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THE AWAKENING OF RUSSIA.

One of the most interesting and remarkable events in modern history is the almost bloodless revolution which has just taken place at Petrograd. On the 15th of March the Czar Alexander II., Emperor of all the Russias, under pressure from the Duma, representing the people of that great country, abdicated his throne for himself and for his young son.

That which it took England centuries and so many wars to accomplish: that which cost so much to the United States of Amer ca in the two great wars of its history: that which deluged France with blood at the time of the French Revolution, has been accomplished, in a country of vastly greater extent and more populous, in the course of a few hours. The same mail which brought the news of the end of the old Empire brought the news of Russia's birth to a government "of the people, by the people and for the people." Whether the new Government will take the shape of a limited monarchy or of a republic remains to be seen. We trust it will be the former, and we say this because recent experiences of our cousins to the south of us clearly indicate that a limited constitutional monarchy, such as that of Great Britain, responds more rapidly to the will of the people and is much more satisfactory in many respects than that which came into existence under the Declaration of Independence.

It would seem from later reports that there is a growing feeling in Russia that the family which ruled and reigned in Russia for so many centuries is not to be trusted so long as there is the possibility of sinister intrigues by Germany or by the pro-Germans of the Baltic Provinces. This remarkable change in the government in a country so great in territory and population as Russia

is the more remarkable by reason of the calm, good-natured manner in which it was accomplished—no riot and no bloodshed. This is surely indicative of a people of a strong, steady, peace-loving character, as well as of great intelligence, perhaps born of the persecution they have endured, and which augurs well for their future national life.

FORFEITURE UNDER CONTRACTS FOR SALE OF LANDS.

This subject is constantly arising and is constantly giving trouble. The purpose of this article is to again discuss it, and the excuse for doing so is the appearance of some recent decisions in the House of Lords and Privy Council.

The point usually arises where the purchaser having agreed to buy lands and having paid some of his purchase money fails to pay the rest and the vendor tries to keep what money he has received, and also to retain or resell the land. The problem of course assumes innumerable forms, according to the circumstances of each case, and the terms of each particular contract, but perhaps a consideration of some elementary propositions of law may help us to deduce a few working principles.

The first point to consider is the interest which the purchaser takes under an agreement to sell to him. This has been variously stated:

1. There is of course the contractual right entitling him at law to sue for damages if he has done his part and the vendor has defaulted. This is purely a right *in personam* and before the fusion of the Courts, he might have brought his action in the Common Law Courts.

2. There is the right to sue in Chancery for specific performance. This too is a right *in personam* but the Chancellor could have put the vendor in gaol if he did not obey the Court's decree and convey to the purchaser. Thus the purchaser got the land but by a proceeding which made not so much a claim to an estate in the land as a demand that the vendor should convey to him or be guilty of a contempt of Court.

(3) There was, thirdly, the interest which the purchaser claims in the land which he had agreed to buy. In this aspect the claim is *in rem* rather than *in personam* and it is the true object of the action for specific performance, even if the form of that action is an appeal to the Court to coerce the defendant. What this interest is has caused some difficulty. Mr. Armour contends that "the equitable right of a purchaser to enforce a contract is not 'property' and is not the subject of a sale under execution": Armour on Titles 181, and in *Re Flatt*, 18 A.R. 1, a majority of the Court of Appeal declined to hold that a purchaser in possession of a freehold estate under a contract of sale was a "freeholder" so that he might petition as a ratepayer. This case, however, deserves to be read with the recent decision of *Allen* v. *Inland Revenue Commissioners* (1914) 1 K.B. 327, 2 K.B. 327, which rather supports the dissenting view of Maclennan, J.A. The difficulty of determining the true nature of the purchaser's interest in the land is accentuated by the judgments in *Robinson* v. *Moffatt*, 37 O.L.R. 52; see particularly p. 55. Generally it is said that there is an implied trust in favour of the purchaser: Williams Real Property, 21st ed., 183, Sugden on Vendors, 14th ed., 175, and this is the result of the judgment of the House of Lords in *Rose* v. *Watson*, 10 H.L.C. 672 though, this term has given trouble as one hardly associates a vendor who has not received his money and has not conveyed with the unfortunate individual who being seized of lands in trust for others has only obligations and liabilities to remind him of his dignity as a land owner. The difficulties which this term creates when applied to a vendor are brought out clearly in the cases cited in *Re Flatt*, at pages 16 and 17, and they lead Mr. Justice Osler to say, at page 17, "that the interest of the purchaser until he is entitled to call for the conveyance is properly an equity or equitable right rather than an equitable estate". These anomalies are recognized also by Jessel, M.R., in *Lysaght* v. *Edwards*, 2 Ch. D. 499, at p. 506, where he speaks of the vendor as a "constructive trustee" for the purchaser and after stating that it has been settled since the time of Lord Hardwicke that the vendor is a trustee immediately on the execution of valid

contract (p. 506), he then describes him as something between a naked or bare trustee or a mere trustee and a mortgagee. This will serve to illustrate the difficulty in defining exactly what interest the purchaser has in the lands, but it makes it abundantly clear that he has some interest and that his rights are not merely *in personam*. Perhaps we can better understand the existence of such a right *in rem* if we recall the sense in which the word "trust" was originally employed. To a lawyer on the common law side, it originally had no legal effect upon an estate. There was only the seisin and the enquiry always was how had the owner of the seisin affected it by his dealings with the land. Any "trust" created was a mere moral obligation afterwards enforceable in equity but unknown at common law. It was a term apparently wide enough to include a "use" which was one form of "trust." For instance, "A use is a trust or confidence which is not issuing out of lands but as a thing collateral annexed in privity to the estate"; 1 Co. R. 121*b*, or "where the trust is not special or transitory but general and permanent there is a use," and "a trust was the way to a use"; Bacon on Uses, p. 9. To the common lawyer all such trusts were not estates or interests in land, and they were not by any means popular. Sir Edward Coke says "there were two inventors of uses, fear and fraud," *ibid.* and the Statute of Uses speaks of them as "divers and sundry imaginations, subtle inventions and practices." These "subtle inventions and practices," however, under the general name of trusts, fastened themselves upon English land and it would be hopeless now to contend that the use which is only one form of trust in this general sense is not an equitable estate. Some of the earlier cases seem to bear out this suggestion. In *Davis* v. *Beardman* (1662), 2 Ch. Cas. 39, we are told that the vendor stood "trusted" for the purchaser and perhaps we can now more readily understand the rule laid down by Lord Hardwicke in 1738, and since undoubtedly followed, "that the vendor of the estate is from the time of his contract considered as a trustee for the purchaser and the vendee as to the money a trustee for the vendor"; *Green* v. *Smith*, 1 Atk. 572. If we concede that a trust was not only an obligation imposed on the trustee but a right vested in the *cestui que* trust

one variety it will help us to realize that the purchaser's interest and enforceable in equity against the land, of which the use is confers in equity a property in the land itself. Whether the vendor is an implied trustee, a constructive trustee, a bare or naked or mere trustee is not of much importance. These terms were probably unknown when the trust was first given recognition in Chancery and the important thing is that the vendor stands "trusted" for the purchaser and thereby the purchaser has an equitable interest in the land. In fact, the vendor's position is hardly that of an implied trustee. He has agreed to convey to the purchaser and his duty is express and not implicit. He is really an express trustee.

Conceding, therefore, that the purchaser acquires an equitable interest in the lands on making a binding contract one naturally asks what happens to this interest if the contract is not carried out.

If the purchaser breaks his contract the effect upon his estate is necessarily different from cases where the vendor is the defaulter. The latter is the simpler problem. The purchaser may forego his equitable interest in the lands and sue for damages, or he may claim his equitable interest and sue for specific performance. If the vendor has not only refused to convey to the purchaser but has conveyed to someone else who is protected by the Registry Act or by the doctrines of equity in favour of innocent purchasers who acquire the legal estate then the equitable interest is gone and damages are the only remedy. Where, however, the purchaser is a defaulter the problem is not so simple and many questions arise. The following are suggested:—

1. The purchaser being in default asks an extension of time. Can he get it?

2. The purchaser having paid a deposit makes default. Can the vendor cancel the sale and keep the deposit?

3. The purchaser having paid certain instalments of purchase money makes default. Can the vendor cancel the sale and keep the instalments?

These questions are to some extent merely a statement in

different ways of the same problem, but they afford a convenient method of dealing with somewhat different classes of decisions.

