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THE FISHERY QUESTION.

The Hague Tribunal has justified its existence, and proved its usefulness as a great court for the trial of international disputes, by the manner in which it has dealt with the long-standing controversy between Great Britain and the United States respecting the Atlantic fisheries. Not only has it proved its capacity as an interpreter of the law of nations, but it has also maintained its dignity as the highest court known to the civilized world.

It is also satisfactory to us as Canadians to know that, often as we have accused the mother country of indifference to our interests, and negligence in protecting them, in this case there was no sign of indifference or negligence. From first to last the same position has been taken by her, and on the principal points of differences she has been justified in her contention by the decision of the Tribunal.

In preparation for the trial no expense was spared, and in its conduct the best talent of the British Bar was enlisted in our cause. Nor in this regard must we fail to record the good work that was done by the Minister of Justice, and the Chief Justice of the Supreme Court, as well as by those who assisted in the preparation of the case. To examine and digest the diplomatic records, the voluminous despatches, state papers, and treaties connected with this controversy which has lasted for a century; to extract what was useful and important, to decide upon the relevancy or irrelevancy of the evidence from such a mass of documents, none of which could be neglected, was a task not only of supreme importance, but of endless difficulty, and to have successfully accomplished it is something of which all concerned may well be proud, and to whom all credit should be given.

A remarkable circumstance is that this award is accepted as satisfactory by both parties—a consummation much to be desired, but not often achieved. Of the points in controversy only two may be said to be of general interest, the others chiefly affecting the local interests of Newfoundland. The first of these was the claim of the United States, based on the words of one of the early treaties, that in certain parts of the coast their fishermen should use the fisheries in common with British subjects, that they were entitled to share in the administration of our coasts and harbours in all matters connected with the fisheries, and in regulations of the fisheries themselves. This claim was disallowed, and the rights of the provincial government fully established. The other point was the decision of the Tribunal that in respect of bays the three-mile-limit must be measured from a line drawn from headland to headland and not, as contended for by the government of the United States, follow the outline of the coast. This question we considered some time ago in connection with the jurisdiction of Hudson's Bay, and so far our contention has been maintained (ante, vol. 40, p. 132).

On both these important questions the decision was in our favour, and we may therefore claim a substantial victory. On the other questions "honours were divided," but, with the exception of the preposterous claim of the Americans first referred to, which they could hardly have expected to succeed in, and the decision in our favour on the headland question, matters remain much as they were, all points in dispute being settled one way or the other.

THE DEVOLUTION OF ESTATES ACT.

In a recent case of *Beer* v. *Williams*, 21 O.L.R.,at p. 51, Mr. Justice Britton says in reference to the effect of a conveyance by the personal representative of land, and the vesting of land under s. 13 without conveyance: "The legal position is now, as pointed out by Mr. Armour, on pp. 192, 194, 195, as follows: Where there has been a conveyance of the land by the executor

or administrator, the heir or devisee is free from an action at the suit of a creditor. Where there has not been a conveyance, but where the land has become vested in a devisee or heir under the 13th section of the Devolution of Estates Act, the heir or devisee shall continue to be liable: R.S.O. 1897, c. 127, as amended by 2 Edw. VII. c. 1, s. 4, and 2 Edw. VII. c. 17."

With great respect we venture to think this statement of the law is not quite accurate and is liable to be misleading, and we do not think it is the opinion of the author to whom the learned judge refers. The former Act, s. 20 (now 10 Edw. VII. c. 56, s. 24(1)), expressly states that where a conveyance is made by the executor or administrator to a beneficiary, a bonâ fide purchaser for value from such beneficiary shall hold the land freed from the debts of the deceased not specifically charged thereon; yet that notwithstanding such conveyance the section does not affect the rights of creditors against the beneficiary to whom the land is conveyed. The position appears rather to be this, that a bonâ fide purchaser for value from a beneficiary to whom the land of a deceased owner has been conveyed by the executor or administrator is entitled to hold the land freed and discharged from the debts of the deceased not specifically charged thereon, and the beneficiary to the extent of any benefit he may have received from such lands remains liable to creditors of the deceased. But a beneficiary on whom land has devolved under s. 13 and a bonâ fide purchaser from him for value, will both take the land subject to a liability to be sued by creditors of the deceased who are entitled to follow the assets into their hands. It is submitted that this is the real effect of 10 Edw. VII. c. 56, s. 24, and we think that is really Mr. Armour's conclusion.

Mr. Armour appears to consider that the right of a creditor of a deceased owner to follow lands into the hands of a devisee rested altogether on the Fraudulent Devises Act, 3 W. & M., c. 14, and that because such statute has not been continued, but in effect repealed, such right no longer exists. But it is submitted that that opinion is open to question. The reason land devised could not be got at in England in the hands of a devisee, except

under the Fraudulent Devises Act, was because these lands were not assets at law for the payment of any debts except those by specialty, whereby the debtor had also bound his heir. But the Imperial statute, 5 Geo. II. c. 7, s. 4, to which Mr. Armour refers, had the effect of altering that rule in Ontario, and lands became thereby assets for the payment of all debts just as fully as goods and chattels, and as creditors had always a right to follow the personal assets into the hands of a legatee, it is submitted that the effect of the statute making lands assets for the payment of debts was to give creditors the right to follow the real assets into the hands of a devisee, for otherwise the statute of Geo. II. could not be effectuated.

DEFENCE OF COUNTERCLAIM AGAINST COMPANY IN SCI. FA. ACTION.

We are rather inclined to think that the head-note in the case of *Grills* v. *Farah*, 21 O.L.R. 457, is somewhat confusing and may lead to possibly an erroneous impression as to the real effect of the judgment of Riddell, J., which it purports to summarize. The plaintiff had recovered judgment against a limited company and the action was in the nature of a sci. fa. against the defendant as a shareholder. The defendant set up by way of defence a set-off sounding in damages against the company alleging that he had been damnified by the company withholding from him certain shares which he had contracted to buy; these shares had nothing to do with the 500 shares which the defendant actually held and in respect of which he was sued. The Ontario Companies Act, 1907 (7 Edw. VII. c. 34), s. 69, provides that "any shareholder may (in such an action) plead by way of defence any set-off which he could set up against the company." After pointing out that at common law there was no such thing as "set-off" and that when "set-off" was allowed by statute to be set up as a defence it only applied to the case of mutual debts and not to cross claims for unliquidated damages; and that when "set-off" was pleadable the excess, if any, found due, might be re-

covered by the defendant in the action in which it was pleaded; and that now under Rule 127 a set-off for unliquidated damages may be pleaded by way of counterclaim. He concludes, "Consequently I think the legislature intended the shareholder to have the right to set-off even claims sounding in damages," which appears to be a distinct confession, that notwithstanding he had struck out the counterclaim at the trial, on further consideration he had come to the conclusion that it might be well pleaded as a defence pro tanto. He then proceeds to discuss the counterclaim on the merits and concludes that on its merits it could not be maintained. The result would therefore appear to be that his striking out the counterclaim at the trial on technical grounds, was erroneous, because a pleading containing substantial matter of defence ought clearly not to be struck out because the pleader chooses to call it a counterclaim where it is really a defence; but inasmuch as the plaintiff's claim failed, the striking out of the counterclaim was immaterial, because in no event could a defendant in such a case have judgment for it or for any excess over the plaintiff's claim against the defendant, the only party liable therefor being the company.

CORPORATIONS PURCHASING SHARES OF THEIR OWN STOCK.

In view of the recent case of *Stavert* v. *McMillan*, 21 O.L.R. 245, it becomes important to consider what is the effect of a bank or other corporation acquiring directly or indirectly shares of its own stock. In the case in question, the manager of a bank in order to keep up its credit on the market, without the knowledge of the directors, applied $400,000 of the bank's money in the purchase of shares of its own stock, the shares thus purchased being transferred to various nominees for the bank. The directors on being made aware of the transaction got some of their friends to give promissory notes payable on demand for various amounts of the stock so purchased, which were transferred to them, on the assurance that they would not be called on

to pay the notes, and that the stock would be resold and the notes would be satisfied out of the proceeds. The stock was not resold, but the notes were indorsed by the bank to the plaintiff, who sued the makers. In this state of facts the learned Chancellor held that the purchase of the stock by the bank was ultra vires, and that the bank was unable to transfer any title in the shares to the makers of the notes sued on, consequently, the notes sued on were made without consideration, and the plaintiff having taken them with notice could not recover on them.

This only disposes of the title of the makers of the notes in question. As to them the judgment is clear that the bank could not give them a title, but it seems to follow, if the bank could not give them a title, neither could it give anyone else a title. The vendors having received their purchase money therefor and having presumably transferred them to the bank's nominees, without notice would appear to have no longer any beneficial interest in, nor any liability for, the shares. Is not, therefore, the conclusion inevitable, that in the absence of statutory power authorizing such a transaction and enabling a corporation to re-issue the shares, such a purchase in effect amounts to a cancellation of the shares? But there is this difficulty, that if such be the result then the double liability, if any, in respect of such shares, is also gone, and that is a detriment to the creditors of the corporation; but those who are responsible for the improper diversion of the funds of the corporation might possibly be held liable for this damage as well as any other, which results from the transaction.

NERVOUS SHOCK.

The question whether a nervous shock is an "accident" which entitles a workman to compensation under the Workman's Compensation Act in England recently came before a County Court judge in an action by a collier for compensation for injury under the following peculiar circumstances. He was working in a colliery when he heard a shout for help in the next working place. He there found that a fellow-workman had been knocked down by a

fallen timber prop. The plaintiff picked him up and carried him away. The effect upon the plaintiff was such that he sustained a nervous shock which incapacitated him from working at his usual place in the mine, and the manager refused to give him any other job and he had not worked since.

