the contrary verdict of the first jury. *The King* v. *Quinn*, 10 Can. Cr. Cas 412, 11 O.L.R. 242.

A conviction for an offence punishable summarily is a bar to proceedings upon indictment on the same facts. *R.* v. *Walker* (1843), 2 M. & Rob. 446; R. v. *Miles*, 24 Q.B.D. 423; but if, after a summary conviction, the act of the defendant results in further consequences calling for a more serious charge, the summary conviction is no bar to such a charge being brought. *R.* v. *Morris* (1867), L.R. 1 C.C.R. 90; 36 L.J.M.C. 84, 10 Cox C.C. 480; *R.* v. *Friel* (1890), 17 Cox C.C. 325; 19 Hals. 598.

If a justice adjudicating upon a summary matter under Part XV. of the Code after hearing the evidence (Cr. Code sec. sec. 726) dismisses the complaint he may make an order of dismissal and give the defendant a certificate of dismissal. Cr. Code sec. 730. The production of this certificate is made a statutory bar to a subsequent complaint "for the same matter" against him. Cr. Code sec. 730; *Hall* v. *Pettingell*, 18 Can. Cr. Cas. 196.

The discharge of the prisoner from custody on habeas corpus

does not amount to a quashing of the conviction. *Hunter* v. *Gilkison*, 7 O.R. 735.

To support a plea of *autrefois convict* the accused must show that the offence for which he is on trial is the same as that for which he was convicted, and the plea will not be allowed merely on the ground that the second offence *might* have been proved instead of the first on the trial of the first information. *The King* v. *Mitchell*, 19 Can. Cr. Cas. 113, 24 O.L.R. 324 (a summary conviction matter).

In *R.* v. *Weiss and Williams* (No. 2), 22 Can. Cr. Cas. 42, 13 D.L.R. 632, the accused were charged before a police magistrate and consented to summary trial. They were convicted of cheating at playing a game with dice, contrary to sec. 442 of the Code. Certiorari proceedings were taken, and the conviction was quashed by Mr. Justice Beck, upon the ground that there was not sufficient evidence on which the magistrate could properly convict. Five new informations were then laid before the same magistrate against both defendants; one for an attempt to commit the offence for which they had been convicted, and others against each defendant separately for conspiring with the other in the one case to cheat (sec. 573), and in the other case to defraud (sec. 444.) The defendants were brought before the same police magistrate and by the agreement of counsel for the Crown and for the defendants, the evidence taken on the former hearing was treated as having been repeated. No additional evidence was given. Counsel for the accused raised objection to their being again proceeded against on any of the charges on the ground that, having once been convicted of the offence of cheating (sec. 422) and having succeeded in having that conviction quashed, they were entitled to the benefit of a plea of *autrefois convict* or *autrefois acquit*. The magistrate, however, committed for trial on all of these new charges, An application for writs of habeas corpus to review the warrants of committal was dismissed by Beck, J. *R.* v. *Weiss and Williams* (No. 1), 21 Can. Cr. Cas. 438, 13 D.L.R. 166.

Mr. Justice Beck said (21 Can. Cr. Cas. at 440): "There is, of course, no doubt that the applicants on the charge of cheating under sec. 442 might have been convicted of an attempt to commit that offence had the evidence established an attempt (C.C., sec. 949) and, therefore, so long as the conviction for the actual cheating remained in force a plea of *autrefois convict* would have been a complete defence to the charge of an attempt. (C.C., sec. 907.) So, too, if they had been acquitted on the charge, inasmuch as they might have been convicted of an attempt, the plea of *autrefois acquit* would have been a good plea to a subsequent charge of an attempt: *Ib.*: *R.* v. *Cameron*, 4 Can. Cr. Cas, 385. The offence, however, of conspiracy was not one upon which they could have been convicted on the charge of cheating, without amendment, and I should think that the change of the

latter to the former charge is not such a "proper amendment" as is contemplated by sec. 907. As to the allied defence of *res judicata* where the same facts constitute several offences, in regard to which I was referred to *The King* v. *Quinn*, 10 Can. Cr. Cas. 412, 11 O.L.R. 242, and the English decisions there cited, it seems to me that that doctrine to its full extent is now embodied in the Criminal Code, sec. 15, "where offence punishable under more than one Act or law." It seems to me that where there has been an acquittal the defendant may be again prosecuted on a charge setting up another legal aspect of the same facts: that the principle is that he must not be punished more than once for the same acts or omissions. See Russell on Crimes, 7th ed., pp. 4, 6, 1911. I think, therefore, that *R.* v. *Quinn* extends the rule too far."