1. *The purchaser being in default asks an extension of time.* This point is continually arising during the period between the execution of the agreement and its completion by conveyance. Most agreements contemplate at least three stages, the service of requisitions, the service of answers and the time for closing. Dates are usually fixed for each and if the vendor or purchaser does not do his part in time then he breaks his contract and at common law he cannot enforce a contract which is not divisible if he has broken it and if the Court should extend the time for him against the will of the other party it would create a different obligation, generally spoken of as making a new contract, though this is hardly correct, as a contract is a mutual agreement, while anything forced upon an unwilling party is not a contract, whatever other kind of obligation it might be. Therefore, at common law, a contract of sale broken as to dates as in any other particular cannot be invoked by a defaulter for the purpose of obtaining common law relief. In equity, however, these severely logical considerations did not always prevail. The Chancellor not only invented and applied the remedy of specific performance, but did so even though the plaintiff had broken his contract as to dates and so we find that parties who buy and sell lands have been compelled to carry out an arrangement different from that stipulated for because it called for completion at a different time. Our law has often created anomalies if they assist fair dealing, so this was cheerfully though somewhat ironically called "specific performance" of a contract. The reason for this indulgence was stated by Lord Eldon as follows: "As to the contract of the party the slightest objection is an answer at law. But the title to an estate requires so much clearing and enquiry that unless substantial objections appear not merely as to the time but an alteration of circumstances affecting the value of the thing . . . many of the cases go the length of establishing that the objection cannot be maintained": *Seton* v. *Slade*, 7 Ves. 265, p. 274. The rule is carefully stated by that most cautious Judge but it makes it clear that owing to the complexity of English titles, the Courts

of Chancery will not deprive a purchaser of his equitable estate merely on account of delay nor will it deprive a vendor of his right to the money for this reason alone. Titles being so much older and more complicated in England than here one might wonder whether the rule would apply equally to sales of land in Ontario. The point was, in fact, considered soon after the establishment of Courts of Chancery in Ontario in *McDonald* v. *Elder* (1850) 1 Gr. 513 at p. 522 *et seq.* and *O'Keefe* v. *Taylor* (1857) 2 Gr. 95, and the Court concluded that the equitable rule ought to be introduced and if anything extended in Ontario not because of the complexity of titles but because of the greater frequency of sales here, the fact that many purchasers took possession under contracts, and deeds were not obtained till later and because of the general looseness of land transactions. These considerations hardly apply with the same force now but there can be no doubt that the equitable rule remains here; see *Foster* v. *Anderson*, 15 O.L.R. 362, 16 O.L.R. 565, 42 S.C.R. 251. It is no harm to point out that the Judicature Act (1881), expressly preserved the equitable rule, though curiously enough the statute is seldom referred to in the cases. It now forms part of the Mercantile Law Amendment Act, R.S.O. c. 133 s. 15.

Concluding, therefore, as we must that a purchaser does not always lose his equitable title to lands because of his delay the next point to consider is whether there are any limits to the indulgence granted by the Court of Chancery. In discussing this question we may properly omit as irrelevant all questions arising out of waiver by the opposite party. It is no doubt true that the provisions as to time may be waived expressly or by conduct, but where there is an extension of time on this account it is referable not to any indulgence granted by the Court but to the fact that the parties have made a different bargain.

In the argument in *Seton* v. *Slade*, 7 Ves. 265, it is suggested (quoting from counsel appearing in an earlier case), that if the indulgence granted in equity was not to be applicable as to dates to all land sales it would be necessary to insert in contracts a provision that time should be strictly observed notwithstanding decisions of the Court to the contrary. This formula was not

followed in practice but the Chancellor refers to cases in which time might be made the "essence of the contract" and it is this expression which has frequently rendered innocuous the equitable penchant for extending time: *Hipwell* v. *Knight*, 1 Y. & C. Exch. 401, *Parkin* v. *Thorold*, 16 Beav. 59, 65.

Though it may be said that there is no magic in these particular words and others will do as well (*Hudson* v. *Bertram*, 3 Madd. 440, *Hudson* v. *Temple*, 29 Beav. 536), yet they have been very generally employed and are so usual in contracts of sale that one might almost say as was said of the Statute of Uses that the only result of the equitable rule as to time has been to add a few words to agreements for sale.

Where the words occurred, they were looked at askance by the Chancellors. They sought to annul the settled policy of Courts of Equity and were strictly construed: *Hudson* v. *Temple*, 29 Beav. 536 at p. 543, *Wells* v. *Maxwell*, 32 Beav. 408 at p. 414, and due to this policy a subtle distinction prevailed for a short time in Ontario cases, very frequently occurring where the contract was in the form of an offer giving a few days for acceptance and stipulating that time should be "of the essence of this offer." It was at first thought that the only matter covered by these words was the acceptance of the offer in time: *Boaerman* v. *Fraser* (1907) 10 O.W.R. 229, and *Crabbe* v. *Little* (1907) 14 O.L.R. 631 at p. 636, and the rule was followed by the late Chancellor in *Foster* v. *Anderson*, 15 O.L.R. 363 at p. 370, but on appeal, 16 O.L.R. 565, a different construction of the wording of the document was made and the Judges were less concerned about questions of strict or liberal construction than about what was the meaning of the actual words used by the parties. The decision of the Court of Appeal was affirmed by the Supreme Court in 42 S.C.R. 251. It should be observed, however, that Mr. Justice Anglin, in *Bark-Fong* v. *Cooper*, 49 S.C.R. 14 at p. 30, again restricts these words to the clause in which they appear although it was the last clause and the provision was that "time shall be of the essence of this *agreement*". *Foster* v. *Anderson* was not cited. It is not necessary, however, that there should always be an express stipulation making time of the essence of the contract. Notwithstanding the

alleged rule of strict construction referred to in the cases in Beaven's Reports *ante*, the Court has in some cases without any words in the agreement held the parties strictly to their bargain as to time. Such cases generally depend upon the character of the property sold or the surrounding circumstances. Williams Vendor & Purchaser, 576, gives as illustrations, sales of reversions or short leases, property used for trade or business purposes as a public house, property required at once for a residence and property of a speculative character such as mines. Similar decisions as to mines are to be found in Ontario in *Sanderson* v. *Burdett*, 16 Gr. 119, and *Thompson* v. *McPherson*, 3 O.W.N. 791. The Toronto land boom of 1888 furnishes another illustration of the rule where vacant land was purchased for speculation and one of the parties made default. It was ultimately held that punctuality was inherently essential and the delinquent plaintiff was refused specific performance, *Robinson* v. *Harris*, 21 O.R. 43, 19 A.R. 134, 21 S.C.R. 390.

Having considered, therefore, the treatment which stipulations as to dates receive at the hands of the Courts, it remains to consider when a purchaser may claim his equitable interest in lands even though he may be late in seeking it. Again, it must be stated that we are not considering questions of waiver as they really involve an enquiry whether by words or conduct a new contract has been made or whether on grounds of estoppel a *quasi* contractual situation has arisen. Even though time is not expressly or by implication essential yet laches will always prevent a purchaser from enforcing specific performance. The Supreme Court of Canada has expressed the doctrine in pretty drastic terms in *Wallace* v. *Hesslein*, 29 S.C.R. 171, though the facts showed great laches on the purchaser's part. The Chief Justice there says (page 174): "In order to entitle a party to a contract to the aid of a Court in carrying it into specific execution he must show himself to have been prompt in the performance of such of the obligations of the contract as it fell to him to perform and always ready to carry out the contract within a reasonable time, even though time might not have been of the essence of the agreement" and, at page 177, he says that the purchaser

must be "ready, prompt and eager" to complete. Mr. Justice Anglin describes this as "what may appear to be an extreme view of the duty of a purchaser who claims specific performance"; *Bark-Fong* v. *Cooper*, 49 S.C.R. 30. The terms criticized, however, are not original with the Supreme Court, as in *Maward* v. *Earl Thanet*, 5 Vesey 720, note, it was said that the purchaser must show himself "ready, desirous, prompt and eager." The rule in England, however, is that where, by the terms of the contract, by subsequent notice or because of the nature of the property the time feature is not essential, delay will not defeat specific performance unless it amounts to an abandonment of the contract: 27 Hals. 69, and Mr. Justice Anglin points out that this is the true ground of the decision in *Wallace* v. *Hesslein*. It has been said that the rule here ought to be different or rather differently applied owing to our different local conditions. *Hook* v. *McQueen*, 2 Gr. 491, 4 Gr. 233, a case containing a useful review of the topic; but the principle adopted seems to be the same, namely, that delay is evidence of abandonment, the only real difference being that less delay will furnish such evidence here than in England. After all if the criterion is intention to abandon it must be a question of fact in each case whether that intention appears.

Different considerations, however, arise where the time feature is essential and the purchaser being in default seeks specific performance of his contract. In *Moodie* v. *Young*, 1 Alta. R. 337, it was held that the provision making time of the essence of the contract was penal so that the Court could relieve against it though the purchaser was late with his payments, but in *Steele* v. *McCarthy*, 1 Sask. R. 317, it was held that the Court has no power to relieve against such a clause where the vendor has cancelled and the purchaser seeks specific performance as it is purely a matter of contract between the parties. These cases are cited as showing the opposing views upon a point recently much mooted in the Ontario Courts. The point came up in 1908 in *Labelle* v. *O'Connor*, 15 O.L.R. 519, where the trial Judge and one Judge in appeal considered the time clause penal so that the purchaser could claim specific performance after his default.