The County Court judge found that there was a genuine incapacity to work due to a nervous shock; that it was clearly the plaintiff's duty to his employer to go to the injured collier who shouted for help, and that his doing so arose both "in the course of" and "out of" his employment; and he awarded compensation to the plaintiff of a certain sum a week. From this judgment the employers appealed. The case was heard before the Master of Rolls, Lord Justice Farwell and Lord Justice Kennedy, and the finding of the County Court judge was upheld and the appeal dismissed. The Master of the Rolls in concluding his judgment, said it was clear from *Eaves* v. *Blaenclydach Colliery Co.* (1909) 2 K.B. 73, that if a workman sustained a nervous shock producing physiological injury which incapacitated him from his ordinary work as a collier this was just as much an accident arising out of and in the course of the employment and entitling the man to compensation as the loss of muscular power was. The present case was within the Act; in principle it was the same as if this man, in going to help his fellow-workman—as he was bound to do—had stumbled and fallen as he went and so sustained a physical injury; there was no difference in principle between an accident of that kind and the present: *Yates* v. *South Kirkby, etc., Collieries* (1910) 2 K.B. 538 at p. 542.

"CESTUI QUE USE": "CESTUI QUE TRUST."

What is the plural of cestui que trust? Some write cestuis que trust, others cestui que trusts, and some cestuis que trustent. The first is probably the best, but there is not much to choose between it and the second; the third is hopelessly wrong. The present writer is not aware when cestui que trust was introduced into our language. It is, of course, bastard Norman-

French, and was probably introduced in the seventeenth century. It is obviously coined after the pattern of cestui que use, and when we come to cestui que use we are on sure ground so far as plurals are concerned, for it is familiar knowledge that use is derived from the Norman-French oes, which in its turn comes from the Latin opus, meaning "benefit"; thus in Britton (34a) the King orders an inquiry to be made as to the moneys which his officers have received a noster oes, "for our benefit," and the statute 15 Rich. II. c. 5 contains provisions designed to prevent land being held al oeps de gentz de religion, or al oeps des gildes & fraternitees. That oes or use in these passages means "benefit"[1] and not "use" in the sense of employment or user, is clear from a case cited by Littleton (s. 383), where an executor took the profits of his testator's lands to his own use, instead of applying them, as he ought to have done, to the use of the dead (al use le mort) by distributing the money for his soul.

Cestui que use, therefore, means "he for whose benefit," and cestui que trust means "he upon trust for whom" certain property is held.

Que is frequently used in law French in the same sense of "whose"; thus Blackstone says (Comm. ii. 264), "All prescription must be either in a man and his ancestors, or in a man and those whose estate he hath; which last is called prescribing in a que estate." So the phrase cestui que vie means "he for whose life," not "he who lives." It seems, however, that the word was originally spelled qui, for in his admirable introduction to the Year Books published by the Selden Society, the late Professor Maitland remarked (vol. i., p. xlviii): "The qui that is the case of the indirect object, the qui (formerly cui) that is doing the work of the Latin cuius and the Latin cui (as in the common phrase qi heir il est, 'whose heir he is'), does not so readily degenerate into que. Our phrase 'to prescribe in a que estate'

1. It occurs in the same sense at least as early as the Chanson de Roland, where there are several examples.—F.P.

is less[2] justifiable than our cestui que trust, since it represents qi estate il ad, 'whose (not which) estate he has.' "

In answer to a letter suggesting that cestui que trust was a justifiable phrase made up by analogy to cestui que use and cestui que vie, Professor Maitland wrote as follows: "(1) The remark that cestui que trust is worse than 'prescription in a que estate' was perhaps unfortunate. I suspect, however, that cestui que trust was not made until people were regarding as verbs the use and the vie in the two older terms that you cite. I feel pretty sure that the clerks of 'my time'—let us say circ. 1350—would not have written either cestui que vie or cestui que use. They would have written cestui a qui oes le feffement fut fait, cestui pour qui vie le dit X tient, and the like. I have here on my table photographs from seven MSS. additional to those that I previously examined, and I can repeat now with greater certainty that circ. 1350 the 'indirect object case' is usually qui. One may find que heir il est, as one may find almost anything; but it is not usual.

"By the time that 'uses' are becoming prominent the language has fallen to a considerably lower level than that represented by my introduction. I suspect a gradual descent from cestui a qui oes (la terre est tenue, or the like) to cestui que use, but I fancy that by the time that men have fashioned the latter phrase they are beginning to think of que as the subject of a verb. The gradual substitution of use for oes (opus) shews that the language is already in a bad way. Is it not also to be remembered that the early feoffments to uses are generally feoffments to the use of the feoffor? I think one might say that in the first stage of the development the cestui que trust is a trust*or* who has placed trust in a feoffee; he is author of the trust as well as sole beneficiary. This makes further confusion possible."

The other two paragraphs of Professor Maitland's letter relate to different questions, also discussed in his introduction. As everything from his pen is of interest, no apology is required for printing them here.

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2. This is obviously a *lapsus calami*; "less" should be "more."

The second paragraph is in answer to the suggestion that que in the sense of "because" might possibly be derived from the Latin quia.

"(2) I thought much about the que which means *for* being derived from quia, and nearly made this suggestion; but I could not find the slightest support for this in French grammars and dictionaries. All seemed to agree that quia did not live, and that que is quod even when it means *because*. In Spanish one can use que in this way as an equivalent for the longer por que, and I understand that in Latin this would be quod instead of per quod (Ande V., que es tarde—says a grammar—Come along, for it is late)."

The third paragraph is in answer to the suggestion that the *-ee*, in which many old French words terminate, resembles the *-ée* in masculine words in modern French, such as musée (from museum), and the *e* in foie (from ficatum), and that the second or final *e* represents the Latin *-um*.

"(3) As to *-ee* for mod. Fr. *-e*. I think that if we said that in Le bref fut portee the last *e* really descended from the *-um* of portatum, we should be flying in the face of a rule that is based on a very wide induction, and I suspect that we should be told that even in Anglo-French this doubled *e* does not appear until long after the Conquest. Are your examples to the point? Musée is a word of 'learned formation.' I think we should be told that if museum had had a continuous life in the mouths of the people it would have come out as musé; just as senatum would have become séné and not the 'learned' sénat. As to foie, I have not my books with me, and I forget how the *foi-* is explained; but I fancy that the final *e* is the *a* of the *-atum*. nct the *-um*."[3]

The letter is dated "Gran Canaria, 23 Jan., 1904."

—*Law Quarterly.*

3. Littré s. v. points out that the form foie postulates a vulgar Latin ficatum or ficitum. Ficatum would have given a termination in *-é*, to which corresponding forms occur in some other Romance languages.—F.P.

WHAT CONSTITUTES "SERIOUS AND PERMANENT DISABLEMENT."

The recent English case of *Hopwood* v. *Olive and Partington, Limited,* 102 L.T. Rep. 790, is one of the very few cases, if not the only one, that has come before the court on the question as to what amounts to "serious and permanent disablement" within the meaning of the Workmen's Compensation Act, sub-s. 2(*c*). This statute relieves an employer from liability to pay compensation to a workman who is injured by accident arising out of and in the course of his employment, if the injury is attributable to his "serious and wilful misconduct, . . . unless the injury results in death or serious and permanent disablement."

In the case referred to the workman was a lad employed at certain paper mills. His work was to catch the paper as it came off the cutting machine, and at the end of the week to clean the machine. On one occasion he started, in breach of his employers' regulations, to perform that latter duty while the machine was still running, with the result that his right hand was caught in a cogwheel, and his first and third fingers were cut off at the top joint. The County Court judge had no course open but to find that the workman had been guilty of "serious and wilful misconduct." His Honour held, however, that the injury which the workman had sustained amounted to "serious and permanent disablement" within the meaning of the sub-section. He accordingly gave effect to the exception in favour of the workman, and awarded him compensation. That the disablement, if it was "disablement" at all, was "permanent," there was no gainsaying. But whether it was "serious" enough to satisfy the sub-section was another consideration. The Court of Appeal, adopting the view taken by the County Court judge, declared that it was. "The workman," said the Master of the Rolls (Cozens-Hardy), "may be disabled in the labour market from being employed in innumerable occupations which otherwise would possibly have been open to him. This renders it a serious disablement, and it is not one of a temporary character." Lord Justice Buckley gave it as his opinion that "disablement" meant

the same thing as "disable," that is to say, less able to earn his full wages. Loss of portions of two fingers of the right hand would unquestionably, in certain callings, render a workman much less able to earn full wages. Regarded in that light, he would be both seriously and permanently disabled.—*Law Times.*

The subject is not a pleasant one to discuss; but it is important, and has attracted much attention in various countries. We learn from one of our English exchanges that Dr. Rentoul, in an address to the Psychological Society of the British American Medical Association again urges the importance of the surgical sterilization of the unfit. The remedy he calls for, with a view to render marriage unproductive in certain stated cases, is, he declares, simple and harmless, injuring neither the mental or the physical condition. It would not prevent marriage but would prevent the production of children. He gives some statistics shewing where five weak-minded, unmarried females had been delivered of fifteen idiot infants in a workhouse. Another doctor has pointed out that ninety-two habitual inebriate women had had eight hundred and fifty infants. As our contemporary remarks, "Naturally, in all sophisticated societies, drastic proposals of this sort filter slowly through the public conscience"; but we are told that in England there is a steadily growing feeling in their favour, and that they are now being discussed in France, Germany and Switzerland. It would appear, however, that the United States is the only country which has legislated upon the subject. An Act has been passed in the State of Indiana "to prevent procreation of confirmed criminals, idiots, imbeciles, and rapists—providing that superintendents or boards of managers of institutions, where such persons are confined, shall have the authority and are empowered to appoint a committtee of experts, consisting of two physicians, to examine into the mental condition of such inmates." California has an enactment much to the same effect.