Mr. Justice Beck, however, took the view that as the conviction for cheating had been quashed, it was as if no conviction had been made, and he referred to *R.* v. *Drury*, 18 L.J.M.C. 189, 3 Car. and K. 193.

A second habeas corpus motion was made to Mr. Justice Stuart. He held that the doctrine of *Reg.* v. *Drury* did not apply and that the accused, whose conviction for cheating had been quashed for lack of evidence to support it, was thereby actually acquitted of the charge of cheating and was entitled to the benefit of the plea of *autrefois acquit* when charged with an attempt to commit the same offence, *R.* v. *Weiss and Williams* (No. 2), 22 Can. Cr. Cas. 42 at 47. But the other charges were distinct and the commitments being valid as to them, the habeas corpus application was refused.

The offence of conspiring to commit an indictable offence is quite distinct from the offence itself. One person alone may cheat at a game. Two out of three persons playing a game may cheat the third without any previous arrangement, and may be jointly indicted, although the evidence might not disclose any prearranged plan.

"In the offence of conspiracy, the essential ingredient is the concocting of a common plan or design. Not a single step towards accomplishment is necessary. The evidence necessary to support the second indictments for conspiracy would clearly not be sufficient to support a verdict on the charge of cheating, or even of attempting to cheat." *R.* v. *Weiss* (No. 2), 22 Can. Cr. Cas. 42 at 49, 6 A.L.R. 264, 13 D.L.R. 632, 5 W.W.R. 48 and 460. In that case Mr. Justice Stuart said: "It is not merely a different legal aspect of the same facts. Certain evidence was given on which the first conviction was made. That evidence was taken as repeated on the present preliminary. It is true that it it to be the same evidence. But when you infer from the facts stated in that evidence that there was, in fact, a conspiracy to cheat, you go in quite a different direction from that in which

you go if you infer that there was, in fact, a cheating . . . . In the first case you infer the existence of one set of facts not directly sworn to. Instead of a different legal aspect of the same facts, we have a different inference of fact from the same evidence. Therefore not only do I think the plea of *autrefois acquit* not available, but think the common law plea of *res judicata* not available either. On the first trial there was no question raised as to whether the men had previously formed a common design to cheat. The question was—had they in fact cheated."

Semble, that *Reg.* v. *Drury*, 18 L.J.M.C. 189, goes no further than to declare that a conviction set aside for some *mere technical defect*, is to be considered the same as no judgment upon the question of former jeopardy. This would apply to some defect in the record, either in the indictment, place of trial, process, or the like, as the result of which the accused was not liable to suffer judgment for the offence charged on that proceeding, *R.* v. *Drury*, 18 L.J.M.C. 189, 3 C. and K. 193, 3 Cox. C.C. 546.

So the discharge of a jury without a verdict being given has been held insufficient to prevent a subsequent indictment. *R* v. *Charlesworth*, 9 Cox. C.C. 44, 1 B. and S. 460, 31 L.J.M.C. 25.

Correspondence.

Soldiers' Wills.

To the Editor, Canada Law Journal:

Dear Sir:—The article on page 400 in the November number of your journal reminded me that there is a serious defect in the will forms supplied to members of the C.E.F. They contain no appointment of an executor. Two have come before me, and I have had to require, in one case the mother and in the other the wife, to furnish bonds with sureties on taking out letters of administration, c.t.a. This may prove embarrassing in some cases.

While on the subject of soldiers' wills, I may mention an interesting case tried before me last Spring. A mariner, possessing ome means, was lost at sea on the voyage from Barbados to Mahone Bay, N.S. During the three day's stay in Barbados he wrote a letter to his fiancee, and, probably inspired by the fantastic stories we used to read in 1914 and 1915 of messages from German prison camps concealed under postage stamps, he printed with his pen on the upper right hand corner of the envelope a brief will, leaving the bulk of his estate to his fiancee and the balance to his mother, and covered it with two big Barbados halfpenny stamps.

The will was contested but sustained.