The other Judges in appeal held that the clause was merely contractual and that as the vendor had elected to rescind upon default the Court could not enforce the contract, so that under this decision the purchaser's interest in the property is lost if he does not strictly comply with the time clauses in his contract and if they are of the essence of the contract. One clause in the judgment of Mr. Justice Anglin in this case, at page 546, should be noted, because it anticipates an important distinction arising out of later Privy Council decisions to be presently considered. It is as follows: "The right of a purchaser to specific performance is one thing, and his possible equity to relief from forfeiture of purchase money paid on account . . . is quite another." In other words, the purchaser's interest under his agreement to purchase may be forfeited if there is a time clause, the purchase money previously paid by him is not necessarily lost even though the agreement may provide for its forfeiture. In 1912 arose the case of *Snell* v. *Brickles*, first reported in 28 O.L.R. 358. There was a "time of the essence" clause calling for closing on March 15th. Both parties wanted to close and were nearly ready but on March 13th the purchaser's solicitor fell ill and did not return to work till March 18th. On trying to close then the vendor declined and kept the deposit. Purchaser sued for specific performance. The trial Judge granted relief, the Appellate Division on March 6th, 1913, reversed him, following *Labelle* v. *O'Connor*. On February 26th, 1913, judgment had been given by the Privy Council in *Kilmer* v. *British Columbia* (1913) A.C. 319, and owing to the very general expressions in that case it is quite likely that if the Appellate Division had seen it, its judgment in *Snell* v. *Brickles* might have been different. In February, 1914, the case was considered by the Supreme Court (49 S.C.R. 360), and while the Court reviewed numerous decisions and talked of many things, it is sufficient for our purposes to say that it followed the Kilmer case, reversed the Appellate Division and granted specific performance, two Judges dissenting. At that time the House of Lords had not delivered judgment in *Stickney* v. *Keeble* (1915) A.C. 386, a case where time was made essential by what was held to be a reasonable notice given after

the date for completion had passed. The Kilmer case was not discussed, but some passages in the judgment might have warned the Supreme Court if they had seen them, that where the claim is for specific performance by a purchaser and not for relief against forfeiture of purchase money paid on account, a time clause would not be ignored, see pages 402 and 416. Then in December, 1914, was decided *Steedman* v. *Drinkle* (1916) A.C. 275, where the Privy Council explained the Kilmer case and made the distinction suggested by Anglin, J., in *Labelle* v. *O'Connor*, 15 O.L.R. at page 546, quoted *ante*, between a claim for specific performance and a claim for relief against forfeiture of purchase money. Viscount Haldane says, page 279, "Courts of Equity which look at the substance as distinguished from the letter of agreements no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it even though literal terms of stipulations as to time have not been observed. But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply by providing that time is to be the essence of their bargain." If this case had been decided a year earlier it is safe to say that the decision of the Supreme Court in *Snell* v. *Brickles* would have been different.

In view of the explanations of the Kilmer case given by the Privy Council it is not surprising that leave to appeal to the Privy Council was granted or that the judgment of the Supreme Court was reversed in July, 1916; *Brickles* v. *Snell* (1916) 2 A.C. 599. The Judicial Committee recognized that the purchaser's default was trivial but said that the vendor might "stand upon the letter of his bond," page 604, and refused specific performance, distinguishing the Kilmer case on the ground of waiver of default by the vendor in the latter decision and ordering the purchaser to pay all costs. Thus ended this tragedy. The Appellate Division, not knowing of the Kilmer case decided in England only a few days earlier, quite rightly followed *Labelle* v. *O'Connor*, the Supreme Court having the wide terms of the Kilmer judgment before it naturally followed that and the Privy Council having limited those wide expressions had to reverse the Supreme Court.

One would like to know what the purchaser thinks of it all. In view of these later decisions it may be that the case of *Boyd* v. *Richards*, 29 O.L.R. 119, decided in June, 1913, will require reconsideration. It not only relieved against forfeiture of instalments of purchase money but granted specific performance after default. There were special circumstances justifying a decree for specific performance and the decision may perhaps be supported on that ground.

To sum up this branch of the matter the following propositions are suggested:—

1. The purchaser has an equitable interest in land agreed to be purchased from the moment the contract is entered into.

2. Where time is not expressly made of the essence of the agreement this interest will not be forfeited by delay not amounting to abandonment unless the subject matter of the sale is of such a character as to make punctuality essential in equity.

3. Where time is made of the essence of the contract and the purchaser defaults the vendor may "stand upon the letter of his bond" and forfeit the purchaser's interest and the Court cannot relieve against this forfeiture.

2. *Can the vendor after purchaser's default rescind his agreement and keep the deposit?*

The forfeiture of the purchaser's interest in the land is not the only question arising upon default under a real estate contract. There is usually money in the vendor's hands called a deposit and the ownership of this deposit is often an important matter. The deposit in modern parlance is generally "money paid to the vendor as a guarantee that a contract will be performed," James, L.J., *Ex p. Barrell*, 10 Ch. App. 512, p. 514. It may ultimately become, but is not necessarily, part of the purchase money, nor does it appear only in real estate transactions. "Something in earnest to bind the bargain" is one of the alternatives required as evidence in sales of goods by the Statute of Frauds and who knows that the practice of adjourning to the public house and buying a vendor or purchaser a drink may not have been at one time a form of "solemnizing" a contract. The antiquity of this earnest or deposit is discussed by Lord Justice

Fry in *Howe* v. *Smith*, 10 Ch. Div., pp 101 and 102. Its primary object is to ask the purchaser to shew his good faith by putting at stake something of value which he will lose if he does not carry out his bargain. Usually the contract provides that a deposit shall serve two purposes. "Its primary purpose is that it is a guarantee that the purchaser means business," but "if the purchase is carried out it goes against the purchase money," Lord Macnaghten in *Soper* v. *Arnold*, 14 A.C. 429, p. 435. In other words, it is a forfeit while the contract is executory, it becomes a payment on account when the contract is being completed. This being so there seems to be no doubt that under certain circumstances the vendor may keep it. What then are those circumstances? Broadly, the answer is: "Even where there is no clause in the contract as to the forfeiture of the deposit, if the purchaser repudiates the contract he cannot have back the money as the contract has gone off through his default." Mellish, L.J., *Ex. p. Barrell*, 10 Chy. App. 512, p. 514. This repudiation need not be express. Inability to pay the balance of the purchase money is a sufficient repudiation to work a forfeiture: *Soper* v. *Arnold*, *supra*, and the purchaser even "may appear to be insisting on his contract, in reality he has so conducted himself under it as to have refused and has given the other side the right to say that he has refused performance. He may look as if he wished to perform but in reality he has put it out of his power to do so": *Howe* v. *Smith*, 27 Ch. D. 89, p. 99. This case was followed in an appeal from our own Courts where $250,000 had been paid as a deposit and the purchaser being in default failed to recover: *Sprague* v. *Booth* (1909), A.C. 576. The fact that the deposit is in the hands of stakeholders does not prevent the vendor from recovering it if the contract is rescinded; *Hall* v. *Burnell* (1911), 2 Ch. 551. This being the nature of the deposit the question arises whether a purchaser in default can ask relief against its forfeiture? It must be borne in mind that the vendor cannot forfeit and claim specific performance or treat the contract as existing. He must rescind or acquiesce in the purchaser's repudiation: see Williams Vendor and Purchaser, 1055, and *Hall* v. *Burnell*, *supra*. In *Fraser* v. *Ryan*, 24 A.R. 441, at

p. 444. The Chancellor says: "The contract has been ended by mutual action of the parties and the law leaves them where they have put themselves. Whatever money has passed from one to another cannot be recovered . . . The contract is at an end and all rights thereunder and remedies thereon end therewith except that damages for the breach of it may be sought by the vendor." If this language refers to more than the deposit it may require explanation in the light of later cases but as to the deposit, it is submitted that it accurately states the law for Ontario. The purchaser being in default and the vendor rescinding, it may be taken as law that as a rule the Court will not relieve against forfeiture of the deposit.

There may be some exceptions to this, though it is hard to find a decision expressly in point. In *Howe* v. *Smith*, 20 Chy. Div. 89, at p. 95, Cotton, L.J., says: "I do not say that in all cases where this Court would refuse specific performance, the vendor ought to be entitled to retain the deposit. It may be that there may be circumstances which would justify this Court in declining and which would require the Court according to its ordinary rules to refuse to order specific performance in which it could not be said that the purchaser had repudiated the contract or that he had entirely put an end to it so as to enable the vendor to retain the deposit." Perhaps *Snell* v. *Bricknell* would have fallen within this suggested exception had the pleadings been so framed. In the Supreme Court, 49 S.C.R. 360, at page 383, Mr. Justice Anglin, who there dissented, says that part of the deposit remaining with the vendor should be returned. His judgment rests upon the ground suggested in *Howe* v. *Smith* that, having regard to the very short default—three days—and to the fact that the purchaser's conduct did not amount to repudiation, though he neglected to comply strictly with the terms of the contract, the deposit or part of it should be returned; and in the Privy Council (1916), 2 A.C., at page 604, it is said that it was unfortunate that the pleadings did not ask for a return of the deposit so that futher litigation should be avoided. It may be, therefore, that where specific performance cannot be granted because of delay and because time has been made of the essence

of the agreement; yet relief may be granted against forfeiture even of a deposit if the purchaser's default is inadvertent and not equivalent to a repudiation of the contract. Any claim to such relief should be carefully scrutinized as the deposit might have been insisted upon not merely as a guarantee for performance but as a guarantee for *punctual* performance, and to treat a deposit as something to be returned to a purchaser in default is to deprive it of its character as a deposit altogether.