A JUDICIAL NONAGENARIAN.

The death, in his ninety-second year, of the Right Hon. Hedges Eyre Chatterton, which we recorded last week, removes from the legal and judicial word one of its most interesting links with the past. Mr Chatterton was one of a number of men of great eminence at the Bar and on the Bench who flourished in the last century and attained the nineties. Two Lord Chancellors of England—Lord Lyndhurst, who died in 1863, and Lord St. Leonards, who was Lord Chancellor of Ireland and subsequently Lord Chancellor of England and died in 1875—had entered respectively on their ninety-third and ninety-fifth years. The Right Hon. Thomas Lefroy, Lord Chief Justice of Ireland, discharged the duties of that great office till 1866, when he had entered on his ninety-first year, and lived for three years after his retirement from the Bench. The Right Hon. James FitzGerald, who in 1799 ceased to hold the office of Prime Serjeant of Ireland, which was abolished in 1805 owing to his opposition to the Government on the question of the Union, lived into the thirties of the last century, when he was well advanced in the nineties. Mr. Robert Holmes, the leader of the Irish Bar, although a stuff gownsman—he refused all preferment, including the Solicitor-Generalship—was born in 1765 and died in 1859.

Mr. Thomas De Moleyns, Q.C., who at his death in 1900 had entered on his ninety-third year and was the father of the Irish Bar, had a curious parity in his career with Mr. Chatterton. They were both natives of Munster; they both had served in the Royal Navy as midshipmen before they matriculated in Trinity College, Dublin; and were both leaders on the Munster Circuit contemporaneously. Mr. Chatterton was, strange to say, called to the Irish Bar, at which the call is made, not at an Inn of Court, as in this country, but by the Lord Chancellor sitting alone in court, by a Lord Chancellor, Sir Edward Sugden (Lord St. Leonards), who himself lived to be a nonagenarian.—*The Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

PASSING OFF—EVIDENCE OF PASSING OFF—IDENTIFICATION OF GOODS PASSED OFF WITH THOSE OF PLAINTIFF.

Hunt v. *Ehrmann* (1910) 2 Ch. 198. This was an action to restrain the defendant from passing off goods sold by them as goods of the like description sold by the plaintiffs. The plaintiffs were wine dealers, and the defendants were also retail wine merchants, and issued a price list in which they advertised for sale "Hunt Roupe's Grand Old Crusted Port, over six years in bottle . . . usual credit price per doz. 60s, now offered by us at per doz. 34s." The plaintiffs sold no wine in bottles and sold two distinct classes of port wine, one a superior and the other an inferior and cheaper wine. The plaintiffs alleged that the defendants were passing off by their advertisement the plaintiffs' inferior wine as and for the plaintiffs' superior wine. It was proved that the plaintiffs sold no matured wine in bottles, as to which it could be said the usual credit price was 60s. per dozen. In these circumstances Warrington, J., held that the plaintiffs had failed to establish the alleged passing off as there was no sufficient identification of the wine advertised by the defendants with any wine sold by the plaintiffs.

POWER—POWER TO APPOINT LIMITED AMOUNT—GENERAL POWER—EXCLUSION OF PERSON FROM BENEFIT WHO DISPUTED WILL—OVERRIDING POWER TO APPOINT MIXED FUND—WILLS ACT 1837 (1 VICT. C. 26) S. 27, (10 EDW. VII. C. 57, S. 30 (ONT.))

In re Wilkinson, Thomas v. *Wilkinson* (1910) 2 Ch. 216. In this case the question for decision was whether under s. 27 of the Wills Act, 1837 (see 10 Edw. VII. c. 57, s. 30 (Ont.)) a residuary devise and bequest had the effect of executing a power of appointment vested in the testatrix. The facts were that one Thomas Wilkinson gave his real and personal estate to trustees in trust for his wife for life, and he gave her power by her will to appoint that the trustees should raise and set apart a sum sufficient to pay £2 10s. per week, and declared that she should have absolute power by her will to dispose of that sum when raised as she might think fit, the testator, however, expressing by his will a wish that she should be able to direct the payment

of the £2 10s. per week to his son James during his life, but that if she should not think fit to exercise the power in favour of James she should have full power to dispose of the same as she might think best. "Subject as aforesaid," the testator gave his estate in trust after his wife's death in favour of his children. A power of sale was given by the testator to his trustees, and he declared that any of his children disputing his will should be deprived of all interest thereunder. The testator died in 1894 leaving his wife and all the children named in the will surviving him. James died in the lifetime of his mother. The mother died in 1909, leaving a will whereby she devised and bequeathed "all the residue of my real and personal estate not hereby otherwise disposed of." It was contended that this clause did not operate as an execution of the power to appoint the sum necessary to raise £2 10s. per week in perpetuity, because it was not a general power of appointment, as the exclusion of James and the other children who disputed the will rendered the power special; and that if there were a general power it did not apply to real estate; and that there was no trust for conversion, and that in order that the will of the widow might operate as an appointment it was necessary first to have created a charge of the money on the land. Parker, J., who tried the case decided (1) that a charge on the testator's residuary real and personal estate for any sum the widow might appoint under the power was created by the words "subject as aforesaid." (2) That notwithstanding the exclusion of children who disputed the will from the benefit of the power, the widow in the events which had happened had a general power in respect of the sum which might be raised. (3) That although there was no express trust for conversion, the power was an overriding one to appoint a mixed fund of realty and personalty, and (4) that by virtue of s. 27 of the Wills Act (Edw. VII. c. 57, s. 30 (Ont.) the power was exercised by the residuary gift in the wife's will.

SETTLEMENT—CONSTRUCTION—MISTAKE OF FACT—MISDESCRIPTION—CLERICAL ERROR—"TAIL MALE" INSTEAD OF "TAIL GENERAL."

In re Alexander Jennings v. *Alexander* (1910) 2 Ch. 225. This was a summary application by trustees, for the construction of a marriage settlement made in 1886, whereby it was provided that if the settler's eldest son should become entitled to his grandfather's real estate under his will for an estate "in tail male"

he should be excluded from all share in the settlement. Under the will of his grandfather the eldest son had become entitled to an estate tail general, and the question was whether or not he was deprived of any benefit under the settlement. Parker, J., who tried the action held that as the settlor must have known at the date of the settlement that if her eldest son came into her father's real estate under his will, it must be for an estate tail general, and not an estate tail male, the insertion of the word "male" in the settlement must be treated as a misdescription and the settlement construed as if the word were omitted, and that consequently the eldest son was excluded from sharing in the settlement moneys.

WILL— GIFT OF LEASEHOLD SUBJECT TO A LEGATEE PERFORMING COVENANTS OF LEASE—INDEPENDENT GIFT TO SAME LEGATEE OF DIVIDENDS—ACCEPTANCE OF LEGACIES—MORTGAGE OF HOUSE AND DIVIDENDS IN ONE MORTGAGE—FORECLOSURE—DISCLAIMER BY MORTGAGEE—LIABILITY FOR REPAIRS.

In re Loom, Fulford v. *Reversionary Interest Society* (1910) 2 Ch. 230. By his will a testator bequeathed a leasehold to one Marian Ross, for life, she performing the covenants in the lease. He also left her dividends on stocks for life. She accepted the legacies and went into possession of the leasehold, and subsequently mortgaged to the defendant company by one mortgage both the leasehold and the dividends. The defendant company foreclosed the mortgage but left the mortgagor in possession of the leasehold. She subsequently became lunatic. The house on the leasehold fell out of repair, and the lessors had given notice of their intention to terminate the lease. The mortgagees disclaimed all interest in the lease and refused to consent to the dividends being applied in making repairs thereon. The repairs would cost £72, and the leasehold was estimated to be worth £300. In the interests of the remaindermen, the trustees applied to the Court by originating summons to determine the rights of the parties, and Parker, J., held that, on accepting the legacies, Marian Ross became personally bound to pay the rent and observe the covenants in the lease, and that the trustees so long as she remained the owner of both dividends and leasehold, had an equitable right to apply the dividends in keeping down the rent and otherwise fulfilling the covenants of the lease, but that the gifts of the leasehold and dividends were distinct, and that the mortgagees by accepting an assignment of both had not

thereby incurred any liability to discharge the covenants of the lease, and, not having taken possession of the leasehold, were entitled to the dividends without any liability to satisfy the rent or other liabilities under the lease.

TRADE MARK—REGISTRATION—TECHNICAL TERM—DECEPTIVE USE OF DESCRIPTIVE WORD.

Re Cassella & Co. (1910) 2 Ch. 240. In this case the applicants desired to register the word Diamine as a trade mark. It appeared that the word was a known chemical term which indicated that the substance to which it was applied contained two amine groups, but that it had been used by the applicants for twenty years for their dyes, whether they contained one, two, or more amine groups, or no amine group at all. The application was rejected, (1) because the word was not distinctive, but descriptive, and (2) because the applicants had used it deceptively.

