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POWER OF PROVINCIAL LEGISLATURES TO ENACT STATUTES AFFECTING THE RIGHTS OF NON-RESIDENT SHAREHOLDERS IN PROVINCIAL COMPANIES.

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1. **Introductory.**—The judgment of the Privy Council in the case of the *Alberta and Great Waterways Railway Company*,[1] has recently illustrated, with respect to novel and somewhat peculiar circumstances, the operation of the clause of the British North America Act (sec. 92 (13)), which confers upon the Provincial Legislatures authority to pass laws "in relation to property and civil rights in the Provinces." As most of our readers are doubtless aware, the Provincial statute which was declared to be *ultra vires* was one which enacted that the whole of the proceeds of the sale of certain railway bonds, and all interest thereon, including such part of the proceeds of sale as was then standing in the banks in the name of the Treasurer of the Province or otherwise, and comprising, *inter alia*, the $6,000,000, and accrued interest in the appellants' bank, should form part of the general revenue of the Province, free from all claim of the railway company or their assigns. The money claimed in the action was paid to the appellant bank as one of those designated to act in carrying out the scheme under which

1. *Royal Bank of Canada* v. *Rex* (1913), A.C. 283.

the bondholders subscribed their money. The bank received the money at its branch in New York, and its general manager then gave instructions from the head office in Montreal to the manager of its branch at Edmonton, for the opening of the credit for its special account. The local manager was told that he was to act on instructions from the head office, which retained control. The conclusion arrived at by the Judicial Board was that "the special account was opened solely for the purposes of the scheme, and that when the action of the Government altered its conditions, the lenders in London were entitled to claim from the bank at its head office in Montreal the money which they had advanced solely for a purpose which had ceased to exist. Their right was a civil right outside the province, and the Legislature of the Province could not legislate validly in derogation of that right."

The only disputed point in this case was the locality of the proceeds of the bonds at the time when Alberta statute came into force. When it was once determined that their situs was then outside the Province, the inference that the Legislature had transcended its powers was unavoidable. The actual effect of the decision, therefore, is merely the definition of a particular set of circumstances under which the transmission of money from persons domiciled outside a Province, who have agreed to lend for the purposes of an undertaking within the Province, will not be deemed to have reached the stage at which it passes under the control of the Provincial Legislature. Presumably the considerations relied upon by Lord Haldane in his judgment would also be treated as controlling in cases that involve subscriptions for shares in companies.

It is unlikely that a court will ever again be called upon to deal with facts of precisely the same, or even a similar, character. Hereafter financial agents in foreign countries will doubtless see to it that the money subscribed for any bonds which they offer to the public is so deposited as to be secure from legislative interference until it has been actually due and payable to the borrowers. The case is, however, suggestive of a

question which is still unsettled, and which is much more difficult and complex than any which can arise out of a statute dealing with the subject-matter of agreements that are merely executory. Sooner or later the Privy Council will be asked to declare, how far the British North America Act limits the power of Provincial Legislatures to make laws which are in derogation of the rights of non-residents who, instead of merely contracting to lend money upon the security of the property and undertaking of a company have, as the result of a completed purchase of shares, become members of the company itself. Upon this extremely important question neither the case referred to above, nor, so far as the present writer has been able to ascertain, any other decided by the same tribunal, throws any light. But it seems possible to contend with some appearance of plausibility that a Provincial Legislature is, to some extent at least, precluded from passing statutes which, either by the express terms, or as a necessary result of their operation, prejudice the interests of foreign shareholders in a company organized under a Provincial statute.

2. Scope of power considered with reference to the situs of the rights of non-residents.—The first point to be noticed is that the clause of the British North America Act by which the territorial limits of the Provincial Legislatures are defined (sec. 92 (13)), specifies not only "property" but also "civil rights" generally. It follows that a law may be valid in so far as it affects "property" in the Province where it was enacted, and yet *ultra vires*, in so far as it affects "civil rights" outside that Province. The bearing of this consideration upon the subject with which we are now concerned is manifest. The "property" of a non-resident shareholder in respect of the shares of a Provincial company is situated in the Province where the company was organized and its business is carried on. Accordingly there is no apparent ground upon which such a shareholder could successfully impugn the constitutionality of a Provincial law which merely deals with his shares as "property," even though it

must, by its indirect operation, affect also the "rights" incidental to the ownership of those shares. Thus it may be assumed that a Provincial Legislature is authorized to impose onerous taxes upon shares, even though the power may be exercised in such a manner as to render them quite valueless.[2] But the situs of the "rights" of a non-resident with respect to the use and disposition of his shares seems to be clearly at their own domicile.[3] In this point of view it may be argued that a statute which does not apply specifically to such shares as a subject-matter for appropriation, or for the imposition of some

2. The accepted American doctrine is that the State Legislatures have full authority to tax the shares of non-resident shareholders. See Cooley on Taxation, 3rd ed., p. 92. In *Olive* v. *Washington Mills*, 11 Allen 268, the Supreme Court of Massachusetts recognized this doctrine, but annulled the given statute on the ground that the tax had been imposed in an improper manner.

The theory of the American judges as to the locality of corporate stock is also illustrated by the doctrine that, for purposes of attachment, it is located where the corporation is organized, and nowhere else. Cooke on Corp., sec. 485. See also Wharton on Confl. of Laws (3rd ed.), sec. 368*d*.

3. The following passage in the leading case, *In re Bronson*, 158 N.Y. 1, is deserving of notice in this connection, although it does not deal with precisely the same question as that which is involved in the construction of the British North America Act: "In legal contemplation the property of the shareholder is either where the corporation exists or at his domicile; accordingly as it is considered to consist in his contractual rights, or in his proprietary interest in the corporation. In the case of bonds, they represent but a property in the debt, and that follows the creditor's person. Hence it cannot be said, if the property represented by a share of stock has its legal situs either where the corporation exists, or at the holder's domicile, as we have said in the *Euston* and *James* cases (*In re Euston*, 113 N.Y. 181; *In re James*, 144 N.Y. 12), that the State is without jurisdiction for taxation purposes. As personally, the legal title does follow the person of the owner; but the property is in his right to share in the net produce, and eventually in the net residuum of the corporate assets resulting from liquidation. That right as a chose in action must necessarily follow the shareholder's person; but that does not exclude the idea that property, as to which the right relates, and which is, in effect, a distinct interest in the corporate property, is not within the jurisdiction of the State for the purpose of assessment upon its transfer through the operation of any law, or of the act of its owner. The attempt to tax a debt of the corporation to a non-resident of the State, as being property within the State, is one thing, and the imposition of a tax upon the transfer of any interest in or right to, the corporate property is another thing. The corporation is the creature of State laws and those who become its members, as shareholders, are subject to the operation of those laws, with respect to any limitation upon their property rights and with respect to the right to assess their property interests for purposes of taxation."

burden, but which operates so as to diminish their value, should be regarded as a statute in relation to "civil rights" which are not "in the Province." A statute of this description, therefore, is apparently assignable to the category of those which are *ultra vires*, unless a different conclusion is indicated by one or other of the considerations discussed in the following sections.

If such a statute is admitted to be invalid, the inference is unavoidable that a Provincial Legislature has no power to pass such enactments as those by virtue of which the Hydro-Electric Commission of Ontario was authorized some years ago to enter into competition with the Electrical Development Company in a territory which the Provincial Government had stipulated not to invade. The necessary result of those enactments, as was quite apparent before they came into force, and as the event has amply demonstrated, was a very considerable depreciation in the market-value of the shares of the company. The foreign shareholders, therefore, were injuriously affected in respect of "rights," susceptible of being exercised, by way of sale, or pledge, or testamentary disposition at their domicile, although the enactments which produced the injury did not operate upon the shares as "property."

3. Scope of power considered with reference to the meaning of the words "in relation to."—With regard to the classification of laws, as being made or not made, "in relation to" the "civil rights" of non-resident shareholders, there is of course no room for controversy in cases of one description, viz., those which turn upon the construction of a law that are specifically applicable to particular companies. No one would seriously contend that an enactment which purported to confiscate the property of a designated company, or to deprive it of some vested right, or to impose upon it some burdensome liability to which other companies of a similar character were not subject, would not properly be described as an enactment "in relation to" the rights of the members of the company. For example, a statute

which, by declaring a mining area to have been closed at a certain date, should deprive a company of a vested right of entry and occupation, would manifestly be a statute "in relation to the rights" of the shareholders. Such a deprivation was at first supposed to have been the actual effect of the Ontario statute which was passed several years ago with respect to the Florence Lake Mine; and, although the facts were ultimately found to be as declared by the statute (which was thus exhibited as a gratuitously superfluous misuse of legislative power), the illustration is sufficiently apt for the purposes of the present discussion.