The answer to this second enquiry, therefore, appears to be:—

1. Upon default by the purchaser constituting a breach of contract by him the vendor may retain any money paid by the purchaser as a deposit.

2. Whether a Court of Equity will relieve against forfeiture of a deposit when the purchaser's delay is inadvertent and not tantamount to a repudiation of the contract *quære?*

3. *The purchaser having paid some instalments of purchase money makes default. Can the vendor cancel the sale and keep the instalments?*

Many agreements for sale provide for payment of purchase money by instalments, postpone delivery of the deed until the whole or a certain number of the instalments are paid and stipulate that upon default the contract shall be no longer binding on the vendor who may retain all instalments paid as liquidated damages. Time is usually made of the essence of such agreements. Under them the purchaser acquires no legal estate for some time but his equitable interest becomes increasingly valuable as his instalments are met and it becomes a serious problem: (1) whether he loses his interest in the lands by default (2) whether, if that interest is lost, he may recover his instalments paid (3) if so, whether the vendor may deduct from them any damages he has suffered through the purchaser's default.

The first of these enquiries has been dealt with in considering the purchaser's right to specific performance notwithstanding his delay and will not be further discussed.

The second enquiry deserves some consideration. We eliminate all cases of deposit as they have also been dealt with and consider only payments which do not bear such character. Logi-

cally there should be no different treatment of the cases of forfeiture of the purchaser's equitable interest in lands after the contract is signed and forfeiture of any money he may pay and imperil by his subsequent default, but practically there is a difference. If he loses an interest in lands for which he has paid nothing he loses his bargain and the advantages, more or less problematic, to accrue from it, but if he loses the money paid and has nothing to show for it, there is nothing speculative about his loss, it is very real and definite. Consequently we find a different treatment (for instance of the time clause in agreements) according to whether it creates forfeiture merely of the equitable interest in lands or forfeiture of purchase money paid on account.

As there has been so much confusion in the cases it may be no harm to make a few distinctions even though they involve a certain amount of repetition.

First: Specific performance of a contract may sometimes be granted to a purchaser in default who has paid part of his money. In such cases the purchaser saves the money paid by paying the rest of it with interest and costs. The nature of the relief granted is really an extension of time for payment. Instances of this are *Re Dagenham*, L.R. 8 Ch. D. 1022, and *Kilmer* v. *British Columbia* (1913), A.C. 319, and the limits set to such relief are laid down in *Brickles* v. *Snell* (1916) 2 A.C. 599.

Second: Where the vendor has had judgment for specific performance under a contract containing no provision for forfeiting purchase money and a purchaser cannot pay the rest of the money a practice has developed in Chancery permitting the vendor to rescind the contract and retain his costs out of the purchase money in his hands and even to keep the deposit if the agreement so provides, but apparently he cannot keep any other purchase money in his hands: Fry Specific Performance 11th ed., 578 and 579, *Griffiths* v. *Vesey* (1906), 1 Ch. 796; *Shuttleworth* v. *Clews* (1910), 1 Ch. 176. These rights do not depend merely upon contract but constitute the practice of the Court whereby it seeks to assist a vendor who holds an unsatisfied judgment for specific performance against a purchaser.

3. There are cases where the following elements appear:—

(1) Default after payment of part of the purchase money other than the deposit by the purchaser.

(2) Rescission by the vendor.

(3) Forfeiture of the moneys paid.

(4) Claim by purchaser for return of his money but no demand for specific performance.

It is this kind of case which now calls for some consideration. Leaving aside the minor questions of interpreting contracts which continually arise and are different in each contract, there are two broad classes (*a*) those where there is no forfeiture clause; (*b*) those containing a forfeiture clause.

(*a*) *Where there is no forfeiture clause:*—If more than a deposit has been paid and there is no forfeiture clause it would appear by analogy from the cases where judgment has been given for specific performance against a purchaser that if the vendor tries to rescind the contract he must return the purchase money other than the deposit. This was the course adopted even as to the deposit in *Mackreth* v. *Marlar* (1786), 1 Cox Equity Reports 259, but there the question was not distinctly raised whether the deposit would have to be returned. Apparently the vendor conceded the purchaser's right to the deposit as otherwise deposits need not be returned if the purchaser is in default. The case is authority, however, for the propsition that the vendor must return everything but the deposit; see also Williams Vendor and Purchaser 1051, note M, and 1120. It naturally follows also from the attempt to rescind the contract; the contract being put an end to both parties must be remitted to their original position. If the vendor is not satisfied with that he should not try to rescind; he should bring an action based upon the contract claiming damages for breach by the purchaser. We may assume, therefore, that if the vendor rescinds a contract which contains no provision for forfeiting the purchase money he must give back any purchase money paid except the deposit.

(*b*) *Where there is a forfeiture clause:*—Where agreements are entered into for payment of purchase money by instalments, they almost always provide for cancellation and retention of all purchase money paid as liquidated damages for default. Where

after default the vendor cancels pursuant to his agreement he is not rescinding it, in the sense that the parties are in the same position as though no bargain had been made. He is performing the contract and at common law he would be entitled to whatever remedies that situation gives him. One of those remedies is the right to retain all purchase money paid, and the purchaser having agreed to it, cannot object at common law.

A comparison, therefore, of cases (*a*) and (*b*) will shew the importance of provisions for cancellation and forfeiture in all contracts for payment of purchase money by instalments

The main question, therefore, under this general heading is whether if the purchaser cannot obtain or does not wish to obtain specific performance, he is entitled to ask for relief against this forfeiture. At common law he was helpless and so his appeal is necessarily to equity and the problem is whether this is one of those penalties and forfeitures from which the Court of Chancery grants relief. In Ontario it was not so treated. The case of *Fraser* v. *Ryan*, 24 A.R., p. 441, already quoted, while a decision upon another point declares that where the purchaser has not complied with his agreement he cannot recover any part of the money which he paid; see also *Gibbons* v. *Cozens*, 29 O.R. 306, and *McCammond* v. *Govenlock*, 2 O.W.N. 563.

In Manitoba and the North West Provinces the matter has received a good deal of consideration and apparently it was the practice in Alberta for vendors holding agreements of this kind and having part of the purchase money in their hands to sue after default for recission and for a declaration that the purchase money was forfeited; see *Great West Lumber Company* v. *Wilkins*, 1 A.L.R. 155; *Merriam* v. *Paisch*, *ibid*, 262; *C.P.R.* v. *Meadows*, *ibid*, 344, and *Schurman* v. *Ewing*, 2 A.L.R. 168, and even though the defendant did not appear some of the Judges refused to rescind and forfeit the purchase money. Instead they appeared to mould the practice governing cases where a vendor's judgment for specific performance against the purchaser remained unsatisfied, and instead of declaring a forfeiture they gave the purchaser time to redeem and directed a sale of the lands after the time limited, authorising the vendor to retain the amount of his principal, interest and costs, and ordering him to pay the balance

in his hands to the purchaser. Mr. Justice Beck went so far as to declare the forfeiture clause void. This practice was not assented to by Mr. Justice Stuart, whose dissenting judgment in *C.P.R.* v. *Meadows* is interesting and valuable, and it was not followed in Saskatchewan: *Steele* v. *McCarthy*; 1 Sask. L.R. 317.

The decisions in Alberta are not quoted as authority for the purposes of this article but merely to shew how widely Judges can differ upon the point. Nothing could be more marked than the strict common law forfeiture enforced in Ontario and the wide equitable practice adopted in Alberta. Our only enquiry, however, is to consider whether the recent decisions in the Privy Council indicate more clearly than the older cases the method which ought to be pursued everywhere. Notwithstanding the forfeiture strictly enforced in Ontario, it is submitted that there was always inherent in the cases a form of relief applicable to contracts of this kind; that is the principle that although a contract provides for forfeiture of payments of any description under the term liquidated damages, yet if such payments are not a fair pre-estimate of the probable damages then the provision for forfeiture is a penalty and not liquidated damages. This is one of the principles enunciated in *Wallis* v. *Smith*, 21 Ch. D. 243, and it is submitted that there is no reason why it should not apply to a contract to pay for lands by instalments as well as to any similar contract. It should be peculiarly applicable because, as pointed out in later cases, the more purchase money there is paid before default the heavier will be the penalty if the purchaser afterwards breaks his contract, so that the more nearly the purchaser performs his contract the heavier and not lighter will be the damages he must pay; see *Barton* v. *Capewell*, 68 L.T.R. 857. In that case there was an agreement for the sale of patent rights by instalments with provisions for cancellation and forfeiture as liquidated damages. The purchaser made default and afterwards made no attempt to have the agreement specifically performed. Probably specific performance was impossible. The Court there declared that the provision for forfeiture was a penalty, that it should be relieved against and that an enquiry should be directed to ascertain what damages the vendor had suffered by the breach, with a direction for payment of any balance to the purchaser.