COMPANY—DIRECTOR—CONTRACT OF SERVICE—RESTRAINT OF TRADE—WINDING-UP—DISMISSAL OF SERVANT—SPECIFIC PERFORMANCE.

Measures Brothers v. *Measures* (1910) 2 Ch. 248. The plaintiffs having appealed from the decision of Joyce, J. (1910) 1 Ch. 336, noted ante, p. 303, the Court of Appeal (Cozens-Hardy and Buckley and Kennedy, L.JJ.) affirmed the decision, Buckley, L.J. dissenting on the ground that in his opinion the contract of the plaintiffs to employ the defendant, and his contract not to engage in a similar business were not interdependent, but separate and distinct, and that the refusal of the receiver in the winding-up proceedings to continue defendant's employment was not the act of the company. But the other members of the court thought that though the company might not incur any contractual liability by the discontinuance of the defendant's employment, yet the fact remained that the company could not carry out its part of the bargain and that the contractual relation was thereby determined and ceased to be in force.

MORTGAGE—MERGER—SUBROGATION—PAYMENT OF MORTGAGE BY STRANGER—EQUITABLE TRANSFER—PRESUMPTION THAT SECURITY KEPT ALIVE—IGNORANCE OF MORTGAGOR—AGREEMENT TO TAKE DIFFERENT SECURITY.

In *Butler* v. *Rice* (1910) 2 Ch. 277, the plaintiff claimed to be the holder of a mortgage of a leasehold, which he claimed to

foreclose. The defendant, Mrs. Rice, a married woman, was the owner subject to a charge in favour of a bank for £450, on a deposit of the title deeds. The plaintiff was applied to by Mr. Rice, the husband of the owner, to advance money to pay off the charge and he thinking the husband was the owner agreed to do so on the understanding that a mortgage was to be executed for £300, and a guarantee given by Rice and his wife for £150, and that in the meantime the solicitor for Mr. and Mrs. Rice was to hold the title deeds for the plaintiff. The money was accordingly advanced and the bank's charge paid off and the title deeds handed to the solicitor, but Mrs. Rice then refused to execute the mortgage and claimed that Mr. Rice owed her £450 and she had never authorized him to make any such arrangement with the plaintiff. Warrington, J., came to the conclusion that this was a mere scheme on the part of husband and wife to cheat the plaintiff, which, however, he held to be unsuccessful on the ground that it must be presumed in the circumstances that the plaintiff intended to keep the bank's charge alive, and was entitled to be subrogated to their rights as chargees. One little point in the question of costs may be noted. The husband was made a defendant, but no relief was asked against him, he, however, put in a defence setting up certain allegations in support of his wife's claim and though the learned Judge thought him an unnecessary party he refused to give him any costs.

DONATIO MORTIS CAUSA—SUBSEQUENT GIFT BY WILL—REVOCATION—SATISFACTION.

Hudson v. *Spencer* (1910) 2 Ch. 285. In this case a testator had made a gift to his housekeeper of deposit notes aggregating in value £2,000 in circumstances which made the gift a valid donatio mortis causa. Two days later he made his will whereby he bequeathed to his housekeeper a legacy of £2,000. The question was whether the will was a revocation of the gift, or whether the legacy was to be deemed a satisfaction of the donation. Warrington, J., answered the question in the negative there being no circumstances shewn from which the court could properly infer the contrary.

INSURANCE—LIFE POLICY—MORTGAGES OF POLICY—PRIORITIES—NOTICE.

In re Weniger (1910) 2 Ch. 291. In this case the relative rights and priorities of mortgagees of a policy of life insurance were in question, and Parker, J., decided that where a mortgagee advances money on the security of a life policy which is not handed over to him he has, if it is in the hands of a prior mortgagee, constructive notice of his mortgage and cannot by first giving notice of his mortgage to the insurers obtain priority over such prior mortgage; and he also held, that in such circumstances it is not necessary for the subsequent mortgagee to give any notice to the prior mortgagee, and that if the latter in ignorance of the subsequent mortgage make further advances, such advances may be postponed to the subsequent mortgagee if he has given the insurers previous notice of his claim. But a doubt is thrown out by the learned judge whether if such subsequent advances are made in pursuance of a provision in that behalf in the original mortgage and without notice of the mesne mortgage in such a case the subsequent advance might not have priority over the mesne mortgage.

LIQUOR LICENSE—BONA FIDE TRAVELLER—SALE OF LIQUOR WITHIN PROHIBITED HOURS—GUEST OF BONA FIDE TRAVELLER—GUEST UNLAWFULLY ON LICENSED PREMISES—LICENSING ACT, 1872 (35-36 VICT. C. 94), S. 25—(R.S.O. C. 245, SS. 54, 56, AS AMENDED BY 6 EDW. VII. C. 47, S. 13 (ONT.)).

Jones v. *Jones* (1910) 2 K.B. 262 was a prosecution for breach of the Licensing Act. The facts were that a bona fide traveller had invited the appellant to licensed premises as his guest for the purpose of getting liquor to drink when the premises were required to be closed to all persons except bona fide travellers. The magistrate had convicted the appellant of being unlawfully on the premises during prohibited hours, and the Divisional Court (Lord Alverstone, C.J. and Channell and Coleridge, JJ.) held that the conviction was right. The case would appear to be applicable to the construction of R.S.O. c. 245, ss. 54, 56, a camended by 6 Edw. VII. c. 47, s. 13, which makes a similar exception in favour of "guests" at a tavern to that made oy the English Act in favour of bona fide travellers.

SOLICITOR—UNDERTAKING BY SOLICITOR TO PAY MONEY TO A PERSON NOT HIS CLIENT—ABSENCE OF MISCONDUCT—ENFORCING UNDERTAKING NOT GIVEN IN ANY LEGAL PROCEEDING—SUMMARY ORDER FOR PAYMENT.

United Mining and Finance Corporation v. *Becher* (1910) 2 K.B. 296. This was a summary proceeding instituted by originating summons to enforce an undertaking given by a solicitor, whereby he undertook to refund to the applicants' solicitor a sum of money placed by the applicants in his hands for the purpose of negotiating a sale, the undertaking not having been given in the course of any legal proceeding, and there was no suggestion of any bad faith or misconduct on the part of the solicitor. Hamilton, J., held that the court had jurisdiction to enforce the undertaking in a summary way and made an order for payment of the money pursuant to the undertaking. According to the note of the reporter the solicitor has instituted an appeal from the order.

SHIPPING—PUTTING INTO PORT OF REFUGE—DEVIATION—UNSEAWORTHINESS—EFFECT ON CONTRACT OF PUTTING INTO PORT OF REFUGE—LIEN FOR "DEAD FREIGHT"—DAMAGES.

In *Kish* v. *Taylor* (1910) 2 K.B. 309, the action was brought by shipowners to recover freight, and to enforce a lien therefor on the cargo. It appeared that the plaintiffs' vessel, through their default, put to sea in an unseaworthy condition by reason whereof it was compelled to put into a port of refuge. The defendants contended that this constituted a deviation as having been caused by the plaintiffs' wrongful act, and put an end to the contract of carriage and relieved the cargo from the obligations of the contract. Walton, J., who tried the case, was of the opinion that putting into a port of refuge in such circumstances did not constitute a deviation, and that the defendants and the cargo were accordingly liable. The contract provided that the plaintiffs were to have a lien for "dead freight" and under that provision the plaintiffs were held entitled to a lien for the unliquidated damages arising from the breach of contract by the defendants in failing to load a full and complete cargo.

RIGHT OF SEARCH—"BAG OR OTHER INSTRUMENT FOR CARRYING FISH"—COAT POCKET.

Taylor v. *Pritchard* (1910) 2 K.B. 320 was a case stated by justices. The prosecution was brought under a Fishery Act,

which authorized the complainant, a water bailiff, to search any "bag or other instrument for carrying fish." The complainant claimed under this provision to be entitled to search the coat pockets of the defendant, and the complaint was lodged because the defendant refused to permit such search. The justices held that the Act did not authorize a search of the person and dismissed the complaint, but the Divisional Court (Lord Alverstone, C,J., and Channell and Coleridge, JJ.) was of the opinion that the defendant ought to have been convicted and allowed the appeal.

EMPLOYER AND WORKMAN—DRIVER OF CAB—WORKMEN'S COMPENSATION ACT, 1906 (6 EDW. VII. C. 58).

Doggett v. *Waterloo Taxicab Co.* (1910) 2 K.B. 336. The plaintiff in this case was the driver of a taxicab belonging to the defendant company. He was paid a percentage of the takings registered by the taximeter. When he took out a cab from the defendants' yard he took it where he pleased and kept the cab sometimes till next day or for several days, and except by refusing to let him have the cab, the defendants had no control over him and could not dismiss him. While driving the cab he was injured, and the action was brought to recover compensation under the Workmen's Compensation Act of 1906. The county judge who tried the case held that the plaintiff was a daily servant of the defendants and that they were liable to make compensation, but the Court of Appeal (Cozens-Hardy, M.R., and Buckley and Kennedy, L.JJ.) were unable to agree with this view, and held on the contrary that the relation between the parties was not that of master and servant. According to Buckley and Kennedy, L.JJ., the contract was merely one of bailment.

PARTIES TO ACTION—JOINDER OF DEFENDANTS—ALTERNATIVE RELIEF CLAIMED AGAINST SEVERAL DEFENDANTS—JOINDER OF DIFFERENT CAUSES OF ACTION—RULES 126, 127, 128— (ONT. RULES 186, 187, 188).