The extent to which the phrase "in relation to" should be deemed applicable to laws which do not purport to deal with the property of any particular company or with the shares of its individual members, but which are calculated to produce, and do produce a distinctly prejudicial effect upon that property or those shares, is a matter of no little difficulty. But it seems by no means impossible that, if the validity of a statute should ever be considered by the Privy Council with reference to the doctrinal standpoint suggested in the present article, a phrase of so broad an import would be construed as embracing all laws which affect, either directly or indirectly, the "rights" of non-resident shareholders. If this surmise is well founded, the statutes, mentioned in the preceding section, by which the Hydro-Electric Commission of Ontario was enabled to subject the Electrical Development Company to a ruinous competition, would obviously fall within the description, of "laws in relation to the rights" of the shareholders, and consequently would be *ultra vires* in respect of any shareholders residing outside the Province. In this particular instance, however, it might well be contended that, even if a distinction is to be taken between laws which do, and laws which do not, directly operate upon the rights of such shareholders, the statutes in question should be assigned to the former rather than the latter category. The broad juristic principle that a person is presumed to intend the natural and probable consequences of his acts may be not unreasonably invoked, where it is a question of

classifying a confiscatory enactment for the purpose of testing its validity.

4. Question considered with reference to the power of a Legislature to dissolve a company.—It may be objected to theories put forward in the foregoing sections that the authority which a Provincial Legislature possesses in respect of dissolving a company,[4] must of necessity include, as the greater the less, authority to pass laws which derogate from the rights of all the shareholders, non-resident as well as resident. That this aspect of the matter is suggestive of some serious difficulties cannot be gainsaid.

Since the situs of the rights of a company, *as a company,* is in the Province in which it was formed, it must be conceded that all laws which modify or extinguish those rights come within the explicit clause of the British North America Act with which we are now concerned. It is also clear that the dissolution of a solvent company always diminishes, even if it does not entirely destroy, the value of the shares held by non-residents. In this point of view there is apparently no escape from the conclusion, that a Provincial Legislature may, by exercising its power to terminate the existence of a company, affect the rights of non-resident shareholders. But the situation thus predicated should, it is submitted, be regarded rather as one in which the modification of rights outside the Province is an incidental result of a law operating upon rights within the Province, than as one in which the possession of one power is deemed to imply the possession of another. If this hypothesis is correct, the circumstance that a Provincial Legislature is authorized to dissolve a company does not involve the conclusion that it is also invested with a general authority to pass

4. In *Royal Bank of Canada* v. *Rex* (1913), A.C. 283, the Board "agreed with the contention of the respondents that, in a case such as this it was in the power of the Legislature of the Province to subsequently repeal any act which it had passed." The position thus taken does not necessarily imply that the Board would hold the dissolution of a company organized under *general* laws to be a valid exercise of legislative authority. But such a dissolution would certainly be lawful under the theory that the powers of the Provincial Legislatures are "plenary."

laws which operate directly upon the rights of non-resident members of the company. The situation which is produced by a dissolution of a company would, in fact, seem to be essentially similar to that which is produced by the enactment of a statute which purports to deal with shares as property. See sec. 2, *ante*. In both cases the prejudice which results to the rights of the non-resident shareholders is purely consequential, and in neither case can it fairly be contended that the competency of the Legislatures to make laws causing such prejudice demonstrates that the British North America Act has conferred upon them the power of making laws which operate directly upon the rights of non-resident shareholders.

The antinomy created by the capacity of Provincial Legislatures to derogate from the rights of non-resident shareholders by dissolving the company of which they are members is distinctly anomalous; but apparently it cannot be obviated. Constitutional law, it is apprehended, offers no ground upon which it could be held that the dissolution of a Provincial company must be carried out in such a manner that the vested rights of the non-resident members shall not be prejudicially affected. It seems unlikely, however, that any English or Canadian tribunal will ever be called upon to state its views concerning the position of foreign shareholders under the circumstances indicated. Even the most unscrupulous of Ministers would scarcely venture to go to the length of suppressing a solvent company for the sole reason that he regarded it as an inconvenient obstacle to the success of some policy upon which he had set his heart. It may be assumed, therefore, that the only question which, for practical purposes, the investigator is called upon to consider in this connection is, whether a Provincial Legislature has power to enact laws which derogate from the rights of non-residents who hold shares in a company which is still a going concern. That question is determinable with reference to the elements discussed in the preceding sections.

5 Concluding remarks.—Having regard to the large and constantly increasing volume of capital that is being invested by foreigners in Canadian enterprises, it is a matter of supreme importance that the precise extent of the power of Provincial Legislatures with respect to the rights of non-resident shareholders in domestic companies should be judicially defined. The existing situation is highly unsatisfactory. Administrations representing both the Liberal and the Conservative parties have taken the position that the confiscatory character of a statute is not of itself a sufficient reason for the exercise of the power of disallowance by the Dominion authorities. The effect of the course thus pursued is the virtual nullification of an important provision of the British North America Act, and the future resumption of the duty imposed by that provision is extremely improbable in view of the circumstance that it has been renounced from motives of a supposed political expediency. Against the mischievous consequences of this singular recognition of a "right divine to govern wrong" in a democracy of the twentieth century, a class of persons whose goodwill and confidence is essential to the prosperity and progress of Canada would be to some extent protected, if it were once settled that the "rights" of non-resident shareholders are not subject to the jurisdiction of Provincial Legislatures, except through the medium of statutes which purport, by their specific terms, to deal with the "property" of which those rights are an incident. Completely effective safeguards for the interests of foreign investors will, of course, not be obtained until a clause forbidding Legislatures to pass statutes impairing the obligations of contracts, and certain other provisions of a tenor similar to those by which property is secured under the American Constitutions, have been inserted in the British North America Act.

C. B. LABATT.

THE CASE OF MR. JUSTICE CLEMENTS.

The profession will have noticed with much pain the result of the inquiry into the charges laid by the Crown on the information of the Attorney-General against Hon. Mr. Justice Clements, of the British Columbia Bench, concerning certain travelling allowances paid to him on the supposition that he resided at Grand Forks, whereas it was alleged that his residence was in the city of Vancouver, and that therefore the sum of $4,290 which had been paid to him was improperly obtained.

The case was heard by Mr. Justice Cassels, Judge of the Exchequer Court of Canada, who held that Mr. Clements' residence was at Vancouver and not at Grand Forks, and that he had no right to claim the travelling allowances which the Crown sought to recover back from him.

His Lordship, in his judgment, said that he was pressed by counsel, both for the Crown and for the defendant, for a ruling as to whether the defendant intentionally endeavoured to deceive the Department of Justice as to his real place of residence, and that he was very reluctantly forced to the conclusion that the contention of the Crown was well founded, and that he was unable to relieve the defendant from the charge.

We understand that the case will be appealed. It will not therefore be proper for us to make any comment upon it, except to say that all will appreciate the concluding remarks of the learned judge: "If I have come to a wrong conclusion as to the meaning of the Judge's Act, and the defendant's contention turns out to be correct, then of course the defendant's contention would be right, and nothing I have written would or ought to prejudice him in an appellate court, and I would gladly welcome a judgment in his favour. I have, however, come to a conclusion on the facts as they appear to me."

[A full report of the case appears post infra p. 67.]

FRAUD OF INFANTS.

In the year 1665 the following case was decided: An infant of the age of twenty and a half years, by falsely and fraudulently affirming that he was of full age, induced the plaintiff to advance him a sum of £300 on the security of a mortgage. He afterwards avoided the mortgage (which probably means that he repudiated it) on the ground of his infancy; he also refused to return the £300. The plaintiff sued him in an action on the case for fraud, and got a verdict for the £300. On the motion of the defendant judgment was stayed. Subsequently Winnington, of counsel for the plaintiff, prayed judgment, but, the Chief Justice being absent, the court would do nothing. Mr. Justice Keeling, however, said: "The judgment will stay for ever, else the whole foundation of the common law will be shaken." On a subsequent day, the Chief Justice being present, Winnington came again, and this time Mr. Justice Keeling said: "Such torts that must punish an infant must be vi et armis or notoriously against the public; but here the plaintiff's own credulity hath betrayed him." The Chief Justice said: "The commands of an infant are void . . . much less shall he be punished for a mere affirmation," to which Mr. Justice Twisden agreed, adding that "there must be some fact joined to it as cheating with false dice." The court awarded on the plaintiff's prayer that he should take nothing by his bill, nil capit per billam. This was the case of *Johnson* v. *Pie*. The story is extant, written in choice Norman French, in Siderfin, 258, and in the vernacular in 1 Keble, 905, 913.