This method had been adopted in Saskatchewan and in *Drinkle* v. *Steedman*, before Mr. Justice Newlands in 1912, while he refused specific performance he offered an amendment so that the purchaser might be relieved from forfeiture of the instalments he had paid. This was not accepted and the purchaser appealed. The Supreme Court of Saskatchewan reversed this judgment, following the *Kilmer* case, as the Judges thought, and granting specific performance. On appeal to the Privy Council the latter judgment was reversed and the judgment of Newlands, J., restored; but with the same proviso granting relief from forfeiture of the instalments. The trial judgment is not reported but it may be found in Vol 42 of the Printed Cases in the Privy Council at Osgoode Hall Library. The other reports are, 7 Sask. L.R. 20, and (1916) 1 A.C. 275.

The result is that a Court of final resort has declared that relief against forfeiture of purchase money will be granted even in cases where specific performance cannot be had. It is, therefore, submitted that the earlier decisions in our Courts are no longer law, and that if specific performance is not granted then the proper relief is that which was given in *Barton* v. *Capewell*, namely, a declaration relieving against forfeiture and a reference as to damages, with appropriate provisions for repaying the balance of purchase money to the purchaser, if any balance is found due to him; see *Boyd* v. *Richards*, 29 O.L.R. 119.

Therefore, the following is suggested as an answer to our third enquiry:—

(1) If there is no provision in the contract for cancellation and forfeiture of instalments of purchase money then, if the vendor seeks to rescind instead of suing for damages or for specific performance, he must return all purchase money except the deposit.

(2) If the agreement contains a provision for cancellation and for forfeiture of purchase money the vendor may cancel, but the purchaser is entitled to a declaration that the purchase money paid is not forfeited, but is held only as security for the true amount of damages which the vendor has suffered by reason of the purchaser's breach of contract.

SHIRLEY DENISON.

THE RIDDELL CANADIAN LIBRARY.

Not only the Law Society of Upper Canada, but also the country at large are under a debt of gratitude to Mr. Justice Riddell of the Supreme Court of Ontario for the generous gift to which we now desire to refer. We are glad for the gift and we appreciate the energy and interest of the donor, who is from time to time enriching this very valuable and instructive collection.

Last year he presented to the Law Society his full collection of Canadiana (and Americana) to form the nucleus at Osgoode Hall of a Canadian Library. This Library, called after the donor "The Riddell Canadian Library," is temporarily housed in the room off the General Library immediately south of the King's Bench Court room, but it is hoped that more appropriate quarters will soon be found for these valuable volumes.

There are not far from two thousand items altogether; and the books are of the most varied character—travels in Canada from the time of Kalm the Swedish traveller, represented in the early and rare German edition of 1757; la Rochefoucault in 1795, in the very rare first French edition of l'An VII. and the first English quarto edition of 1799; Heriot in a sumptuously bound copy of the quarto edition of 1807, Howison, Duncan, McGregor and many others.

We find histories from Parkman upward and downward, descriptive works like Lillie, Smith, etc. (among them the exceedingly rare volume by D'Arcy Boulton, afterward Mr. Justice Boulton); Col. Strickland describes the Canada of his day as do his talented sisters Mrs. Moodie and Mrs. Traill and the novelist Captain Marryat in less formal but no less accurate characterization. And from the Upper Canadians of the very early period of the history of our Province to the uncouth Doukhobor of to-day, hardly a decade or a class of the community fails to receive description in some work of this collection.

Political history is not neglected. Of the noted Robert Gourlay are found many works, amongst them a unique copy of his "Neptunian;" from William Lyon Mackenzie and his times down to

the times of Confederation, there are many volumes of the lives of those who made Canada what it is.

The biography of others than politicians and statesmen is not neglected, the leaders in the Church in all its branches, in education in its manifold forms, of pioneers in settlement—all these receive due attention.

The poets, too, receive due consideration—even "the Poet Gay" of Guelph is represented by his extraordinary volume.

Not least in value is the collection of pamphlets bearing on all kinds of subjects from University Education to plans for Savings' Banks.

From his personal acquaintance with the Secretary of State of the United States, Mr. Justice Riddell has received for the Library a valuable donation of books, maps etc., dealing with international law and the arbitrations between Canada and the United States—and in the same way his friendship with the Ambassadors of France and China has procured from their governments interesting volumes of great value. The Russian Ambassador has sent illustrated volumes, some of which show the horrible atrocities perpetrated by the Prussians on Russian prisoners.

Historical Societies or Commissions of many States have also contributed their publications, New York, Illinois, Wisconsin, Michigan, North Dakota and many others—many of these volumes bear directly upon early Canadian history.

The local histories of Canada have been procured so far as possible, and the transactions of many local Historical Societies are also to be found on these shelves.

The collection is being constantly added to by Mr. Justice Riddell from purchases made in the British Isles, in this country and in the United States; and as it is desired that everything of Canadian interest should be obtained for this Library, it is to be hoped that all Canadians will send copies of their own works and of the works of other Canadians as well as other works of all kinds which have Canadian interest. Many Canadians have already responded to Mr. Justice Riddell's invitation to send

books, pamphlets, maps, etc., dealing directly or indirectly with Canada or Canadian past or present or having Canadian interest: but there must be a large quantity of such materials yet to be gathered in.

We would urge our readers to take an interest in this Library and assist it as far as possible.

*APPLICATION OF THE DOCTRINE OF RES IPSA LOQUITUR IN MASTER AND SERVANT CASES.**

Generally.—The phrase, *res ipsa loquitur*, literally translated, means that the thing speaks for itself, or the thing itself speaks. As used in law, it is merely a way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify the conclusion that the accident was caused by negligence. The inference of negligence is deducible, not from the mere happening of the accident, but from the attendant circumstances.

There seems to be a widely prevalent idea that the relation of master and servant is *per se* inimical to the application of the maxim *res ipsa loquitur*, and that the maxim is one specially designed for cases in which a traveller is injured while on a public highway, or while he is a passenger in the conveyance of a common carrier. This general impression may be due in part to its origin, for it seems to have been applied at first only to cases in which the defendant's contractual obligation to the injured person was practically that of an insurer, and in part to its subsequent extension to actions in which there was no contractual relation between the parties. "It may be fairly surmised, at any rate, that the great preponderance of these two classes of cases in the category to which the maxim has been applied has given rise to the occasional expressions in some of the text-books and decisions, indicating that its application is regarded as depending

*This article is copied from the Central Law Journal of St. Louis. Authorities are cited for the various propositions are given in foot notes (Vol. 84, p. 67.)

primarily upon the relation of the person injured to the defendant whom he sues; but, from whatever source this view may have sprung, the fact remains that it is not supported by the maxim itself nor by the decisions of this Court."

Although there are numerous cases stating that this rule is not applicable in actions by employes to recover against their employers for injuries received in the course of their employment, the logical and sensible view is that where the facts warrant it application the rule applies in master and servant cases as well as in other classes of cases.

The application of the doctrine does not depend upon the relation of the injured person to the person or party who is charged with causing the injury, but upon the explanatory circumstances which surround the happening of the accident.

It is generally held by the Courts which apply the doctrine in master and servant cases that where the evidence of the accident was such as to leave it purely a matter of mere surmise or conjecture whether the injury was due to a cause for which the employer is liable the doctrine of *res ipsa loquitur* is not applicable. Under the evidence adduced in the trial of some cases it can as well be said that the injury resulted from a cause as to which the employe assumed the risk, or for which a fellow-servant was responsible, as that it was due to some cause resulting from the employer's negligence. But, it is held, where the evidence is of such a nature as to fairly warrant the inference as a fact, in the absence of explanation that the accident was due to a cause for which the employer is liable, the doctrine applies.

It appears that the Courts apply a stricter rule in their requirements as to what constitutes a *primâ facie* case under this doctrine in master and servant cases than they do in cases in which passengers are seeking to recover from common carriers for injuries. This is explained by some by reference to the higher degree of care owed by the carrier to its passengers than is owed by the employer to his employes. This explanation is far from satisfactory, however. The degree of care is immaterial if the accident was due to a cause for which the defendant is not responsible. The higher degree of care imposed on the carrier may

broaden the scope of its liability and render it liable in instances in which it would not be liable under an ordinary degree of care, but it is not made an insurer thereby. Its scope of liability is not infinite.