In *Compania Sausinena, etc.*, v. *Houlder* (1910) 2 K.B. 354 the plaintiffs entered into a contract with the defendant Houlder whereby the latter agreed to carry the plaintiffs' goods, on certain named steamers belonging to the Houlders or on other suitable steamers in addition or substitution therefor. It was subsequently agreed that a certain cargo of the plaintiffs should be shipped on

a vessel called the Devon, procured by the Houlders and belonging to another company on the terms of the first mentioned contract. This cargo was shipped and the master of the Devon signed the bills of lading in respect of it. The cargo was damaged owing to the alleged unseaworthiness of the Devon. The plaintiffs joined both the Houlders and the owners of the Devon as defendants, claiming against the former under the contract above mentioned and against the latter on the bills of lading. On a motion by the owners of the Devon to strike out their names as defendants, as having been improperly joined, Hamilton, J., ordered their names to be struck out, but on appeal the Court of Appeal (Williams, Moulton and Buckley, L.JJ), reversed his order, holding that in the circumstances the defendants were properly joined, and that it was not necessary in order to join the applicants as defendants that the cause of action against them and their co-defendants should be identical, but that it was sufficient that though technically different in form the causes of action were substantially the same.

LIMITATION OF ACTION—RENT CHARGE—PERSONAL COVENANT TO PAY—CIVIL PROCEDURE ACT, 1833 (3-4 WM. IV. C. 42), S. 3—REAL PROPERTY LIMITATION ACT, 1874 (37-38 VICT. C. 57), S. 1—(10 EDW. VII. C. 34, SS. 5, 49 (ONT.)).

Shaw v. *Crompton* (1910) 2 K.B. 370 was an action to enforce a covenant for payment of a yearly rent charge. There had been no payment of the rent charge since September, 1893, and owing to the twelve years' limitation imposed by the Real Property Limitation Act, 1784 (37 & 38 Vict. c. 57), s. 1 (which in Ontario is ten years, see 10 Edw. VII. c. 34, s. 5), the charge as against the land was barred and extinguished; but it was contended by the plaintiff that the twenty-year limitation for actions on covenant, 3-4 Wm. IV. c. 42, s. 3 (10 Edw. VII. c. 34, s. 49 (Ont.)), not having expired he was entitled to maintain the action, but Bray, J., held (following *Sutton* v. *Sutton*, 22 Ch. D. 511), that the remedy against the land being barred, the remedy on the covenant was also gone. We may note that the Court of Appeal for Ontario in *Allan* v. *McTavish*, 2 A.R. 278, came to a different conclusion on the like facts, and consequently *Sutton* v. *Sutton* has not been followed in Ontario: see *Macdonald* v. *Macdonald*, 11 Ont. 187; *McDonald* v. *Elliott*, 12 Ont. 98, 22 C.L.J. 229.

PRINCIPAL AND AGENT—LIABILITY OF PRINCIPAL ON CONTRACT MADE BY AGENT CONTRARY TO HIS ORDERS—MANAGER OF HOTEL —LICENSE IN NAME OF MANAGER—PRESUMPTION AS TO HOUSE BEING TIED—UNDISCLOSED PRINCIPAL.

In *Kinahan* v. *Parry* (1910) 2 K.B. 389 the plaintiffs had sold whisky to the manager of a hotel who held the license therefor in his own name. The plaintiffs supposed that he was the principal, but they discovered subsequently that the defendants were the owners of the hotel, and the action was brought against them to recover the price of the whisky. It appeared that the manager had been instructed by the defendants to order spirits from a particular firm, with whom the plaintiffs were in no way connected, and from no other place; but this prohibition was unknown to the plaintiffs. The County Court judge, who tried the action, gave judgment in favour of the defendants, but the Divisional Court (Pickford and Coleridge, JJ.) reversed his decision. The County Court judge thought the case governed by *Davie* v. *Simmons*, 41 L.T. 783, where the facts were similar, except that there it was known to the plaintiffs in that case that the manager was merely an agent, and the court held that in such cases, it being common knowledge that public houses are often tied, the manager could not be presumed to have had unlimited authority. The Divisional Court on the other hand held the case to be governed by *Watteau* v. *Fenwick* (1893) 1 Q.B. 346, where it was held by a Divisional Court that where a vendor deals with an agent of an undisclosed principal, assuming the agent to be the principal, the ordinary doctrine as to principal and agent applies, that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding any undisclosed limitation put upon that authority by the principal.

WHARFINGER—CARRIAGE OF GOODS BY LIGHTER FROM SHIP TO WAREHOUSE—COMMON CARRIER—LIABILITY OF WHARFINGER.

Consolidated Tea Co. v. *Oliver* (1910) 2 K.B. 395. In this case the defendants were wharfingers and their business was to carry goods from ships to their warehouse by means of lighters, they did not hold themselves out as ready to carry goods for any other persons; while one of their lighters containing the plaintiffs' goods was thus in transit it was sunk by a collision with another vessel, and the plaintiffs' goods were damaged. It was ordered that the preliminary question should be tried, whether in

the circumstances the defendants undertook the liability of common carriers; and Hamilton, J., before whom that question was tried, held that they did not, but were only liable for negligence.

SHIP—CHARTER-PARTY—DEMURRAGE CLAUSE—NO TIME SPECIFIED FOR DEMURRAGE.

Wilson v. *Otto Thoresen* (1910) 2 K.B. 405. This was an action by the charterers of a vessel to recover damages occasioned by the vessel leaving port before she had loaded a complete cargo. The charter-party contained the following clauses: "Cargo to be loaded and discharged as fast as steamer can receive and deliver as customary at respective ports and during customary working hours thereof." "If vessel be longer detained to be paid at the rate of four pence per gross register ton per day." The ship arrived at Calais and commenced loading at 12.30 p.m. the same day. The customary working hours were from 7 a.m. to 5.30 p.m. A reasonable time for loading the cargo was 2½ days, and that time would be up on 20th December at 5.30 p.m. The ship was advertised to leave Las Palmas with a cargo of fruit on 7th January, and the master being anxious to arrive at that port in time left Calais at 4 p.m. on December 30, having an incomplete cargo; had she waited until 5.30 p.m. the following day 136 tons more of cargo could have been loaded. The question, therefore, was whether the vessel was bound to wait a reasonable time on demurrage, there being no fixed time named for demurrage. Bray, J., held that where a contract is silent on this point the law limits the time of demurrage to what is reasonable in the circumstances, and he, therefore, held that the defendants were liable for the damages less one day's demurrage.

ESTOPPEL—RES JUDICATA—LANDLORD AND TENANT—AGREEMENT FOR LEASE—ACTION FOR RENT—DEFENCE OF NO CONCLUDED AGREEMENT — SECOND ACTION — DEFENCE OF STATUTE OF FRAUDS.

In *Humphries* v. *Humphries* (1910) 2 K.B. 531 the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) have unanimously affirmed the judgment of the Divisional Court (1910) 1 K.B. 796, noted ante, p. 443.

CONTRACT—BREACH OF CONTRACT—DAMAGES CONTINGENT PROFITS —REMOTENESS—COSTS.

Sapwell v. *Bass* (1910) 2 K.B. 486 was an action to recover

damages for breach of a contract whereby the defendant who owned a stallion agreed that during the season of 1909 it should serve a brood mare of the plaintiff for a fee of £315 to be paid at the time of service. Before the time for the fulfilment of the contract arrived the defendant sold the stallion to a purchaser in South America. It appeared by the evidence of the plaintiff that the profits he had made by the sale of foals got by the same stallion out of other mares of the plaintiff considerably exceeded £315, and he claimed damages on the footing that he had lost a valuable foal. Jelf, J., who tried the action, however, came to the conclusion that the damages claimed were too remote, and all that the plaintiff could recover was nominal damages, and he left each party to pay his own costs.

CRIMINAL LAW—STATEMENT MADE IN THE PRESENCE OF PRISONER —ADMISSIBILITY OF EVIDENCE—MISDIRECTION.

The King v. *Norton* (1910) 2 K.B. 496. This was a prosecution for having carnal intercourse with a child under thirteen. Shortly after the alleged commission of the offence the child who was not called as a witness pointed out the prisoner and accused him of the offence, which he denied. This statement was admitted as evidence at the trial. But the Court of Criminal Appeal (Lord Alverstone, C.J., and Pickford and Coleridge, JJ.) held that the only ground on which such a statement would be admissible was where the prisoner had then by his words or conduct acknowledged the truth of the accusation, but there being here no evidence of any such acknowledgment by word or deed the statement was inadmissible and the conviction of the prisoner was quashed. How *King* v. *Thompson*, ante, p. 330, can be reconciled with this case we fail to see.

SALE OF GOODS—RIGHT OF VENDOR TO STOP IN TRANSITU AS AGAINST SUB-PURCHASER—ASSENT BY VENDOR TO SUB-SALE—UNPAID VENDOR'S LIEN—SALE OF GOODS ACT, 1893 (56-57 VICT. C. 71), S. 47.

Mordaunt v. *The British Oil & Cake Mills* (1910) 2 K.B. 502. The Sale of Goods Act, 1893, which has been declared to be declaratory of the common law, provides by s. 47, that the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto; and it was held by Pickford, J., in this action that the assent must

be given in such circumstances as to shew an intention on the part of the seller to renounce his right against the goods sold by the buyer, and therefore an assent to a sale of an unascertained part of the goods could not have that effect. The circumstances of this case were, that the defendants had sold a quantity of oil and the buyers had made sub-sales to the plaintiff of various quantities, to whom they gave delivery orders, addressed to the defendants and directing them to deliver to the plaintiff the quantities mentioned therein, "ex our contract." The plaintiff presented orders of this kind to the defendants, who either sent word they were in order, or received them without comment. So long as the defendants' vendees kept up their payments, the orders were honoured, but they having fallen into default, the defendants refused to make any further deliveries, and the judge held they were within their rights.