In the year 1913 an infant, by fraudulent misrepresentating that he was of full age, induced the plaintiff to sell and deliver to him certain furniture and effects of which she was the owner and which were not in any sense necessaries to the infant. The purchase money of the goods was agreed at £300. After getting the goods the infant sold them for £130, but he never paid the £300 or any part thereof. The plaintiff sued him for £300 and got judgment by default, whereon she issued a bankruptcy notice, and subsequently, on a bankruptcy petition, obtained a

receiving order. The infant got the receiving order rescinded and the petition dismissed, leave being reserved to the plaintiff to take such proceeding as she might be advised for asserting any right she might have in equity against the infant for having induced the contract of sale by falsely and fraudulently representing that he was of full age. The proceeding which she selected was an action in the King's Bench Division before a judge and a common jury, and in that action she recovered judgment for £130. Only for special circumstances the learned judge, Mr. Justice Lush, appeared willing to give judgment for the full value of the goods. This was the case of *Stocks* v. *Wilson* (1913), 2 K.B. 235.

On the 9th May, in the case of *R. Leslie Limited* v. *Shiell*, 29 Times L. Rep. 554, the plaintiffs, who were registered moneylenders, were induced to lend to the defendant, a minor, a sum of £400 upon his false and fraudulent representation that he was of full age. The plaintiffs brought an action in the King's Bench Division before a judge without a jury, and recovered judgment for the full amount of the loan.

Much water has run under London Bridge since 1665. Has there been enough to submerge *Johnson* v. *Pie?* If so, the Court of Chancery has supplied the flood. That court exercised a special auxiliary jurisdiction in rescinding deeds and conveyances on the ground of fraud. Furthermore, it disliked the practice whereby a person, who, having while an infant, made a disposition of property and obtained a benefit by so doing, persisted when he came of age in retaining the benefit while he repudiated the rest of the transaction. In such cases the court was inclined to find fraud on somewhat slight evidence. Having done so, it would not allow the person to retain the benefit. The practice of the court was uncertain and undefined, as appears from the judgment of Vice-Chancellor Knight Bruce in *Stikeman* v. *Dawson* (1847), 1 DeG. & Sm. 90. "Unquestionably," said the Vice-Chancellor, "it is the law of England that an infant, however generally for his own sake protected by an incapacity to bind himself by contracts, may be doli capax in a civil sense,

and for civil purposes, in the view of a court of equity, though perhaps only when pubertati proximus or older . . . and may, therefore, commit a fraud for which, or for the consequences of which, he may after his majority be made civilly answerable in equity. I am not now speaking of cases in which infants, if liable at all, are liable at law only, or in which adults, if suable in respect of acts done during infancy, are suable at law only. But as far as equity is concerned, the practical application of the rule or doctrine to which I have been just referring must not seldom, I conceive, be matter of much delicacy and difficulty. I agree with a learned author who says that in what cases in particular a court of equity will thus exert itself it is not easy to determine." The learned author referred to is Chambers on the Jurisdiction of the High Court of Chancery over Infants, published 1842, at p. 413.

It is proposed now to examine some of the cases in which the Court of Chancery held persons of full age responsible for frauds committed by them while infants.

In *Watts* v. *Cresswell* (1714), 9 Viner Abr. 415, the facts appear to have been these: The father of the defendant was tenant for life of real estate; the defendant was tenant in tail in remainder. While the defendant was still an infant about twenty years of age, his father was anxious to borrow a sum of £300. The father made an affidavit that he was seised in fee free from incumbrances, and then made a fine and feoffment of the estate to the plaintiff, who advanced the money. All this was done with the knowledge and assent of the defendant. After the defendant came of age the father, with the privity of the defendant, borrowed £100 more on the mortgage. After the father died the defendant refused to pay the mortgage debt and claimed the land as tenant in tail. The plaintiff filed a bill in equity to have discovery of the defendant's title, and to have an account of the rents and profits of the estate. Lord Chancellor Cowper said: "The defendant is liable and ought to make satisfaction to the mortgagee, because at the time of this transaction he was very near being of full age . . . and was principally concerned all

along in the fraud when he knew at the same time . . . that his father was but tenant for life with remainder to himself. If an infant is old and cunning enough to contrive and carry on a fraud, I think in a court of equity he ought to make satisfaction for it." And it was decreed accordingly.

Now here was a young man claiming an estate after having while an infant been party to creating a mortgage upon it, and having after attaining majority been a party to procuring a further advance upon the mortgage. The Court of Chancery decreed that he should not have the estate without paying the mortgage debt.

The next case of importance was *Evroy* or *Esron* v. *Nicholas* (1733), 2 Eq. C. Ab. 488, 1 DeG. & Sm. 118, n. There A. was an infant; his guardian, with the approbation of A., made a lease to the plaintiff for a fine of £157. The guardian became insolvent. He made a lease to another person, who evicted the plaintiff. The plaintiff then filed a bill for a new lease or for a return of the fine. Lord Chancellor King said: "Infants have no privilege to cheat men. This lease was made with the consent and approbation of A., the infant, who was above the age of discretion and knew what he was doing; and it is certain that his consenting to the lease was the only inducement the plaintiff could have to take it as so large a one, . . . and, therefore, whether ever the money came to A.'s hands or not he ought to make good the lease or refund the fine . . ." In this case there is little, if any, evidence of fraud, and on that ground the case is criticised by Vice-Chancellor Knight Bruce in *Stikeman* v. *Dawson* (ubi sup.). But suppose that the infant had induced the plaintiff to pay the large fine for the lease by fraudulently asserting that he was of full age, then, if he purported afterwards to repudiate the lease, he could only do so on repaying the fine.

In *Clarke* v. *Cobley* (1789), 2 Cox 173, a woman married an infant. At the date of the marriage she was a debtor to the plaintiff on two promissory notes. After the marriage the infant gave the plaintiff a bond in exchange for the notes. The plaintiff brought an action on the bond. The defendant pleaded

infancy. The plaintiff then filed a bill in equity for relief. The court ordered the notes to be returned to the plaintiff with directions that the defendant should not plead the Statute of Limitations to any action which the plaintiff might bring upon the notes, or any other plea which could not have been pleaded at the time the bond was given. But the court would not order immediate payment of the money. This case was approved in *Stikeman v. Dawson* (ubi sup.), and the later decision of *Lemprière* v. *Lange*, 41 L.T. Rep. 378, 12 Ch. Div. 675, is strictly in accordance. It follows that at the suit of the party defrauded the court will rescind the transaction and restore the parties to the positions they held immediately before it.

There are other cases before the year 1858 in which the Court of Chancery purported in a sense to impose liability upon an infant who procured some advantage by means of a fraudulent misrepresentation. It is unnecessary to cite them all. They may be grouped into the following classes:—

(1) Cases where persons on attaining full age are held bound by acts done during infancy which after attaining twenty-one years they have allowed to stand.

(2) Cases of postponement of prior incumbrancers who have induced persons to become purchasers or mortgagees of property by representing that it was free from incumbrances.

(3) Cases of rescission of deeds and conveyances and restoring the parties to their original positions.

(4) One doubtful case, *Evroy* or *Esron v. Nicholas* (ubi sup.), where an infant on repudiating a lease was ordered to restore a fine taken on granting it.

Now comes the case on which *Stocks* v. *Wilson* and *R. Leslie Limited* v. *Shiell* (ubi sup.) purport to be based. This is *Ex parte Unity Joint Stock Mutual Banking Association; Re King* (1858), 3 DeG. & J. 63. In that case Octavius King, an infant, and his brother Alfred carried on business as O. and A. King, opened an account with a bank, and applied for a cash credit of £5,000, giving securities including bonds and policies of insurance on their lives, while Octavius King added to the induce-

ment by representing himself to be of the age of twenty-two. The firm became bankrupt. The bank claimed and were admitted to prove in the bankruptcy. Octavius King moved to expunge the proof, and his application was allowed. The bank appealed, and the court allowed the appeal. Lord Justice Knight Bruce said: "I think that upon the the admitted facts the case is concluded by the judicial opinions of Lord Cowper, Lord Hardwicke, Lord Thurlow, and other eminent judges which it would be improper in us practically to question. A young man, who from his appearance might well be taken to be more than twenty-one years of age, engaged in trade, wished to borrow or obtain credit, and for the purposes of so doing represented himself to the petitioning creditor as of the age of twenty-two, expressly and distinctly so represented himself. . . The question is whether in the view of a court of equity . . . he has made himself liable to pay the debt, whatever his liability or non-liability at law. In my opinion we are compelled to say that he has." Lord Justice Turner concurred. The result was that the bank was allowed to prove in the bankruptcy. The question is what did this case decide?