Then, too, the degree of care owed by the defendant has never been stated by any authority as a reason for the application of this doctrine. The reason for the rule is this: "When a thing which causes injury is shewn to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

If a passenger in the train of a common carrier is injured by the derailment of the train, he makes a *primâ facie* case by shewing that he was a passenger in the train, that the train was derailed, and that he was injured thereby. As matter of fact the wreck may have been due to any one of a number of causes for which the carrier is not liable. On the other hand, if an employe is injured he must not only shew that he was injured by an appliance or place of the employer, but he must exclude the idea that his injury was due to a risk assumed by him—which may have been a risk arising from the negligence of a fellow-servant. If the reason for the application of the rule is present, why compel the employe to go further in his proof than the passenger? If the employe is required to exclude all other sources of the cause of the accident than one for which the employer is liable, why not require the same of the passenger in his action against the carrier?

Again, in many jurisdictions assumption of risk (including the risk of a fellow-servant's negligence), like contributory negligence, is a matter of affirmative defense. Why, then, require the employe to prove that his injury was not due to such a risk in order that this doctrine may apply, when it is not required in other circumstances?

There seems to be no sound reason for refusing a full application of this rule in master and servant cases where the reason

for its application are present and their requirements have been fulfilled. The reason for the reluctance of the Courts to apply the rule in such cases is probably due to their inclination in the past to find and apply harsh rules inimical to the employe's interests.

In a New York case it is said that, "If the injured employe sues at common law and seeks to invoke the maxim, he must necessarily make proof of facts and circumstances which, under the common law, exclude every inference except that of the employer's negligence." The Court says that this is necessarily true. Why is it true? It is not required of any other litigant. With much solicitude a Court will say, as an excuse for not applying the maxim, that "It might have been due to the negligence of a fellow servant." Too many Courts have taken this position without reference to the language of the maxim or the reasons for its application. Instead of following the rule, they have offered some excuse (never a reason) for not following it.

That some of the Courts would like to avoid the consequence of erroneous precedent is indicated by the following language taken from the opinion in an Illinois case: "The existence of a rule exempting master and servant cases from the operation of the general principles of the doctrine expressed by '*res ipsa loquitur*' has been doubted and a logical reason for it is difficult often to see; but we are unable to escape from the conviction that it is the settled law of this state."

The Supreme Court of Minnesota lays down a proper rule in the following language: "The doctrine of *res ipsa loquitur* applies, the other conditions to its proper application obtaining, to the occurrence of an injury in the relation of employer and employe, when such injury arises in the use of an appliance which it is the legal and nondelegable duty of the employer to furnish and to keep in a reasonably safe condition for use."

In a Missouri case it is said that, "Where the injury to the servant is traced to a defect in a particular instrumentality or appliance being used by the servant in his work, then there are many cases holding that the proof of the occurrence and its attendant circumstances furnishes sufficient proof of actionable negligence."

On the other hand, the doctrine does not apply when the evidence before the Court merely shews the happening of the accident. Negligence is never presumed from the fact only that an accident occurred. It would constitute no case for a plaintiff to say that while he was a passenger in the defendant's train he suffered the injury complained of. The injury may have been self inflicted, or inflicted by a fellow passenger for whose conduct, in the circumstances, the carrier was not liable. The circumstances accompanying an accident frequently raise an inference of negligence, but the mere occurrence of the accident never does.

It would be equally nonsensical to say, as some Courts have said, that the doctrine in question does not apply at all in master and servant cases.

The following illustrations will give a fair idea of the views entertained by the Courts on this subject:

Unexpected Action of Saw or Machine.—The sudden starting of a machine when it should be at rest is evidence of negligence on the part of the employer if unexplained.

The plaintiff was employed by defendant to operate a cut-off saw, arranged on two upright timbers which moved to and fro as the saw was operated. When not in use the saw rested in a hood about 12 or 14 inches from the perpendicular, and was drawn forward against the timber to be sawed. At the time in question the saw had been placed back in the hood, and plaintiff was engaged in straightening a piece of timber, when the saw, which should have remained in the hood, unexpectedly sprang forward and injured the plaintiff. It was held that under the doctrine of *res ipsa loquitur* the circumstances raised an inference of negligence on the part of defendant which it was required to explain or disprove.

Without any known cause the arbor next to a saw, about which plaintiff was employed, flew out of the box and the saw fell to the ground, severely cutting plaintiff's foot. It was held that the doctrine did not apply, that there must be some evidence shewing what the defect or negligence was that caused the accident.

In an action by an employee to recover for injuries there was evidence that the carriage of the sawing machine, at which he

was employed, started up and injured him when it was left at rest with the steam shut off and the lever locked which was used to start and stop it; that a machine which would do that was improperly constructed or adjusted, and was unsafe; that the defendant's foreman knew that the machine had started up in a similar manner three days before the accident. Held, that the jury were warranted in finding that the defendant was negligent.

Explosion of Oil Can.—The rule was held not to apply in a case where a locomotive engineer was injured by the explosion of an oil can which he was filling, because "the accident might have been due to improper handling as well as to improper furnishing the thing causing the accident," and because both the oil and the lamp were in the exclusive control and custody of the plaintiff "It cannot be said," said the Court, "that common experience points more closely to a defect in the oil or lamp attributable to the master than to some carelessness on the part of the servant using it; *primâ facie* such negligence will be attributed to the person charged by law with the duty of managing and maintaining the thing causing the injury.

Explosion in Mine.—The plaintiff was employed as a labourer under the orders of a certified miner who, upon inspection after firing a blast, directed plaintiff to go in and break up a large stone thrown out and to hasten. Plaintiff struck the rock a few times and by so doing exploded dynamite or a cap, whereby he was blinded. There was evidence that a careful inspection would have disclosed the presence of the explosive. Plaintiff was a certified miner, but had never worked as such. It was held that the doctrine of *res ipsa loquitur* applied, and verdict for plaintiff was allowed to stand.

Fall of Mine Roof.—In an action by a coal miner to recover for injuries caused by the fall of slate from the mine roof, it appeared that he had been assigned to work on a pillar of coal abutting the entry in question, and had not been there more than 30 minutes; that he had not removed any coal, and that no act of his could have occasioned the fall of slate; and that it fell from the roof directly over him. It was not disputed that it was

the defendant's duty to keep the entry in a reasonably safe condition. Held, that the case was properly submitted to the jury under the doctrine of *res ipsa loquitur*.

Fall of Crowbar. Where the plaintiff was working beneath several carpenters, in the service of the same employer, who were prying up a floor with a crowbar, and the bar fell and struck plaintiff, injuring him, and there was no evidence to shew why it fell, it was held that the evidence was sufficient to cast upon the defendant the necessity of explaining; that "unless defendant can account for the fall of the implement in such a way as to exculpate itself it will be held to have done the act negligently."

Fall of Article in Department Store.—The fall of a fire extinguisher in a department store, whereby an employe was injured, the cause of its falling being enexplained, was held not to raise a presumption of negligence on the part of the employer. "From the mere fact that the extinguishers fell from the counter, it cannot be assumed that they were negligently placed or that it was negligence to display them upon a counter. They may have been pushed accidentally by one of the clerks, or even by a passing customer."

Defective Coal Car Brake.—In an action in which it was claimed that the defendant coal company failed to furnish the plaintiff, its employe, with a reasonably safe brake for him to use on a coal-pit car which resulted in his injury, it was held that the doctrine did not apply.

Collision of Handcar and Train—The mere fact that a handcar, on which the plaintiff, a section hand, was riding with his crew and a train collided furnished no proof of negligence on the part of the employer, the railroad company. "It is common knowledge that the use of handcars on railroad tracks is not supposed to stop or interfere with trains, but the sectionmen are to keep handcars off when trains approach, and that without any special warning or notice to them."

Roof of Freight Car Blowing Off.—The rule was applied in an action by an employe of a railroad company seeking to recover for injuries sustained when the roof of a box car, in a train of sixteen cars, was blown off by a wind so slight that he had no

difficulty in standing on the car, and the roofs of the other cars remained intact. This case arose under the Federal Employer' Liability Act, which takes away the defense of fellow servant.

Sudden Stopping of Train.—Where a section foreman was riding on an empty gravel train in the course of his employment, standing about the center of a flat car, and the train, which was moving 6 to 10 miles an hour, was suddenly and almost instantly stopped, so that he was thrown off the car to the ground and injured, the doctrine was applied. "The train was under the management of defendant's servants, and the instant stop of a train is not an occurrence in the ordinary course of things, if those who have the control thereof use proper care in its operation and with respect to its equipment. In such a case, *in the absence of any explanation* by the defendant, it affords reasonable evidence that the instant stop was due to a want of ordinary care."

Failure of Car Couplers to Couple on Impact.—Under the Federal Safety Appliance Act, which, *inter alia*, provides that it shall be unlawfulf or any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car in moving interstate traffic not equipped with couplers coupling automatically by impact, it is held that failure of such couplers to couple on impact raises an inference that the carrier has failed to comply with the standard created by the act.

Miscellaneous.—The rule was held not to apply where the injury to the servant was caused by the falling of a barrel from a stack near where he was working.