DIVIDEND—PAYMENT OF DIVIDEND BY WARRANT—LOSS OF DIVIDEND WARRANT—RIGHT TO SUE FOR DIVIDEND—INDEMNITY—PAYMENT.

Thairlwall v. *The Great Northern Ry.* (1910) 2 K.B. 509. This was an action by a shareholder against a limited company to recover the amount of a dividend due to the plaintiff. It appeared that a dividend had been declared to which the plaintiff as a shareholder was entitled, and that it had been ordered by the directors to be paid by warrant; and that a warrant for the amount the plaintiff was entitled had been sent by post to his registered address, but had been lost in transit. On these facts being brought to the defendants' attention they offered to issue a new warrant on the plaintiff giving them indemnity against any claims on the lost warrant, this the plaintiff refused to do. The County Court judge, who tried the action, gave judgment for the plaintiff, but the Divisional Court (Bray and Coleridge, JJ.) held that the position the defendants had taken was correct, and that the plaintiff's only remedy was as upon a lost bill of exchange; and that the warrant was in effect a bill of exchange notwithstanding a provision that it would not be honoured three months after the date of issue unless specially indorsed by the secretary.

CONTRACT—STATUTE OF FRAUDS, S. 4, (R.S.O., C. 338, S. 5)—AGREEMENT NOT TO BE PERFORMED WITHIN A YEAR—POSSIBLE PERFORMANCE WITHIN A YEAR.

Reeve v. *Jennings* (1910) 2 K.B. 522. In this case in April, 1908, the defendant entered the service of the plaintiff, a dairy-

man, under a verbal agreement that the employment might be determined by either party on one week's notice, and that the defendant should not within 36 months after quitting the plaintiff's service carry on the business of a dairyman within a specified area. On 6 February, 1910, the defendant quitted the plaintiff's service and immediately set up the business of a dairyman within the prohibited area, and this action was brought to restrain him from continuing such business. The judge of the County Court, who tried the action, gave judgment for the plaintiff holding that the fourth section of the Statute of Frauds did not apply. But the Divisional Court (Bray and Coleridge, JJ.) reversed his decision, holding that it did, because while it was true the plaintiff might perform his part of the contract within a year, it was clear that the defendant could not perform his contract for at least three years after the employment was determined, no matter when it was determined. From the judgment of the Divisional Court it would appear that this precise point had not been previously covered by decision.

JURISDICTION TO GRANT NEW TRIAL—JUDICIAL DISCRETION.

Brown v. *Dean* (1910) A.C. 373. In this case the House of Lords (Lord Loreburn, L.C., and Lords Atkinson, Shaw and Mersey) hold, that where a statute gives a County Court judge discretion to grant a new trial in a case tried before him, the discretion is a judicial and not an arbitary discretion, and must be exercised according to the rules binding on the High Court in similar cases.

DENTIST—UNREGISTERED PERSON—HOLDING OUT AS PERSON "SPECIALLY QUALIFIED TO PRACTICE DENTISTRY"—DENTISTS' ACT, 1878 (42-43 VICT. C. 33) S. 3—(R.S.O. C. 178, S. 26).

Bellerby v. *Heyworth* (1910) A.C. 377. This was an appeal from the decision of the Court of Appeal (1909) 2 Ch. 23 (noted ante, vol. 45, p. 563). The House of Lords (Lord Loreburn, L.C., and Lords James, Atkinson, Shaw and Mersey) have affirmed the judgment of the court below, and hold that the words "specially qualified to practice dentistry" in section 3 of the Dentists' Act, 1878, refer to the qualification by diploma, certificate, or other hall mark, and not to competence or skill. Consequently that the advertising by an unregistered person "finest artificial teeth, painless extraction, advice free" is not a breach of the Act. (See R.S.O. c. 178, s. 26.) The decision in *Barnes* v. *Brown* (1909) 1 K.B. 38 is overruled.

MINES—OVERLYING AND UNDERLYING SEAMS OF COAL—SUBSIDENCE —RIGHT TO SUPPORT—EVIDENCE—NECESSARY IMPLICATION.

Butterley Coal Co. v. *New Hucknall Colliery Co.* (1910) A.C. 381. This was an appeal from the judgment of the Court of Appeal (1909) 1 Ch. 37 (noted ante, vol. 45, p. 122), The plaintiffs were lessees of a seam of coal, the lease containing a reservation to the lessor and his assigns of a right to work the mines under the plaintiffs' seam subject to provisions for indemnifying the plaintiffs against any physical damage which might thereby be occasioned. The lessor having leased to the defendants a seam of coal lying 174 yards under the plaintiffs' seam they in working the seam had caused a subsidence in the plaintiffs' seam which occasioned no physical damage to the plaintiffs' coal, but rendered it more difficult to mine. The plaintiffs claimed an injunction, but the Court of Appeal dismissed the action, and the House of Lords (Lord Halsbury, Macnaghten, Atkinson, and Collins) have affirmed the judgment, holding that under the lease there was an implied power to the lessor and his assigns to cause subsidence.

ADMIRALTY—COLLISION—NEGLIGENCE OF DEFENDANTS' SERVANT CAUSING ORIGINAL DAMAGE—NEGLIGENCE OF PLAINTIFFS' SERVANT CAUSING ADDITIONAL DAMAGE—SERVANT ACTING IN DUAL CAPACITY—CONSEQUENTIAL DAMAGE.

Grant v. *SS. Egyptian* (1910) A.C. 400. This was an appeal from the decision of the Court of Appeal (1910) P. 38 (noted ante, p. 161). The case was simple. A. acting as the defendants' servant caused a collision whereby the plaintiffs' vessel was injured, but owing to the negligence of A. acting as the plaintiffs' servant, the plaintiffs' vessel sank which but for A's. negligence it would not have done. The Court of Appeal held that for the additional damage caused by A. when acting as the plaintiffs' servant, the defendants were not liable; and the House of Lords (Lord Loreburn, L.C., and Lords James, Atkinson, Shaw, and Mersey) have affirmed the judgment.

MONEY LENDER—BUSINESS CARRIED ON AT OTHER THAN REGISTERED ADDRESS—LOAN MADE AT BORROWERS' HOUSE — MONEY LENDERS' ACT, 1900 (63-64 VICT. C. 51) S. 2, SUB.-S. 1 (*b*).

Kirkwood v. *Gadd* (1910) A.C. 422. This was an action brought to restrain the defendant from enforcing a bill of sale

given in the following circumstances. The defendant was a money lender having a duly registered address as required by the Act of 1900. An agent of the plaintiff wrote to him at this address stating that the plaintiff desired a loan on the security of a bill of sale of his furniture; the defendant thereupon sent his servant to the plaintiffs' residence, and he drew up the bill of sale and got it executed and thereupon advanced the money. The plaintiff contended that this was a breach of the Act which requires the defendant to carry on business at his registered address and no other. The Court of Appeal held that it was, and granted an interim injunction. The House of Lords (Lord Loreburn, L.C., and Lords James, Atkinson, Shaw and Mersey) considered that whether or not it was a breach of the Act was to a large extent a question of fact to be determined in each case on its own special circumstances, and that on the evidence in this case, no breach of the Act appeared to have been committed, and therefore the interim injunction ought not to have been granted.

COMPANY—BOND—CONSTRUCTION—BONUS PAYABLE OUT OF PROFITS—ISSUE OF PAID-UP SHARES IN SATISFACTION OF BONUS—DIVIDENDS OUT OF CAPITAL—ISSUE OF SHARES WITHOUT CONSIDERATION—WANT OF CONSIDERATION—ULTRA VIRES.

Famatina Development Corporation v. *Bury* (1910) A.C. 439. This was an appeal from the judgment of the Court of Appeal (1909) 1 Ch. 754 (noted ante, vol. 45, p. 477). The facts were that the defendant corporation (the appellants) had issued £10 bonds to the amount of £50,000 repayable in seven years with a bonus of £25 per bond, the principal and bonus to be paid exclusively out of the profits. These bonds were subsequently exchanged for first mortgage debentures, but this was not to affect the bonus. No profits had been earned and it was proposed by the defendant corporation in 1909, to issue paid-up shares in satisfaction of the claims for the £25 bonus, and the present action was brought to restrain the carrying out of that arrangement. The Court of Appeal held that there was nothing in the bonds authorizing the company to turn a contingent liability on income into a present liability on capital, and that the proposed arrangement was ultra vires as being equivalent to paying dividends out of capital and issuing paid-up shares without consideration. The House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, Ashbourne and Collins) affirmed the judgment and for the same reasons.

APPEAL—COURT BELOW DRAWING WRONG INFERENCE FROM ADMITTED FACTS—REVERSAL OF JUDGMENT ON FACTS.

Draupner v. *Draupner* (1910) A.C. 450. This was an appeal from the judgment of the Court of Appeal in *The Draupner* (1909) P. 219. The House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, Atkinson and Shaw), without determing any point of law, reversed the judgment on the ground that the Court below had drawn the wrong inference from the admitted facts.