A careful search has failed to discover any decision of Lord Cowper, Lord Hardwicke, or Lord Thurlow that although the loan could not be recovered at law it can be recovered in equity. A number of cases are cited, including *Esron* v. *Nicholas, Clarke* v. *Cobley,* and *Stikeman* v. *Dawson,* none of which pretend to decide anything of the sort. In short, the case seems to rest on no authority save its own. Referring to it, Sir G. Jessel, M.R., said in *Re Jones; Ex parte Jones,* 18 Ch. Div. 109, at p. 120: "An infant is capable of committing a fraud in equity just as he is capable of committing a crime, and may be made liable for it. But the authorities shew that there must be an express representation, and one which would naturally deceive the person to whom it is made. In such a case it has been decided that, if the person who has committed the fraud becomes a bankrupt after he is of full age, the person who has been defrauded can prove in the bankruptcy for the amount of the equitable liability resulting

from the fraud. It is difficult to see how those decisions came about, for, at the time when they were given, liabilities generally could not be proved in bankruptcy as they can now. Only debts could then be proved. But there is no decision which says that this kind of liability is a legal debt. I use the words 'legal debt' advisedly; of course, there can be no other debt than a legal debt, but the inaccurate expression 'equitable debt' has crept into the books. But this liability is not really a debt at all; it is only a liability in equity to pay a sum of money, and, whenever a debt is required by law in order to found any proceedings, this equitable liability will not be enough."

What, then, should be the fate of one who comes with such a claim before a judge and jury or a judge alone in the King's Bench Division? Should he not meet with the same fate as one who should come before a similar tribunal with a claim against a trustee under a will? And would not that fate be pronounced in the words "judgment for the defendant." In a proper proceeding before the Chancery Division the contracts in *Stocks* v. *Wilson* and *R. Leslie Limited* v. *Shiell* might, in certain circumstances, have been set aside, and the defendants might in that proceeding have been ordered to refund the money they had got under the contracts, if the facts and circumstances justified such an order. But to come before a judge and jury in the King's Bench Division and claim the value of the goods sold is simply to sue an infant for fraud in the process of making a contract. For such an act an infant is not liable by the common law, which as Lord Justice Chitty once said, "is still the law of the land." The future history of *Stocks* v. *Wilson* and *R. Leslie Limited* v. *Shiell* (ubi sup.) will interest others besides those actually concerned. If one may hazard a prophecy it is this, that in the Court of Appeal the case of *Levene* v. *Brougham*, 25 Times L. Rep. 265, will exact of the respondents a more attentive consideration than they have up to the present been called upon to accord it.—*Law Times.*

DEFENCE TO SPECIALLY ENDORSED WRITS IN ONTARIO.

The result of the decision on *Smith* v. *Walker* referred to in our issue of December last (page 717), has been recognized as absurd, and a Rule has been passed amending Rule 112 and making the practice more in accordance with common sense. The amendment in effect provides that if the defendant who has filed an affidavit shewing his defence does not file a statement of defence, then his affidavit is to be treated as his defence.

The judges have provided a committee of judges to deal with questions of practise, viz., the Chief Justice of Ontario and Justices Middleton and Kelly. It is to be hoped that under their able guidance such absurdities as that above referred to may be promptly corrected when discovered.

One of the great men of Canada, and perhaps the one most widely known throughout the Empire, passed off the scene on the 20th ult. at the ripe age of 94. Though in no way connected with the legal profession, it is meet that the event should be recorded even in the columns of a legal journal. The story of the life and services of the Right Honourable Baron Strathcona and Mount Royal, G.C.M.G., G.C.V.O., LL.D., High Commissioner for Canada in England, have been set forth in numberless places, and are part of the history and heritage not only of this Dominion, but of the Empire at large. Great as were his achievements for Canada as a public man, no less was the love and respect he won from the multitude of those who were the recipients of his unostentatious generosity, his friendly help and his princely hospitality. A grateful country wished that he should rest in Westminster Abbey, but his desire was, that he should be buried beside his wife in the family vault.

REVIEW OF CURRENT ENGLISH CASES.

NULLITY OF MARRIAGE—WILFUL REFUSAL OF WIFE TO ALLOW MARITAL INTERCOURSE.

In *Dickinson* v. *Dickinson* (1913) P. 198, a decree of nullity of marriage was pronounced by Evans, P.P.D., on the ground that the defendant wife had persistently refused to hold marital intercourse with her husband, although no physical incapacity was proved, the defendant refusing to submit to medical inspection.

TRADE MARK—SURNAME AS TRADE MARK—REGISTRATION—PASSING OFF—ACTION TO RESTRAIN USE BY DEFENDANT OF HIS OWN NAME—TRADE MARKS ACT, 1905 (5 EDW. 7, c. 15), ss. 34, 35.

Teofani v. *Teofani* (1913) 2 Ch. 545. In this case the validity of a trade mark was in question. The trade mark was the surname of the plaintiff's predecessor in business. The defendant applied to remove the trade mark from the register, which application was refused by Warrington, J., because the application to register had been sanctioned by the Board of Trade which in his opinion precluded him from considering the application, but on this point the Court of Appeal (Cozens-Hardy, M.R. and Kennedy, and Eady, L.JJ.) considered that he erred; but on the merits of the application of the Court of Appeal thought that as a rule a surname ought not to be registered as a trade mark, yet where it is an unusual one and has for a great number of years been used, as in the present case, as a distinguishing mark for goods, it would be permissible to register the name as a trade mark, but not so as to prevent any other person of the same name using his name, so long as he took care not to pass off his goods as those of the owners of such a trade mark. The plaintiffs in this case complained that that was what the defendant was doing, and the action was brought to restrain him from so doing, and Warrington, J., granted the plaintiffs an injunction as prayed, which judgment the Court of Appeal affirmed.

WILL — SETTLEMENT — HOTCHPOT CLAUSE—TRUSTS BY REFERENCE.

In re Wood, Wodehouse v. *Wood* (1913) 2 Ch. 574. In this

case an appeal was brought from the decision of Neville, J. (1913) 1 Ch. 303, (noted ante vol. 49, p. 299). The facts of the case were that a testator gave three separate funds to trustees upon trust fully set out in each case, for his three children respectively for life, with remainders to their issue as they should respectively appoint, and in default of appointment to their respective children in equal shares, with a hotchpot clause. —In each case the fund was given over on the failure of the express trusts, upon trusts in favour of the other children and their issue respectively, by reference to the trusts expressly declared in favour of such children and their issue concerning the fund given in trust for them in the first instance. One of the children appointed two-thirds of his share to his daughter and died without making any appointment of the other third whereby a granddaughter became entitled to the two-thirds under the appointment and to a moiety in the rest of the share by default of appointment, and Neville, J., decided that she was entitled to take her share in the unappointed fund without bringing into hotchpot the fund which she took by appointment, and this conclusion was affirmed by the Court of Appeal (Cozens-Hardy, M.R. and Kennedy, and Eady, L.JJ.).

COMPANY—DEBENTURE-HOLDERS—RESERVE FUND—PROPOSED DISTRIBUTION OF RESERVE FUND AMONG SHAREHOLDERS—DEBENTURES NOT IN DEFAULT—JEOPARDY—RECEIVER.

In re Tilt Cove Copper Co., Trustees, etc. v. *The Company* (1913) 2 Ch. 588. This was an action by debenture-holders of a company for the appointment of a receiver of the assets of the company in the following circumstances: In 1888 the company acquired certain mines and created a debenture issue of £80,000, which was made a floating charge on the company's property, secured by the usual trust deed. In 1912, the mines were worked out and the land, plant and machinery at the mines were worthless; the company's issued capital was exhausted and its only asset was a reserve fund of £10,000 accumulated profits which it was proposed to distribute among the shareholders. None of the debentures were in default, and no event had happened entitling the debenture-holders to enforce their security. Neville, J., however, held that the case came within the principle that where debenture-holders' security was in jeopardy a receiver may be appointed and he accordingly granted that relief.

ADMINISTRATION—INSOLVENT ESTATE—EXECUTOR SURETY FOR TESTATOR—RIGHT OF EXECUTOR TO INDEMNITY—EXECUTOR'S RIGHT OF RETAINER—NON-PAYMENT OF DEBT FOR WHICH EXECUTOR SURETY.

In re Beavan, Davies v. Beavan (1913) 2 Ch. 595. In this action which was one for the administration of a deceased person's estate which was insolvent, the executor was surety for a debt of the testator. He had not paid the debt, but claimed to have a right to retain the amount of the debt by way of indemnity against his liability as surety therefor; but Neville, J., held that as the executor had not paid the debt he could not exercise his right of retainer, and his claim was therefore disallowed. In Ontario, however, a surety without paying the debt has been held to have a right of action for indemnity against his principal and in such an action the principal has been ordered to bring the money into Court to be employed in discharge of the debt: *e.g.*, see *Cunningham* v. *Lyster*, 13 Gr. 575; *Mewburn* v. *Mackelcan*, 19 Ont. App. 729.

INSURANCE OF DEBENTURES—RE-INSURANCE—INDEMNITY—BANKRUPTCY OF INSURER—LIMIT OF LIABILITY UNDER CONTRACT OF RE-INSURANCE.