Where a servant in a factory was found dying, with his left arm and his neck broken, near an unprotected shaft, but there was no evidence as to the precise way in which the accident occurred, no one having seen it, the questions of the defendant's negligence and decedent's contributory negligence were for the jury.

The breaking of a hook in a crane was held insufficient to raise a presumption of negligence.

It was held not applicable in an action to recover for the death of a workman who was killed by the derailment of a hand-car while being transported to work.

The doctrine held not to apply in case of a boiler explosion.

Where the employe made the specific allegation that failure to brace certain posts was the cause of a traveling crane falling on him, the doctrine did not apply.

The doctrine was applied in an action to recover for the death of a locomotive engineer, who was killed when his engine was derailed by running into an open switch.

The pulling out of a draw-bar of a freight train affords a proper basis for the application of the doctrine.

The want of man power in England calls attention to the necessity of dispensing, as far as possible, with the services of jurors during the war, and the Attorney-General has announced that some action may be taken in reference to Grand Juries, owing to the fact that in these days magisterial investigations are so much more thorough than they used to be, that neither Grand juries nor Coroners juries are as importan tor so indispensable as they used to be. Whilst we think it would be a misfortune to do away with the jury system, we can well afford at the present time to dispense with the services of men who would be better employed on their farms, or in munition factories, unless indeed they are eligible for military service and if so they ought to be enlisted.

As we learn from *Law Notes*, a somewhat unique libel suit has recently been determined in New York, wherein a well-known magistrate recovered a verdict of $35,000 from the publishers of a popular novel on proof that a character, somewhat unattractively portrayed therein, was intended to represent him: (*Corrigan* v. *Bobbs-Merrill Co.*, 158 N.Y.S. 85). This case will doubtless go to appeal. The difficulty in such a case is not so much the law as the difficulty of proving the allegations.

REVIEW OF CURRENT ENGLISH CASES.

SHIP—CHARTER-PARTY—BILL OF LADING CONCLUSIVE—EVIDENCE OF QUANTITY DELIVERED AS STATED THEREIN—ESTOPPEL.

Crossfield v. *Kyle Shipping Co.* (1916) 2 K.B. 885. In this case the plaintiffs were the holders of a bill of lading of timber, and sued the shipowners for shortage in delivery. The charter-party of the vessel by which the timber was shipped provided that the captain should sign bills of lading as per surveyors' return for the cargo, and that the bills of lading should be conclusive evidence of the quantity delivered to the ship as stated therein. The cargo was brought to the ship in lighters and owing to rough weather some of it was washed overboard from the lighters and lost. The captain's agent signed bills of lading nevertheless for the full quantity, as per surveyors' return. All the timber actually placed on board was delivered to the plaintiffs as indorsees of the bill of lading: and the question therefore was whether or not the defendants, in the circumstances, were liable for the shortage; and Bailhache, J., who tried the action, held that they were estopped by the bill of lading from denying that the full amount mentioned in the bill of lading had been received.

ADMIRALTY — SHIP — FORFEITURE — BRITISH COMPANY CONTROLLED IN GERMANY—PRINCIPAL PLACE OF BUSINESS OF COMPANY—BRITISH SHAREHOLDERS IN GERMAN CONTROLLED COMPANY—MERCHANT SHIPPING ACT 1906 (6 EDW. 7 c. 48) s. 51.

The Polzeath (1916) P. 241. This was a proceeding under the Merchant Shipping Act 1906 to determine whether a ship owned by a British Company, which had its principal place of business in Hamburg, and whose proceedings and business were controlled in Germany by a naturalized British subject of German origin who held the majority of the shares, was entitled to be registered as a British ship. Deane, J., held (1916) P. 117 that it was not, and that it was forfeited to the Crown, and the Court of Appeal (Eady, Phillimore, and Bankes, L.JJ.) affirmed his decision. The Court of Appeal rejected the claim of the British shareholders to relief, and held that their only resource was to appeal to the merciful consideration of the Crown.

SHIP—SEAWORTHINESS—SHIP FIT TO CARRY CARGO—IMPROPER STOWAGE—BILL OF LADING—EXCEPTED PERILS.

The Thorsa (1916) P. 257. This was an action by the consignees of a quantity of chocolate, for damages arising from its having been stowed in proximity to a number of gorgonzola cheeses whereby it had become tainted. The defendants relied on an exception in the bill of lading from liability for negligent stowage. The plaintiffs replied that the defendants could not rely on the exception because the ship was unseaworthy for carrying the chocolate, in that it was carried where it was liable to become tainted. Deane, J., who tried the action, held on the evidence that the ship was not unseaworthy, and that the damage in question was caused by negligent stowage, which was within the exception, and with this conclusion the Court of Appeal (Eady, Phillimore, and Bankes, L.JJ.) concurred.

PRIZE COURT—NEUTRAL VESSEL—CONTRABAND CARGO—DESTINATION NEUTRAL PORT—ULTIMATE ENEMY DESTINATION—CONDEMNATION OF VESSEL—ORDER IN COUNCIL ADOPTING ART. 40 OF DECLARATION OF LONDON.

The Hakan (1916) P. 266. This was a proceeding before the Prize Court for the condemnation of two neutral vessels captured with contraband cargoes ultimately destined for the enemy. Evans, P.P.D., held that it is now part of the law of nations that a vessel carrying contraband may be condemned if the contraband reckoned either by value, weight, or volume of freight, forms more than half of the cargo. He also held that where such a proportion of cargo is being carried it is not necessary to prove knowledge on the part of the owner or master that the cargo is intended for the enemy. He also held that the Order in Council adopting Art. 40 of the Declaration of London, which is a limitation of the rights of the Crown, is valid, and, under that Article, he held that a neutral vessel carrying a full cargo of conditional contraband to an enemy base of supply was subject to condemnation, and that the like penalty was incurred by a neutral vessel carrying to a neutral port a full cargo of contraband ultimately destined for the enemy.

PRIZE COURT—SHIP REGISTERED AS BRITISH SHIP—SEIZURE AS PRIZE—SHIP OWNED BY BRITISH COMPANY CONTROLLED BY ENEMY—MERCHANT SHIPPING ACT, 1894 (57-58 VICT. C. 60) S. 1.

The St. Tudno (1916) P. 291. The vessel in question in this case was used as a tender for the vessels of the Hamburg-Amerika

Line coming to Southampton, and was nominally owned by a British company. The Hamburg-Amerika Line appointed the directors, and paid for their qualification shares, took from them an agreement to conform to their directions, received the profits, and in the person of its nominees owned the entire share capital of the company. Evans, P.P.D., held that the real owners of the vessel were the Hamburg Amerika Line, and that the vessel was enemy property, and as such liable to be treated as any other enemy ship in port at the outbreak of hostilities; and an order for its detention was made.

PRIZE COURT—PRIZE BOUNTY—DESTRUCTION OF ENEMY WARSHIP—NAVAL PRIZE ACT, 1864 (27-28 VICT. C. 25), S. 42—ORDER IN COUNCIL, MAR. 2, 1915.

The Sydney (1916) P. 300. By an Order in Council it was provided in pursuance of the Naval Prize Act, 1864, s. 42, that a bounty should be paid to the officers and crew of H.M.A.S. *Sydney* for the destruction of the *Emden*, to be calculated at the rate of £5 for every person on board the *Emden* at the beginning of the engagement. It appeared that part of the *Emden's* crew was on board a captured British ship which was being compulsorily used by the *Emden* as a collier, and the question was whether these members of the crew were to be included in the computation. Evans, P.P.D., held that all who were active members of the *Emden's* crew should be included, though some in the discharge of their duty might not actually be on board.

PARTNERSHIP—INSOLVENCY—DEATH OF PARTNER—WILL—TRUST TO PAY DEBTS—SURVIVING PARTNER RESIDUARY LEGATEE—CONVEYANCE TO LEGATEE—FALSE RECITAL—LEGAL ESTATE—PURCHASER FOR VALUE WITHOUT NOTICE—STATUTE 13 ELIZ. C. 5—(R.S.O. C. 134, S. 5).

Pearce v. *Bulteel* (1916) 2 Ch. 544. The facts in this case were somewhat complicated, but all that appears to be material for the present note may be briefly stated thus. A banking partnership existed between three persons, A. B. and C. A. was the owner of all the capital. Part of the capital consisted of real estate. The partnership deed provided that on the death of a partner the surviving partners might purchase the deceased's net share in the business, after providing for the debts. A. died leaving a will, whereby, after providing for payment of his debts, he devised his residue to C., and appointed B. and C. his executors. B. and C.

elected to purchase A.'s interest in the partnership, and by deed, reciting that A.'s debts were paid, as executors of A. conveyed the lands above referred to C., the residuary legatee, who mortgaged the land to the defendant to raise money for carrying on the business, which, at the time of A.'s death, was in fact insolvent. The firm subsequently became bankrupt, and the trustee in bankruptcy attacked the mortgage to the defendant as being void under the statute of 13 Elizabeth, c. 5 (R.S.O. c. 134, s. 5), but Neville, J., held that the defendants were holders of the legal estate as purchasers for value without notice, and therefore were not bound by any antecedent equities of creditors of the bank, and the mortgage was not impeachable under the statute because it was not made for the purpose of defeating creditors, but with the intention of carrying on the business and paying them by that means.