LIBEL—DISCOVERY—DOCUMENTS REFERRED TO IN DOCUMENTS PRODUCED—FURTHER AFFIDAVIT OF DOCUMENTS—PRODUCTION OF DOCUMENTS.

Kent Coal Concessions v. *Duguid* (1910) A.C. 452. The House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, James, Atkinson, and Shaw) have affirmed the judgment of the Court of Appeal in this (1910) 1 K.B. 904 (noted ante, p. 445), on the ground that the order complained of was discretionary and it was not shewn that the court below had gone upon any wrong principle.

PARTNERSHIP—PROVISION FOR PURCHASE BY SURVIVING PARTNER OF SHARE OF DECEASED PARTNER—SURVIVING PARTNER SOLE EXECUTOR OF DECEASED PARTNER—VALUATION OF SHARE—VALIDITY OF PURCHASE.

Horden v. *Horden* (1910) A.C. 465 was an appeal from the Supreme Court of New South Wales. The facts of the case were that by articles of partnership between two brothers it was provided that on the death of either, the surviving partner should pay to the executors of the deceased the full share to which the deceased was entitled on taking an account of the partnership assets "such stock and other assets as shall not consist of money to be valued either by mutual agreement or valuation in the usual way, nothing being charged for good will." One partner died in 1886 leaving his co-partner his sole executor who effected the valuation as directed and paid for the share as surviving partner, and thenceforth carried on the business on his own account. In 1908 the residuary legatees of the deceased partner instituted this action against the surviving partner claiming that there had been no operative sale and purchase by reason of the valuation not having been made in the manner authorized, and

that the business must be deemed to have been carried on for the benefit of both parties to the suit. The court below had directed an account to ascertain whether or not the valuation arrived at in 1886 was the true value of the share and, if not, what was the proper value thereof. The plaintiffs contended that the sale was bad because the defendant purported to buy from himself as his brother's sole executor and that the valuation was improperly made. The Judicial Committee of the Privy Council (Lords Macnaghten, Collins and Shaw and Sir A. Wilson) however dismissed the appeal, holding that the contract of sale was binding, and that the valuation was only an incident in carrying it out, and that the evidence shewed that a substantially accurate method had been adopted, but even if there were error, that would be corrected by the court on its being clearly and conclusively proved, and that the appellants could not object to the [illegible] character of the defendant which had been imposed on him by their own testator.

CIVIL SERVICE — SUPERANNUATION — PERMANENT OFFICER DISCHARGING TEMPORARY DUTIES IN ANOTHER CAPACITY.

Williams v. *Macharg* (1910) A.C. 476 was an appeal from the High Court of Australia. The plaintiff was a public civil servant and under a statute was entitled to a superannuation allowance. On his appointment he was styled a "temporary draftsman," but the office was permanent and he continued in it being subsequently styled "assistant draftsman" until his retirement, and the question was whether the time he was styled "temporary draftsman" was to be reckoned in his period of service for the purpose of computing the allowance, the Act providing that it was not to apply to persons "employed temporarily." The court below held that it was to be reckoned, and the Judicial Committee of the Privy Council (Lords Macnaghten, Collins and Shaw and Sir A. Wilson) affirmed the decision.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Middleton, J.] REX v. COOTE. [Sept. 10.

Liquor License Act—Conviction for second offence in absence of defendant—Enquiry as to first offence—Statute, directory or imperative.

Motion to discharge the defendant from custody on a return to a habeas corpus. The question was as to the power of the magistrate to proceed with the trial of the defendant in his absence, he being charged with an offence against the Liquor License Act, as a second offence. Reference was made to the Liquor License Act, s. 101; Crim. Code, ss. 718, 721; R.S.O. 1897, c. 90, s. 2; 10 Edw. VII. c. 37, s. 4.

Held, that the provisions of the Act requiring the trial of the subsequent offence to precede the inquiry as to the former conviction are imperative and not directory, has been determined in *Rex* v. *Nurse*, 7 O.L.R. 418, which overrules an earlier case of *Regina* v. *Brown*, 16 O.R. 41, in which Armour, C.J., had held the provisions to be directory only. This case accepts the reasoning of the court in Nova Scotia in *Rex* v. *Salter*, 20 N.S.R. 206, which determined that the provisions of the clause relating to the asking of the accused whether he admitted or denied the previous conviction were imperative. I can see no ground for distinguishing between the different provisions of this section, and holding some to be imperative and others directory, and, even if I am not technically bound by the decisions, I have no hesitation in accepting them. The Nova Scotia case is upon the precise question now before me, and determines that the magistrate has no power to convict of a second offence without bringing the defendant before him, so that the course pointed out by the section in question can be strictly followed. The view of the majority of the court in *Ex p. Grover*, 23 N.B.R. 38, 24 N.B.R. 57, does not commend itself to me. I cannot see why the bringing of the accused before the magistrate on a warrant before proceeding with the trial should be regarded as a "defeating of the ends of justice," or as practically preventing the making of a conviction for a second offence. On the other hand, to read into s. 101

of the Liquor License Act the words found in s. 721 of the Criminal Code, "If the defendant is personally present at the hearing," would be legislation rather than interpretation. There does not seem to be any good reason for the requirements of s. 101, but this is a matter for the legislature, and not for the courts.

Haverson, K.C., for defendant. *Bayly*, K.C., for Crown.

Middleton, J.] [Sept. 16.

NATURAL RESOURCES SECURITY CO. *v.* SATURDAY NIGHT, LTD.

Libel—Interim injunction restraining publication.

Motion by plaintiff for an interim publication restraining the publication of libels generally.

Held, that the most that can be asked is to restrain the further publication of particular libels. The decision on the section of the Judicature Act applicable herein defines the exceptional cases in which such relief should be granted and this case is outside them. The test prescribed may be seen in *Coulson* v. *Coulson* (1887) 3 Times L.R. 846; *Bonnard* v. *Perriman* (1891) 2 Ch. 269; *Monson* v. *Tussauds, Limited* (1894) 1 Q.B. 671. The context shews that this means that the court must be clearly satisfied that the defence of justification must fail, not merely that the article is defamatory if untrue.

Glyn Osler, for plaintiffs. *G. M. Clark*, for defendants.

Middleton, J.] COLVILLE *v.* SMALL. [Sept. 19.

Action by assignee in trust — Absolute assignment — Adding assignees as plaintiffs—Pleading — Champerty.

Appeal by plaintiff from an order of a local judge directing that the assignors of the plaintiff should be added as parties plaintiff. The order was made at the instance of the defendant. The plaintiff opposed it, relying upon his own title under the assignment which was absolute in form. The assignee was the trustee to divide the proceeds of the litigation between himself and his assignors.

Held, 1. Where an assignment is absolute in form it is immaterial that the assignee holds in trust or that the assignee has been officially interested: *Comfort* v. *Betts* (1891) 1 Q.B. 737. The order was wrong in requiring the addition of the assignors as plaintiffs.

2. If the defendant desires to contend that by reason of the plaintiff having an interest in the proceeds of the litigation the assignment is champertous and this defence should be pleaded and raised at the hearing.

McClemont, for plaintiff. *Counsell*, for defendant.

Province of British Columbia.

SUPREME COURT.

Clement, J.] [Sept. 16.

SEMI-READY, LIMITED *v.* SEMI-READY, LIMITED.

Companies—Dominion and provincial—Legislation affecting—Companies incorporated with same trade name—Injunction.

Where plaintiff company had obtained incorporation under the Dominion Companies Act for a special purpose and with a special trade name, a company formed under the Provincial Act for similar purposes and with the same name, was restrained from operating under such name.

Jackson, for plaintiffs. *Killam*, for defendants.

Gregory, J.] IN RE LEE HIM. [Sept. 27.

Statute, construction of—Chinese immigration—Exemption from entry tax—Onus on applicant—Appeal from decision of controller of customs—Habeas corpus—Mandamus.

The Chinese Immigration Act, s. 7, imposes an entry tax upon all immigrants of Chinese origin coming into Canada, but by sub-s. (*c*) exempts merchants and certain other persons, who are required to substantiate their status to the satisfaction of the controller of customs, subject to the approval of the Minister of Customs.

Held, that an applicant dissatisfied with the controller's decision, should proceed by way of appeal to the Minister of Customs, and that if it should ultimately become necessary to apply to the court for assistance the proceeding should be by mandamus and not by habeas corpus.

Farris, for the application. *Senkler*, K.C., contra.

Hunter, C.J.] CROSSLEY *v.* SCANLAN. [Sept. 28.

Mining law—Location—Survey post used as No. 1 *post—Omission of surveyor's signature on plan—Leave to add signature.*

The location of a mineral claim is not invalid merely because an old survey post is used by the locator as his No. 1 post if the facts bring the locator within the benefit of sub-s. (*g*), of s. 16, of the Mineral Act as amended in 1898.

Leave was given to amend a plan by attaching the signature of the surveyor.

Lennie and *Wragge*, for plaintiffs. *S. S. Taylor*, K.C., for defendants.

Book Reviews.

Notes on the Remedies of Vendors and Purchasers of Real Estate. By C. C. MCCAUL, B.A., K.C., of Osgoode Hall, and of the Bar of Alberta and Saskatchewan and British Columbia. Toronto: Carswell Company, Limited. 1910.