In re Law Guarantee T. & A. Society, Liverpool Mortgage Insurance Co.'s Case (1913) 2 Ch. 604. This is another case concerning the liability of sureties under a contract of indemnity. The Law Guarantee Society had insured the payment of certain debentures and had re-insured 2/11ths of the risk with the Liverpool Mortgage Insee. Co. The Law Guarantee Society went into liquidation and a scheme was agreed to by the debenture-holders whereby they were to receive less than 20*s.* in the pound in satisfaction of their claims against the society, and the question for decision in this case was whether the society was beneficially entitled under the contract with the mortgage Insurance Co. of re-insurance to recover 2/11ths of the amount of the debentures, or 2/11ths of the amount agreed to be accepted in satisfaction, and Neville, J., determined that the society was only beneficially entitled to recover 2/11ths of the sum paid and to be paid by way of composition, and that if the company were entitled to recover the rest of the amount guaranteed, it could only do so as trustees for the debenture-holders, but this latter point he held was not before him, and therefore did not decide.

WILL—CONSTRUCTION—GIFT FOR LIFE OR UNTIL AN EVENT HAPPENS—DEATH OF DONEE BEFORE HAPPENING OF EVENT—DETERMINABLE LIFE INTEREST—EVENT NEVER LIKELY TO HAPPEN.

In re Seaton, Ellis v. *Seaton* (1913) 2 Ch. 614. In this case the construction of a will was in question, whereby a testator gave one-fourth of his residue in trust to pay the income thereof to his daughter for life, or until she should receive a legacy left to her under the will of her father-in-law, and then that the one-fourth share and the income thereof should fall into the residue to be divided between his other three children. The daughter survived the testator and died without ever receiving the legacy, her father-in-law's estate having proved insolvent, and there being no prospect that the legacy could ever be paid. Parker, J., held that the words of the will were not sufficient to enable the Court to imply an absolute gift in any event to the daughter, and he held that she took only a terminable life estate, and that on her death the gift over took effect, notwithstanding the legacy to her had not been paid and was never likely to be paid.

MERGER—SETTLED ESTATE—TENANCY FOR LIFE AND FREEHOLD REVERSION—EXECUTORY GIFT OVER—CONVEYANCE OF LIFE ESTATE TO REVERSIONER—INTENTION—LAW AND EQUITY.

In re Atkins, Life v. *Atkins* (1913) 2 Ch. 614. This case involves a nice question of real property law on the question of merger. A testator who died in 1889, devised a freehold farm to his widow for life with remainder to her son in fee, with an executory gift over to G. Atkins, in case the son predeceased his mother unmarried. By deed made in 1889, the mother conveyed her life interest to the son. The son predeceased his mother in 1912, unmarried and intestate, and letters of administration were granted to his mother. The land had in the meantime been sold, and the question was whether the life estate still continued, or whether it had merged in the freehold when she conveyed it to the son. Eve, J., held that there had been a merger both at law and in equity, as there was nothing which could indicate any intention on the part of the son to keep the life estate in esse. He, therefore, held that the gift over took effect and G. Atkins was entitled to the proceeds of the estate.

STATUTE OF FRAUDS (29 CAR. 2, c. 3) s. 4—CONTRACT FOR SALE OF LAND—TIME LIMITED FOR ACCEPTANCE OF OFFER—ACCEPTANCE AFTER TIME EXPIRED—SUBSEQUENT CONDUCT OF PARTIES—IMPLIED PAROL AGREEMENT TO EXTEND TIME, OR TREAT ACCEPTANCE AS VALID—TERM LEFT OPEN IN OFFER AND ACCEPTANCE—WAIVER BY VENDOR AT BAR.

Morell v. *Studd* (1913) 2 Ch. 648. This was an action by a vendor for specific performance of a contract for the sale of land. The contract was contained in an offer by letter sent by the purchaser which limited a month for its acceptance. This means according to English law a lunar month, and the acceptance was sent after the lunar month had expired, accepting the offer subject to the purchase money being secured to his satisfaction; the purchasers treated the offer as in time and entered into negotiations for completion of the purchase. Subsequently they withdrew the offer, contending that there had never been any completed contract because the acceptance was qualified as to the purchase money being secured to the plaintiff's satisfaction, although the defendants had in regard to this term furnished the plaintiff with references as to their financial ability which had been accepted as satisfactory. Ashbury, J., who tried the action held that notwithstanding the offer had limited a time for its acceptance which had not been complied with, yet that the acts of the parties was evidence of a parol agreement to treat the acceptance as sufficient, and that this agreement need not be in writing under the Statute of Frauds; and he also held that the vendor might waive at the bar, which he did, the stipulation as to securing the purchase money which he had inserted for his own benefit. Specific performance of the contract was therefore ordered with costs.

SETTLEMENT—TRUST FOR SALE—ABSOLUTE DISCRETION IN TRUSTEE AS TO TIME OF SALE—DIFFICULTY IN EFFECTING SALE—APPROPRIATION IN SPECIE—UNAUTHORIZED INVESTMENTS.

In re Cooke, Tarry v. *Cooke* (1913) 2 Ch. 661. This was an application by trustees in whom was vested property in trust for sale, they having an absolute discretion as to the time of sale, for authority to divide the property in specie among the beneficiaries owing to a difficulty in effecting a sale. Some of the property was invested in unauthorized securities—and the share of one of the beneficiaries being subject to a settlement to

WILL—CONSTRUCTION—GIFT FOR LIFE OR UNTIL AN EVENT HAPPENS—DEATH OF DONEE BEFORE HAPPENING OF EVENT—DETERMINABLE LIFE INTEREST—EVENT NEVER LIKELY TO HAPPEN.

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on the master's premises was a trespass, the damage in question did not naturally flow from it, and was too remote, the injury to the deceased not being the natural and probable consequence of the trespass. The judgment against the owner of the horse was therefore reversed. The Court of Appeal found that there was really no connection between the horse being unattended and the happening of the accident. Eady, L.J., thought the case somewhat similar to that of Jackson whose thumb was crushed by a railway porter, while he was endeavouring to keep passengers from entering an already overcrowded railway carriage, where the House of Lords unanimously held that, assuming it was the duty of the railway company to prevent overcrowding, yet the injury to the plaintiff was not sufficiently connected with such negligence to give him a cause of action.

PARLIAMENT—HOUSE OF COMMONS—VOTING WHEN DISQUALIFIED—ACTION FOR PENALTY—PRIOR ACTION FOR SAME PENALTY—MISTAKE IN PLEADING AS TO STATUTE—AMENDMENT—EVIDENCE.

Forbes v. *Samuel* (1913) 3 K.B. 706. This was an action by an informer against the Post Master General to recover penalties for having voted in the House of Commons while disqualified from being a member of the House, on the ground of being interested in a contract with the Crown. It appeared that there had been a previous action instituted to recover the same penalties, but that both informers had alleged the penalties to be payable under a statute which related to the Parliament of Great Britain, whereas they were in fact payable under a subsequent statute relating to the Parliament of the United Kingdom. The plaintiff applied for leave to amend, but Scrutton, J., who tried the action, held that leave to amend ought not to be given where there were competing actions for penalties, and he also held that the prior action attached the right of action, and, if bonâ fide brought, was a bar to any subsequent action. He, therefore, held that the plaintiff could not recover. The reporter also notes that the prior action failed because the wrong statute was relied on, and an amendment was also refused in that case, and the action was dismissed. What became of the third action does not appear. It was ruled in the course of the trial that the test roll of the House of Commons, and the official copy of the division lists were admissible as evidence, and that the best evidence of membership is the writ of election with the returning officer's indorsement thereon.

which it was proposed to appropriate some of the unauthorized securities. The proposed appropriation was approved by all persons interested. Ashbury, J., held that the Court had jurisdiction to sanction the proposed appropriation and did so, having regard to the special circumstances of the case.

WILL — GIFT TO "CHILDREN" — ILLEGITIMATE CHILDREN EXCLUDED.

In re Pearce, Alliance Assurance Co. v. *Francis* (1913) 2 Ch. 674. In this case a will was in question whereby the testatrix gave the residue of her property to her brother for life, and after his death in trust for all or any of the children or child of her brother living at the death of the survivor of the testatrix and her brother. The brother survived the testatrix and had living at his death six illegitimate children and two legitimate children. The woman who bore the illegitimate children had been known and received as the brother's wife, and the children were received as legitimate. The testatrix knew them all, and of some she was fond, but Sargant, J., held that only the legitimate children were entitled to share in the bequest. He refused to follow *In re Du Bochet* (1901) 2 Ch. 441, thinking that *In re Brown,* 63 L.T. 159 was most in accordance with principle and authority.