Yours truly,

Lunenburg, N.S. S. A. Chesley.

Bench and Bar.

RULES OF COURT.

Supreme Court of Ontario.

On the 1st October, 1917, Rule 773 (*e*) was made, amending several Rules as follows:—

(1) Rule 544 is amended so as to read as follows:—

544.—(1) Where a judgment directs the recovery of specific goods, chattels, deeds, securities, documents, or any property other than land or money, a writ of delivery may issue directing the sheriff to cause such goods or property to be delivered up in accordance with the judgment.

(2) If the goods and property are not delivered up by the judgment debtor and cannot be found and taken by the sheriff, the judgment creditor may apply for an order directing the sheriff to take goods and chattels of the judgment debtor to double the value of the property in question to be kept until the further order of the Court to enforce obedience to the judgment.

(3) By leave of the Court such judgment may also be enforced by attachment, committal, or sequestration,

(2) Form 118 is amended so as to read as follows:—

No. 118.

Writ of Delivery.

We command you that without delay you cause the following chattels, that is to say [*here enumerate the chattels recovered by the judgment*] to be returned to A.B., which chattels the said A.B. by a judgment in this action dated recovered against C.D. [or C.D. was ordered to deliver to the said A.B.]

(3) Rule 722 (3) is amended by inserting "5 per cent." in lieu of "4½ per cent."

(4) Rule 268 is amended by adding clauses (2) and (3) as follows:—

(2) The Court may fix the remuneration of any such person and may direct payment thereof by any of the parties.

(3) Unless all parties are *sui juris* and consent, the powers conferred by this Rule shall only be exercised by or by leave of a Judge.

(5) Rule 735 is amended by adding clauses (2) and (3) as follows:—

(2) All money paid into a Surrogate or County Court and unclaimed for two years shall be transmitted by the registrar or clerk to the Accountant together with a statement shewing when the money was paid in and a certified copy of all judgments or orders affecting the same.

(3) Such money shall be paid out to any person found entitled thereto upon the production of a judgment or order of the Surrogate or County Court Judge and shall in the meantime be dealt with as other money in the Supreme Court.

On the 7th December, 1917, Rule 773 (*f*) was made as follows:—

Rule 492 is amended by adding clause 6 as follows:—

(6) Notwithstanding the provisions of Rule 176, the time limited by this Rule may, either before or after its expiry, be extended only by a Judge of the Appellate Division. An application to extend time may be referred to a Divisional Court.

Flotsam and Jetsam.

Judicial Decisions Under Industrial Disputes Investigation Act.

During the past year several cases of alleged infringements of the Industrial Disputes Investigation Act have come into court. On May 1, nine employees of the Algoma Steel Company, Limited, engaged in the manufacture of munitions at Sault Ste. Marie, Ont., were charged in the police court with going on strike contrary to the law. The counsel for the accused stated that they had a bona fide dispute about wages, as they had been offered an increase of 5 cents per hour, which ws reduced to about 4 cents, without their being informed of the change. In consequence of a notice posted at the works the men hastily inferred that the increased pay was not going to be given, and they stopped work.

They stated that they were willing to return to work at once on the understanding that the increased rate should apply from April 17. One of the accused was discharged, and the case against the eight others was adjourned to May 10, when they were also discharged, having returned to work.

On November 4, a foreman of the Algoma Steel Corporation told his men that they should demand more wages and if they did not get them they should quit work. The men accordingly made a demand for more wages, and as they were met with a refusal, they went home. On November 8, three of the men were found guilty of going on strike and were each sentenced in the police court to a fine of $40 and costs. Two days later another striker was similarly fined, and the foreman was fined $50 and costs for inciting the men to go on strike.

On July 9, 12 employees in the mines of the Manitoba & Saskatchewan Coal Company were prosecuted at Estevan, Sask., for unlawfully going on strike contrary to sections 56 and 57 of the Industrial Disputes Investigation Act, 1907. One man was dismissed, four were fined $25 and costs each, and seven were fined $50 and costs each, the costs in each case amounting to $13. On the following day 15 employees of the Western Dominion Collieries, Limited, working in the mines at Taylorton, Sask., were tried for the same offence. Two were dismissed with costs, seven were fined $25 and costs, and six were fined $50 and costs, the costs in each case amounting to $11.—*Labour Gazette.*