INSURANCE (LIFE)—DEPOSIT—SALE OF BUSINESS BY COMPANY—DISSOLUTION OF VENDOR COMPANY—DEPOSIT—ASSURANCE COMPANIES ACT 1909 (9 EDW. VII. c. 49), ss. 2, 313—(9-10 EDW. VII. c. 32, s. 14 (D.)).

In re City of Glasgow Life Assurance Co. (1916) 2 Ch. 557. In this case a life assurance company had sold its business to another company and had been dissolved, and the question Sargant, J., had to determine was as to the proper disposition of the government deposit made by the vendor company. It appeared that there were outstanding claims in the nature of paid-up policies of the vendor company, the holders of which had not novated their claims with the vendee company. In these circumstances Sargant, J., held that the proper order to be made was to direct the deposit to be carried to a separate account "In respect of the life assurance of the" vendor company "now dissolved."

WILL—CONSTRUCTION—ANNUITY PAYABLE OUT OF INCOME OF SETTLED SHARE—RIGHT OF TRUSTEES TO RETAIN SURPLUS INCOME TO MEET POSSIBLE DEFICIENCY IN FUTURE.

In re Platt, Sykes v. Dawson (1916) 2 Ch 563. This was a case of construction of a will whereby the testator bequeathed a sixth share of his residuary estate to trustees upon trust out of the income to pay to his widow an annuity for life of £1,000, and "subject thereto to permit the same share and the income thereof" to devolve under trusts therein declared or referred to, in favour of the testator's son and daughter and their issue respec-

tively. A summary application was made by the trustees for the opinion of the Court as to whether they were entitled to retain the surplus in question, to provide for a possible deficiency in future years; a possible deficiency being immediately possible. Sargant, J., held that, although by the terms of the gift, the annuity was not dependent on the amount of the income, but was cumulative so that the deficiencies in any one year would have to be made good out of the surplus of any succeeding year, that did not entitle the trustees to retain surplus income from past years to meet possible deficiencies in future years.

WILL—CONSTRUCTION—TRUST FOR MAINTENANCE OF DAUGHTER —ACCUMULATION OF SURPLUS INCOME FOR TWENTY-ONE YEARS—SURPLUS INCOME AFTER TWENTY-ONE YEARS TO FALL INTO RESIDUE—THELLUSSON ACT (39-40 GEO. III. C. 98)—(R.S.O. C. 110).

In re Hawkins, White v. *White* (1916) 2 Ch. 570. By the will in question in this case the testator bequeathed two sums of £10,000 to trustees on trust out of the income to provide for the maintenance of his two daughters, and he directed the surplus income of each sum to be accumulated for a period of twenty-one years after his death, and at the end of that period the accumulations were to fall into the residue as capital and be disposed of as such. This was a summary application to determine what was the legal effect of this disposition, and Sargant, J., held that the direction that the surplus should fall into the residue as capital was an attempt to accumulate beyond the period permitted, and therefore that this disposition was null and void under the Thellusson Act (see R.S.O. c. 110, s. 2), and the will must be read as if it contained no such disposition, and that being so the surplus income after the expiration of twenty-one years, and also the income of the accumulations made during the term, were not undisposed of, but were properly payable to the tenants for life of the residuary estate.

Bench and Bar

ONTARIO BAR ASSOCIATION.

ANNUAL MEETING.

The eleventh annual meeting of this Association was held at Osgoode Hall, Toronto, February 23, 1917. Owing to the war, the proceedings which have usually taken two days were condensed into one and the annual banquet was omitted.

The retiring President, Lieut.-Col. J. E. Farewell, K.C., gave an account of the proceedings of the past year and recounted many interesting experiences in connection with criminal matters arising from his experience as a County Attorney. Sir George Gibbon, K.C., Honorary President, also gave a short address.

Reports of the various committees were presented. That of Lieut.-Col. W. N. Ponton, K.C., Historian and Archivist of the Association, was read by Mr. Maclennan in Mr. Ponton's enforced absence. Further reference to this report will appear hereafter. Papers were also read by John S. Ewart, K.C., on the subject of Waiver, and by Hon. George Lynch-Staunton, K.C., on Company Law. We hope to give these to our readers in a subsequent issue.

The Committee on Criminal Law recommended three reforms as follows: (1) The payment of Crown witnesses attending preliminary enquiries or coroners' inquests. (2) That provision be made for calling and paying witnesses for the defence in murder trials. (3) That section 1140 of Criminal Code be amended so far as it relates to offences under sections 211, 212, and 215 B. At present prosecutions for such offences commence after the expiration of one year from the commission of the offence are barred. This should not be where the defendant's misconduct commenced at a period prior to the term of one year A special committee was appointed to take these matters up with the Minister of Justice and the Attorney-General of Ontario.

The following resolutions were also passed: (1) That it is desirable to increase the fees payable to County Crown Attorneys for their services on prosecutions in Assize Courts. (2) That a committee be appointed to interview the Workmen's Compensation Board and discuss with them the question of having lawyers appear before the Board on behalf of injured workmen or their relatives. (3) That a committee be appointed to interview the Judges of the Supreme Court with a view to amend the

rules dealing with the payment of money out of Court so as to provide that money paid into Court as security for costs may be paid out to such solicitor after the disposition of the action.

The following are the officers for the year 1917:—

Hon. President, Z. A. Lash, K.C.; President, George C. Campbell; Vice-Presidents, R. T. Harding, N. B. Gash, K.C., George F. Henderson, K.C.; Recording Secretary, C. F. Ritchie; Corresponding Secretary, Arthur A. Macdonald; Treasurer, E. J. Hearn, K.C.; Historian and Archivist, Lt.-Col. W. N. Ponton, K.C.

War Notes.

LAWYERS AT THE FRONT.

KILLED.

Major Miles Langstaff. The promise of a brilliant professional career was cut short when Major Langstaff was killed in action last month in a battle on the Somme front, when Lt.-Col. Beckett his C.O., of Toronto, was also killed. He graduated from the Ontario Law School in 1912, as gold medallist. He was one of the best students that ever passed through Osgoode Hall. He enlisted in the 75th O.S. Battalion and rose rapidly to the rank of Major.

The annual report of the Nova Scotia Bar Society gives the following list of its members who have recently given their lives for King and Country. They are:—

Captain Charles D. Livingstone, admitted November 10th, 1903.
Captain William Gore Foster, admitted October 3rd, 1905, son of William R. Foster, Secretary of the Society.
Captain Horace Dickey, admitted January 19th, 1907.
Lieut. F. H. P. Layton, admitted January 6th, 1911.
Major Henry H. Pineo, admitted October 4th, 1915.

The same report tells of military honours conferred upon the following members of the Society: Captain Barry W. Roscoe, son of W. E. Roscoe, K.C., has received the D.S.O.; Lieut. Ivan S. Ralston, brother of Major J. L. Ralston, also at the front, has received the M.C.; Lieut. Owen B. Jones has been twice awarded the D.C.M.; Lieut. B. W. Russell, has returned home wounded.

At a recent meeting of the English Law Society the President referred to the large number of the legal profession who had contributed to the successful prosecution of the war. He stated that at that time 2,689 solicitors and 1,335 articled clerks were engaged in military service, and that the great majority of those eligible to serve did so voluntarily and promptly.

Flotsam and Jetsam.

As we all know, and are glad to know, Mr. Lloyd George became Premier of the Imperial Government in the place of Mr. Asquith. This has met with general approval as it was felt that the former administration had not conducted the affairs of the nation, so far as the war is concerned (and that is the only matter of importance now) with the vigor which the occasion required. The special interest to the profession in this appointment is the fact that Mr. Lloyd George is the first "solicitor" who has become Premier. Members of the Bar have frequently occupied that position, but never before a solicitor. Sir Robert Finlay has become Lord Chancellor, stipulating that his right to a pension should be waived. Sir F. E. Smith remains as Attorney-General. Sir George Cave, who was Solicitor-General, having gone to the Home Office, his place has been taken by Mr. George Hewart.

At the recent meeting of The Ontario Bar Association, Mr. John S. Ewart, K.C., took exception to the use of the word "Confederation" as applied to Canada. A federation is a union of peoples, and has, therefore, a common or central legislature, acting directly on all the inhabitants as well as local legislatures; whereas a confederation is, by mere agreement, a union of states and has no common or central legislature. Like ourselves, the United States, Australia and Germany are "federations," whilst Austria-Hungary is a "confederation."

By a typographical error the case of *Turner* v. *Coates*, poetically rendered, was cited as having been reported in 115 L.J. It should have been printed 115 *Law Times*, 766.