NEGLIGENCE—KICK OF HORSE—SCIENTER—LIABILITY OF OWNER.

Bradley v. *Wallaces* (1913), 3 K.B. 629. This was an action under the Workmen's Compensation Act, but deals with a question of general interest apart from that Act. In the course of his employment, the plaintiff was fatally kicked by a horse not belonging to his master, but which had been brought on the master's premises by some third person and left unattended. The master admitted liability under the Act, but claimed indemnity from the owner of the horse. The County Court Judge who tried the case held that the question of scienter was immaterial, that the bringing of the horse on the master's premises was a trespass, and that by reason of negligently bringing it there the owner was liable to indemnify the master. The Court of Appeal (Cozens-Hardy, M.R., and Kennedy, and Eady, L.JJ.), however, held that the case was governed by *Cox* v. *Burbidge* (1863), 13 C.B. (N.S.) 430, that it was not in the ordinary course of things that a horse, not known to be vicious, would kick a man—and assuming that the bringing of the horse

REPORTS AND NOTES OF CASES.

Dominion of Canada.

EXCHEQUER COURT OF CANADA.

THE KING ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA *v.* HON. W. H. P. CLEMENT.

Allowances to judges for travelling expenses—Meaning of "where he resides"—Judges Act, R.S.C. 1906, *c.* 138, *s.* 18.

Held, 1. That the residence of the defendant, a judge of the Supreme Court of British Columbia, was at the City of Vancouver, where the courts were held, and was not, as claimed by the defendant, at Grand Forks, some 700 miles distant; and that therefore he had no right to charge for travelling allowances under the above act.

2. That the words "where he resides" must be taken in their plain and ordinary sense without any question of domicile, which might be different from residence, and that the words quoted cannot be twisted by any legal fiction to mean that the judge should be paid for expenses never incurred or contemplated by the act.

[OTTAWA, Nov. 28, 1913.—Cassels, J.

The information in this case was exhibited by the Crown claiming that from August, 1907, to March, 1910, the defendant had obtained large sums of money for travelling allowances, including six dollars per day, on the representation that he was absent necessarily from his place of residence, alleged to be Grand Forks in the Province of British Columbia, for the number of days he was so absent, for the purpose of attending in Court or Chambers.

The allegation of the Crown was that during the whole period when these allowances were claimed the defendant was in fact residing in Vancouver, and the Crown claims a refund of $4,290.00 alleged to have been improperly obtained by the defendant by a misrepresentation as to his place of residence. It was not claimed that any sum should be refunded for travelling expenses, but only six dollars per diem charged during his stay in Vancouver absent from his alleged place of

residence at Grand Forks. The charges in question were from August, 1907, to March, 1910 and amounted to about the sum of $4,290.00.

F. S. Maclennan, K.C., for the Crown. *Sir C. H. Tupper*, K.C., *E. P. Davis*, K.C., *E. V. Bodwell*, K.C., and *J. McD. Mowat*, for defendant.

CASSELS, J.:—There is hardly any dispute as to the facts of the case. The defendant was appointed as a Judge of the Supreme Court of British Columbia about December, 1906. At this time his place of residence was at Grand Forks. Grand Forks is distant from Vancouver about seven hundred miles, involving a journey of six days to go to Vancouver and return to Grand Forks. In his defence the defendant puts his case as follows:—

"5. In further answer to the information this defendant says that he was appointed one of the judges of the Supreme Court of British Columbia in the year 1906, and at that time the defendant's place of residence was at the city of Grand Forks, in the Province of British Columbia, where he owned a furnished house and land and had his home; that from 1906 until March, 1910, the defendant retained his place of permanent residence at Grand Forks aforesaid, and in the interval temporarily sojourned at various hotels and lodgings at the cities of Victoria, Nelson, Rossland, Fernie, Greenwood, Revelstoke, Clinton, New Westminster and Vancouver; that the facts aforesaid were well known to the Crown represented by the members of the Government of Canada and to the Department of Justice, and were public and notorious, and the defendant claims under the said facts, and according to the provisions of the Judges Act, that his place of residence was Grand Forks at all times referred to in the applications and certificates mentioned in paragraphs 3 and 4 of the information, and this defendant says he was not obliged to reside nor did he reside at any such times elsewhere than at Grand Forks, and the said application and certificates were made in good faith and in accordance with the facts and provisions of the Judges Act."

The provision of the Judges Act (Ch. 138, R.S.C. 1906, sec. 18) bearing on this question before me reads as follows:—

"18. There shall be paid for travelling allowances to each judge, whether of a superior or county court, and to each local judge in Admiralty of the Exchequer Court, except as in this section otherwise provided, in addition to his moving or trans-

portation expenses, the sum of six dollars for each day, including necessary days of travel going and returning, during which he is attending as such judge in court or chambers at any place other than that at which he is by law obliged to reside: Provided that:—

(*a*) No judge shall receive any travelling allowance for attending in court or chambers at the place where he resides.

* * * *

5. Every application for payment of any such allowances shall be accompanied by a certificate of the judge applying for it of the number of days for which he is entitled to claim such allowance."

This statute was amended by 3 & 4 Geo. V., Ch. 28, sec. 8, granting an additional allowance of four dollars per diem for each day the judge is required to attend in a city for the performance of his judicial duties. Parliament no doubt recognized the fact that no judge could maintain the position he ought to be able to maintain in a city such as Halifax, St. John, Quebec, Montreal, Toronto, Winnipeg, Vancouver, etc., for the sum of six dollars per diem, and therefore increased the allowance to ten dollars per diem during the time the judge is compelled to reside in a city away from his place of residence in performance of his judicial duties.

Now it seems to me too clear for any reasonable doubt that this statute only contemplates an indemnity to the judge for expenses he is put to in travelling from and to his place of residence. It never could have been intended as a statute to augment the salary prescribed by statute. The sole legal question is where was the place of residence of the defendant as contemplated by the statute during the time the charges in question were made?

Before dealing with this question I refer to certain evidence adduced before me by the defendant as to the extra expense he had to incur by reason of living in Vancouver instead of at Grand Forks. This evidence I considered at the trial as well as certain other evidence as irrelevant to the case. Considering the gravity of the case, and counsel for both the Crown and the defendant desiring that the evidence should be received, I allowed it to be given.

In my opinion the increased cost of living as between Vancouver and Grand Forks has no bearing on the case. When a barrister is offered the high honour of a seat upon the Bench,

if he finds the pecuniary sacrifice of leaving a lucrative practice at the bar greater than he can afford he is not compelled to accept the position. If, however, he does accept he does so with a knowledge of what the salary is and also with the knowledge that his whole time has to be given to his judicial duties. If as time goes on the cost of living increases so that the salary which may have been sufficient when he accepted the office turns out to be insufficient to enable him to live as a judge should be entitled to live, one or other of two courses is open to him, first to await relief from parliament, or in the alternative resign and resume his practice at the bar—the latter course to be deprecated except for special reason.

Out of respect for the able counsel representing the Crown and the defendant, I have perused and considered the various authorities cited and others. In my opinion there can be no reasonable doubt on the question. The words "where he resides" must be taken in their plain and ordinary sense. Authorities relating to change of domicile have no bearing on the question. Where a legal question turns on the point of change of domicile of origin the question of intention becomes often of importance. There may be a residence as distinguished from domicile. The Judges Act is a statute as I have mentioned of indemnity for outlay. It never in my judgment could be twisted by some legal fiction to mean that a judge should be paid for expenses never incurred. I am inclined to think that the defendant must have been of the same opinion as I have come to, at all events as late as the 12th of May, 1910, because in his letter of that date he states:—

"I have delayed answering your enquiry as to my change of residence to Vancouver from Grand Forks because I have been seriously contemplating going to Victoria to live. Now, however, I have decided to remain here for probably a year," etc.

I should hardly have thought that such a statement referring to a temporary residence would be accepted as evidencing a change of domicile to Vancouver.

Now what are the facts of the case: The defendant himself admits that at all events as early as 1908 it was apparent that the legal business of British Columbia was centering in Vancouver. He foresaw that most of his time would be taken up by judicial work in Vancouver with trips from Vancouver to Westminster, Victoria and other places. Grand Forks, as I have pointed out is seven hundred miles from Vancouver. He decides if he is to see anything of his wife and family he must

move them to Vancouver. He closes his home at Grand Forks, insures his library as an absentee risk on the 20th August, 1907. He rents Mrs. Henderson's house, 1424 Burnaby Avenue, Vancouver, from the latter part of July, 1907, until about the middle of April, 1908. Mrs. Clement and the children join him, and live with him in this rented house—the house at Grand Forks being closed. Mrs. Clement and the children go back to Grand Forks for a period of about three and one-half months during the summer of 1908. The defendant remains in Vancouver during the summer and has his library forwarded to Vancouver in the early summer of 1908. He rents the White House, Vancouver, from the 1st July, 1908; resides there with his wife and family until about the beginning of May, 1909, when he rents the Risteen house, Vancouver, from the 1st May, 1909, and was residing there at the date of the letter referred to of the 12th May, 1910, a letter written in consequence of the attack made upon him in the legislature by Mr. Macgowan. He opens his bank account in Vancouver, and lives with his wife and family at Vancouver as his place of residence.