As the author tells us, these notes grew out of an attempt to condense within the compass of a magazine article the subject of relief against forfeiture; but he evidently saw, as cannot be gainsaid, that there was too much preliminary ground to cover to permit the accomplishment of this, in view of the necessity to get a clear understanding of the principles relating to the various remedies available to vendors or purchasers on a breach of contract. The book as it stands has a special reference to Instalment plan agreements, Rescission, Determination, Relief against forfeiture, etc., etc. He modestly says that it does not profess to be a text-book; but it may certainly claim the honour of being a text-book and a very good one indeed; and we cordially commend to the attention of our readers. Chapter I. is introductory. II. Vendors' remedies—Contract affirmed. III. Vendors' remedies—Contract disaffirmed. IV. Vendors' remedies—Special stipulations. V. Determination apart from special stipulation. VI. Purchasers' remedies. VII. Notice—Waiver—Delay. VIII. Election of remedies. Whilst, as he says, it is necessary in dealing with such subjects to have at hand Dart, Williams or Fry, it is also most desirable, having these, to have also Mr. McCaul's collection of essays on the above subjects.

The Elements of Jurisprudence. By THOMAS ERSKINE HOLLAND, K.C., of Lincoln's Inn, Chichele Professor of International Law and Diplomacy, D.C.L., and Fellow of All Souls' College, Oxford, etc., etc. 11th edition. Oxford: Clarendon Press. London and New York: Henry Froude; also sold by Stevens & Sons, 119 and 120 Chancery Lane, London.

The first edition of this standard work was published in 1880. Nine other editions have been published from time to time since then, and now this year still another is called for. It has received careful revision, with a view as far as may be to note the improvement of legal theory and practice in all countries claiming any legal system to control its domestic governmental relations. We need say no more about a work of world-wide reputation.

Bench and Bar.

JUDICIAL APPOINTMENTS.

His Honour George Hedley Vicars Bulyea, of the City of Edmonton, in the Province of Alberta, to be the Lieutenant-Governor of the Province of Alberta. (Oct. 5.)

George William Brown of the City of Regina, in the Province of Saskatchewan, Esquire, Barrister-at-law, to be the Lieutenant-Governor of the Province of Saskatchewan. (Oct. 5.)

United States Decisions.

MEASURE OF DAMAGES FOR RIGHT OF WAY FOR TELEGRAPH OR TELEPHONE LINE.—Although there is a conflict, the weight of authority apparently sustains the right of an abutting property owner to compensation where telegraph or telephone poles and wires are placed upon a public street or highway, as an additional servitude is created. The measure of damages when an abutting owner is entitled to compensation is held in *Illinois Telegraph News Co.* v. *Meine*, 242 Ill. 568, 90 N.E. 230, to be the value of the land occupied by the poles, and the amount of decrease in the value of the land between the poles, owing to the right of the company to use it jointly with the property owner for stringing and maintaining the wires. The decisions discussing the measure of damages appropriate in such cases are presented in a note appended to the *Meine* case in 26 L.R.A. (N.S.) 189.

CLOSING HIGHWAY AGAINST AUTOMOBILES.—The recent Maine case of *State* v. *Mayo*, 75 Atl. 295, is authority for the proposition that the legislature may, without impairing the constitutional right to equal protection of the laws, or the right of pursuing happiness, authorize a municipal corporation to close to automobiles dangerous streets, the use of which by such machines may endanger the lives of their occupants or of those driving horses upon the streets. The case also determines that an ordinance forbidding the use of automobiles on highways constructed over deep ravines and along the edges of cliffs, to protect the lives of the occupants of such vehicles and of those attempting to use horses along the roads, is reasonable. The decision is accompanied in 26 L.R.A. (N.S.) 602, by a note upon the power to prohibit the use of automobiles upon public thoroughfares, which is supplementary to an earlier note to *Christy* v. *Elliott*, 1 L.R.A. (N.S.) 221.

DUTY OF CARRIER TO ACCEPT SICK OR DISABLED PASSENGER.—The question of the duty of a common carrier to accept a physically or mentally disabled person as a passenger is presented in the recent Massachusetts case of *Connors* v. *Cunard Steamship Co.*, 90 N.E. 601, holding that a common carrier is bound to accept as a passenger one who is ill, provided it can furnish the necessary accommodations, and the passenger is willing to pay for what he demands. But, as appears by the note which accom-

panies this case in 26 L.R.A. (N.S.) 171, the right of sick and decrepit persons to be transported is not unlimited. Nor can a carrier be compelled to accept an unattended insane person or an intoxicated person as a passenger. On the other hand, however, it is not justified in refusing to accept an individual as a passenger upon the sole ground that he is blind.

HARNESS AS "WAYS, WORKS, AND MACHINERY."—The recent Massachusetts case of *Murphy* v. *O'Neil*, 90 N.E. 406, 26 L.R.A. (N.S.) 146, holding that the harness used in connection with a merchant's delivery is not part of the "ways, works, and machinery," within the meaning of a statute making him liable for injuries to a servant for defects therein, the same as to strangers, seems to be one of first impression.

LIABILITY OF MUNICIPAL CORPORATION FOR TORT IN CONNECTION WITH PROPERTY USED BY IT.—The question whether a municipal corporation may be made to respond in damages for a tort, either of misfeasance or nonfeasance, in connection with a particular department of municipal activity, depends, according to the weight of authority, upon the question whether the duties of that department pertain to the public or to the private functions of the municipality; and the same criterion applies to the liability of a municipality for torts in connection with buildings used by it. This view is confirmed by the recent Kentucky case of *Columbia Finance & T. Co.* v. *Louisville*, 122 S.W. 860, holding that a municipal corporation is not liable for the negligence of one operating an elevator in the city hall, which is erected and maintained for the transaction of its public affairs. The case is accompanied in 25 L.R.A. (N.S.) 88, by a note discussing the considerable body of case law pertaining to the subject.

A similar question arose in *Libby* v. *Portland*, 105 Me. 370, 74 Atl. 805, 26 L.R.A. (N.S.) 141, in which it is held that a municipal corporation which rightfully attempts to operate, for its own benefit, a farm within its limits, is liable for injury to one rightfully on the premises, through a step which it negligently permits to become out of repair.

CIVIL LIABILITY FOR NEGLIGENT USE OF FIREARMS.—The law undoubtedly requires a very high degree of care from all persons using firearms in the immediate vicinity of others, no matter how lawful or innocent such use may be. It was held in the recent case of *Rudd* v. *Byrnes*, 153 Cal. 636, 105 Pac. 957, 26 L.R.A. (N.S.) 134, that a member of a party of hunters is

negligent as matter of law in firing at an object moving through bushes which conceal it, without taking time to discover what it is, which results in his hitting a member of the party. A discussion of the earlier cases on this subject may be found in a note accompanying the case of *Siefker* v. *Paysee*, 4 L.R.A. (N.S.) 119.

Flotsam and Jetsam.

THE SKY LAWYER.

In the development of the professions marching on with the progress of invention, the aeroplane lawyer is about to appear.

Men seeking mastery of the air are invading the United States Patent Office, and, at the present rate of productivity in aeronautic ideas, it is predicted that the volume of litigation which will soon follow will be incalculable. There are now more than 140 applicants for patents relating to the single point of automatic balance for air craft. In addition there are hundreds of applications for patents for motors, planes, propellers, skids, and other essentials in air navigation.

"From the present outlook," a patent lawyer said recently, "we will soon have in this country a new crop of aeroplane lawyers, men who have specialized in the law of the air, and who keep track of the hundreds of aeroplane patents that probably will be granted."

"Just as there are lawyers," says the *Lincoln Nebraska Journal*, "who become especially learned in the regulations governing the high seas, so there will be men before long making a specialty of the laws governing the skies. A conference of jurists from the various nations has been held at Paris at different times during the last six months, for the purpose of considering the rights of people who use the skies, and also the rights of people who own land under them. It will require a long time to work out an adequate system of international law governing such matters, but a start has been made by an agreement that 'the air over inhabited states, including the 3-mile limit of the sea, is free, subject to the right of the state over which the air space exists to take any proper and necessary steps for the national protection and for the protection of the private rights of its inhabitants.' An aviator flying over a foreign country would under this arrangement be subject to the laws of that

country only in so far as his conduct affects the rights of the people or the security of the government. All events happening in the balloon which do not touch those rights would be subject to the jurisdiction of the country to which the aerostat belonged. This is applying, so far as it can be done, the principles underlying the admiralty laws. The details must be worked out as experience shows more laws to be necessary. In the course of the next twenty-five years, the law of the sky will be an important branch of the international legal regulations."—*Case and Comment.*

A very ingenious defence, says the *Westminster Gazette*, was raised at Watford, on July 5th, by a solicitor defending a motorist who was summoned for driving negligently. The defendant fell asleep whilst driving over Bushey Heath, and woke up to find that he had smashed into a fence. This, pleaded the solicitor, was not negligence, because sleep is an act of God just as lightning is in the eye of the law. A man does not, of course, encourage sleep deliberately when he is driving a car, and there is something in the argument that if sleep overcomes him it is not a voluntary act, but the *Westminster Gazette* fancies it would not avail a sentry found asleep at his post to plead that he had been suddenly struck by sleep and was therefore not responsible. In the case in question a fine was inflicted, but a case is to be stated, and the arguments used on appeal will be interesting to note. Poets have rhapsodized a good deal over "gentle sleep," and it is rather a shock to poetic sentiment to have it argued that sleep is analogous to being struck by lightning.—*Law Notes (Eng.)*

Lycurgus and Solon inscribed their laws, as they imagined, for endless durability, and Justinian prepared his Pandects for universal application; but the common law of England has proved the basis of a superstructure beneath whose shadow all other systems have dwarfed, and abandoned their hold on human affairs.—*Daniel W. Voorhees.*