If his residence during this period was not at Vancouver, it is difficult to comprehend what residence means. The question of whether he had in his mind an intention subsequently of living in Westminster or Victoria is of no importance. The sole question is was he a resident of Vancouver, and if so, disentitled to put forward as a claim these charges while so resident in Vancouver? In my judgment he was not so entitled under the terms of the Judges Act.

I would have gladly closed my reasons for judgment at this point, but having been pressed by counsel both for the Crown and the defendant to express my views on the second question, viz.: whether the defendant intentionally endeavoured to deceive the Department of Justice as to his real place of residence, I must to the best of my ability give my opinion on this question.

Since the trial I have perused and reperused the evidence and exhibits, and very reluctantly I am forced to the conclusion that the contention of the Crown is well founded, and I am unable to relieve the defendant from the charge.

If I have come to a wrong conclusion as to the meaning of the Judges Act and the defendant's contention turns out to be correct, then, of course, the defendant's contention would be right, and nothing I have written would or ought to prejudice him in an appellate court, and I would gladly welcome a judg-

ment in his favour. I have, however, come to a conclusion on the facts as they appear to me.

I have set out my reasons as to the meaning of the statute, and the effect of the evidence as to residence in Vancouver. I cannot conceive of any one dealing with the case impartially forming any other opinion. The defendant must be judged on the evidence as any other litigant should be judged.

Now, I have dealt with the facts as to change of residence and the construction of the statute. Personally, I find it hard to understand how a learned judge could come to any other conclusion. The defendant states that he consulted Mr. Justice Morrison. This learned judge was a witness in the case. He is not asked any question as to his advice. It shews that the defendant must have had a doubt in his mind, and I would have thought, having regard to the previous correspondence passing between himself and the Department of Justice he would have laid the whole case before them and asked for their view. He did not do so.

For the first time in rendering his account from August 6th to September 5th, 1907, stating his residence as being at Grand Forks, he places at the foot of the account the memo.: "Please send c/o Eastern Townships Bank, Grand Forks, B.C.," and so on in each account until that rendered of his expenses from March 1st to March 19th, 1910—when for the first time he names his residence as at Vancouver. Is it possible to arrive at any other conclusion than that this was done purposely with the object of impressing on the minds of those receiving it that he was in fact a resident of Grand Forks while, as I have stated in my opinion, his residence was Vancouver?

The defendant states his main account was at Grand Forks and his Vancouver account was fed by remittances from Grand Forks. His main account must have been at Vancouver, where he had a bank account and where he and his family were residing. I could understand the bank account at Grand Forks, a place seven hundred miles from Vancouver being fed from Vancouver. The house at Grand Forks was unoccupied and the outlays would be necessarily small as compared with the Vancouver expenditure.

Until the report of the Attorney-General of British Columbia (on file as an exhibit) is produced no contention was, as far as I can see, raised by the defendant as to "residence" meaning "domicile."

The task devolving upon me has been painful, and I would gladly have come to a different conclusion could I see my way to do so.

I have nothing whatever to do with the suggestions made of persecution by the Attorney-General of British Columbia or the action of the Minister of Justice in exhibiting this information. They are the guardians of the proper administration of justice in the Dominion of Canada and the Province of British Columbia respectively and must be held to have acted in the best interests of the trusts committed to them.

I think the defendant must repay the various sums of money received by him with interest from the dates of payment. The amounts should be easily arrived at. In the event of a difference the amount should be settled by the Registrar.

The defendant must pay the costs of this action.

B.C.] [Oct. 22, 1913.

SUPREME COURT OF CANADA.

MAHOMED v. ANCHOR FIRE AND MARINE INSURANCE CO.

Fire insurance—Blank application—General agent—Misrepresentation—Knowledge of company—Overvaluation.

F., the manager, for British Columbia, of a fire insurance company, with power to accept risks and issue policies without reference to the head-office of the company, received an application from M. for insurance for $2,100 on merchandize, furniture and fixtures contained in a building described as a store and dwelling-house. The application was accepted, and a policy issued by him apportioning the insurance upon the three classes of property separately. A loss having occurred, payment was refused on the grounds that the stock was overvalued and the premises improperly described as a dwelling-house whereas, in fact, it was also used as a lodging-house. At the trial it appeared that a portion of the premises was fitted up for lodgers; the plaintiffs testified that F. inspected the premises before the policy was issued, and that they had made no apportionment of the insurance but left the matter altogether in the hands of F. F. testified that he sent an agent to have the application signed and the apportionment made and that he filled in the figures upon the blanks in the application from

the agent's report. The jury found that F. inserted the description of the premises and apportioned the insurance.

Held, reversing the judgment appealed from (17 B.C. Rep. 517), that the company was affected by F.'s knowledge of the premises and of the property insured; that the question as to who had made the apportionment was properly left to the jury, and that the evidence justified the jury in finding that it had been made by F., and that the insured, therefore, had made no valuation as to the stock or the apportionment thereof and could not have misrepresented its value.

Held, per Davies, and Duff, JJ.:—That the evidence justified the jury in finding that F. had described the premises as a dwelling-house and that the company was bound by his act in doing so.

Per Davies, J.:—A dwelling-house does not lose its character as such from the fact that it is occupied by one or more lodgers.

Held, per Duff, J.:—As, under the conditions of the policy in question, notwithstanding an overvaluation, the company would still be liable for a certain proportion of the actual value of the property insured, the policy could not be avoided.

Ont.] BELL *v.* GRAND TRUNK RY. CO. [Dec. 23.

Evidence—Onus—Railway company—Negligence — Excessive speed—Railway Act, s. 275.

By 8 & 9 Edw. VII. c. 32, s. 19, amending section 275 of the Railway Act, no railway train "shall pass over a highway crossing at rail level in any thickly peopled portion of any city, town or village at a greater speed than ten miles an hour," unless such crossing is constructed and protected according to special orders and regulations of the Railway Committee or Board of Railway Commissioners or permission is given by the Board. In an action against a railway company for damages on account of injuries received through a train passing over such a crossing at a greater speed than ten miles an hour.

Held, reversing the judgment of the Appellate Division (29 O.L.R. 247), that the onus was on the company of proving that the conditions existed which, under the provisions of said section, exempted them from the necessity of limiting the speed of their train to ten miles an hour or that they had the permission of the Board to exceed that limit.

Appeal allowed with costs.

Laidlaw, K.C., and *Cleaver*, for appellant. *D. L. McCarthy*, K.C., for respondents.

Ont.] [Dec. 23.

ANGLO-AMERICAN FIRE INSURANCE CO. *v.* HENDRY.

Fire insurance—Application—Misrepresentation — Materiality —Statutory conditions—Variation.

In an action on a policy insuring a stock of merchandize, the company pleaded—That the stock on hand at the time of the fire was fraudulently overvalued. That the insured in his application concealed a material fact, namely, that he had previously suffered loss by fire in his business. That the action was barred by a condition in the policy requiring it to be brought within six months from the date of the fire. This was a variation from the statutory condition that it must be brought within twelve months.

Held, affirming the judgment of the Appellate Division (29 O.L.R. 356), that the evidence established the value of the stock at the time of the fire to be as represented by the insured; that the materiality to the risk of the non-disclosure of a former loss by fire was a question of fact for the judge at the trial who properly held it to be immaterial; and that the question whether or not the variation from the statutory conditions was just and reasonable depended on the circumstances of the case, and the courts below rightly held that it was not.

Held, *per* Davies, Anglin and Brodeur, JJ.:—That the insured having supplied, on demand, duplicate copies of the invoices of goods purchased between the last stock-taking and the time of the fire as well as copies of the stock-taking itself, was not obliged to comply with a further demand for invoices of purchases prior to said stock-taking.

Appeal dismissed with costs.

DuVernet, K.C., and *Heighington*, for appellant. *Rowell*, K.C., and *George Kerr*, for respondents.

N.S.] [Nov. 17.

CURRY *v.* THE KING.

Criminal law—Perjury—Form of oath.

On trial of an indictment for perjury it appeared that the prisoner when called as a witness in the proceedings in which

the alleged perjury was committed, was told to hold up his right hand which he did, when the usual formula, the evidence you shall give, etc., was repeated. He had not been asked if he had any objection to being sworn on the Bible. He was convicted of perjury and his conviction affirmed on appeal by an equally divided court (47 N.S. Rep. 176).

Held, that, having made no objection to being sworn as he was he must be held to have assented and was properly convicted.

Appeal dismissed with costs.

[NOTE: The report in 47 N.S. Rep. 176 erroneously states that the conviction was quashed.]

Madden, for appellant. *Jenks*, Dep. A.-G., for respondent.

Province of Ontario.

COUNTY COURT OF THE COUNTY OF WATERLOO.

REX v. GENZ.

Liquor License Act—Meaning of the word "kept."

Held, 1. The sale of liquor in more than one bar, in licensed premises, even though in a temporary structure, is a breach of R.S.O. 1897, c. 245, s. 65.

2. The word "kept" in the above section is to be interpreted as meaning "had in use."

Rex v. *Lewis*, 41 C.L.J. 842, not followed.

[BERLIN, Nov. 18, 1913.—Keade, Co.J.

The defendant, a licensed hotelkeeper in the village of Elmira, in the county of Waterloo, was charged before a Police Magistrate under the License Act, R.S.O. 1897, c. 245, s. 65, with keeping more than one bar, contrary to the provisions of that enactment.

The facts were that the defendant put up a temporary structure in the sitting-room of his hotel across the hall from the ordinary bar-room, for the sale of liquor, and sold liquor there in the regular way.

The Police Magistrate found the defendant guilty of the offence charged and imposed a fine of $20 and costs. An appeal was taken to the judge of the County Court.

Haverson, K.C., for the defendant. *E. P. Clement*, K.C., for the complainant.

READE, Co.J.:—In the opening, Mr. Haverson objected that the information only charged that the defendant "did unlawfully at his hotel have a second bar," and that the formal conviction used the same words, and contended that the information and conviction thereby disclosed no offence under the Act. Both the information and conviction, however, refer to section 65 of the Liquor License Act as the one contravened, and I find that by the provisions of the Criminal Code the description of any offence in the words of the Act, or any similar words, shall be sufficient in law, and that no objection shall be allowed to any information for any alleged defect therein in substance or in form, but that if by reason of any variations between the information and the evidence in support thereof it appears that the defendant is deceived or misled, the justice may adjourn the hearing of the case, and in the case of an indictment, which includes an information, it is provided that a court therein may refer to any section or sub-section of any statute creating the offence charged therein, and in estimating the sufficiency of any such count, the court shall have regard to such reference, and in this case the particular section of the Act under which the charge was laid being referred to both in the information and formal conviction, I find that both are sufficient, and disclose an offence under the Act.

No evidence was offered or taken before me, but it was admitted that the defendant was, at the time of the alleged offence, a duly licensed hotelkeeper in the village of Elmira in the county of Waterloo, and that on the 24th day of September, 1913, upon which day an Agricultural Fair was being held in the said village, a structure was erected and used as a bar in the defendant's hotel across the hall from the regular bar.

The whole matter thus hangs upon the true meaning of the word "kept" as used in the said section.

The word "keep," according to dictionary interpretation, has many shades of meaning according to the various ways in which it is used, sometimes indicating permanency and sometimes not, and one must look to the context and apply one's reasoning faculties in a common sense way in order to arrive at what appears to be the natural meaning of the word, and the intention of the Legislature in using it in the way that it did, and not on the other hand set one's self to refine and narrow down its meaning so as to unduly limit its application.

Mr. Haverson contends that the word portends something permanent and lasting, so that the use of an additional bar for only one day under special circumstances for meeting increased demands of the public, and for their accommodation supplying greater facilities for handling the business of the hotel under circumstances of a particular and temporary emergency, such as existed on the day in question when a fair was being held, was not an infraction or violation of the Act, and cites *Rex* v. *Lewis* (1905), 41 C.L.J. 842.

Mr. Clement contends that the meaning of the section is that no more than one bar shall be used at any time in an hotel, or for any period whatever, and that the using of one for even one day, or less, is an infraction and violation of the Act, and cites *Shelley* v. *Bethell*, 12 Q.B.D. 11.

The words "keep open" as applied to places of business, particularly saloons, when it has been provided that they should not keep open after or during a certain time, have been held to imply a readiness to carry on business therein, and a single occasion of being open would be an infraction of the prohibition, and in connection with fire insurance when it is provided that a policy shall become void if certain articles are kept or used on the premises, a temporary or occasional having of such article on the premises may be sufficient to avoid the policy: 24 Cyc. 792.

In a case above referred to, under a certain Act that enacts that "it shall not be lawful for any person to have or keep any house or other place of public resort for public performance of stage plays without a license," an owner and occupier of a building, which he gratuitously allowed to be used on a few occasions for the performance of stage plays, to which the public were admitted on payment for the benefit of charities, without a license, was convicted of "having or keeping" a house for the public performance of stage plays without a license," and upon appeal the conviction was affirmed, the court stating that one day of such performance when the house was so "kept" open for such purpose was without legal authority: *Shelley* v. *Bethell*, 12 Q.B.D. 11.

It seems to me that, taking the ordinary meaning of the English language, and the meaning of the word "kept" as it occurs to one at the first reading of the section in question, (and as to which one is still further impressed upon consideration of the matter) the true interpretation and meaning of this section is that more than one bar should not be *had in use*, in any

house or premises licensed under the Act, at any time, and that it would only be refining away and playing with the meaning of the word to otherwise construe it, and that there is no warrant for narrowing down its meaning in the manner contended for.

The case of *Rex* v. *Lewis*, 41 C.L.J. 842, referred to, although the facts are not quite the same, seems to support a contrary view, but, with all respect for the views of the learned judge therein expressed, I find myself unable to follow his line of reasoning or to concur in his conclusions.

The appeal will be dismissed with costs. Conviction affirmed.

Book Reviews.

Chitty's Statutes of Practical Utility. With notes and indexes. Vol. 17, part III. By W. H. Aggs, M.A., Barrister-at-Law. London: Sweet & Maxwell, 3 Chancery Lane. 1913.

This volume contains the statutes of practical utility, passed by the Imperial Parliament in 1913, with incorporated enactments and selected statutory rules.

The text of this book and the explanatory notes gives the reader full information as to the legislation of the mother country during the past year. The author in his preface says:—

"The labours of Parliament have resulted in some useful measures being placed upon the statute book, though nothing of a very novel character has been enacted, with the exception of the Prisoners (Temporary Discharge for Ill-health) Act, 1913, whereby prisoners obtain a temporary discharge by reason of their own misconduct. Such a provision is not merely entirely new in this country, but, it is believed, nothing of a similar character can be found in the legislation of any other country."

Report of the Thirty-Sixth Annual meeting of the American Bar Association, held at Montreal, Sept. 1, 2 and 3, 1913.

We have already referred (page 509) to this influential and useful Association; and to its last meeting, held at Montreal; and now simply call attention to the fact that a full report of the proceedings can now be obtained from Mr. George Whitelock, secretary, 1408 Continental Building, Baltimore, Md., U.S.A.

The Lawyers Reports Annotated. (New series.) BURDETT A. RICH, HENRY P. FARNHAM, editors. Rochester, N.Y.: The Lawyers Co-operative Publishing Company. 1913.

This complete series of reports comes with unceasing regularity and promptitude. We have now before us the index to all the law of the L.R.A. Notes, taken from vols. 1 to 70, and 1 to 42 L.R.A. (N.S.) The value of such a compilation (1146 pp. printed on India paper) cannot be over-estimated. It may safely be said that it contains all the law given in the series, and that means substantially all U.S. law worth noting, since the Law Reports commenced some 25 years ago.

Bench and Bar

SUPREME COURT OF ONTARIO—RULES OF COURT.

Amendments of Rules passed 24th December, 1913, and ordered to come into force immediately.

56.—(6) An affidavit shall not be necessary where an appearance is entered by the Official Guardian for an infant or lunatic.

66.—(2) On the signing of default judgment the officer signing judgment may fix and ascertain costs without taxation.

112.—(3) Where a defendant who has appeared to a writ which is specially indorsed and filed the affidavit required by Rule 56 does not file a statement of defence within the time limited, his affidavit shall stand as his defence and notice of trial may be at once served.

The tariff of disbursements is amended as follows: On page 210, item, "fees to witnesses residing over three miles from the Court House," strike out figures "1.25" and insert "per diem 1.50."

Amend items relating to fees payable to professional witnesses by striking out the figure "4" where it appears, and insert after the words "per diem" in each item, the words and figures "Unless otherwise provided by Statute, $5.00."

Add to the item relating to witnesses the words: "A reasonable sum may be allowed for the preparation of any plan, model, or photograph, when necessary for the due understanding of the evidence."

The new Lord Chief Justice of England, Sir Rufus Isaacs, has been raised to the Peerage under the title of Lord Reading. He takes the name from the town of Reading, which he represented in the Imperial Parliament from 1904 to 1911.