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THE DIGNITY OF THE BENCH

A representative legal journal cannot well ignore, much as we might wish to, occurrences such as those which recently took place in Manitoba in regard to an investigation held there by a learned Judge, sitting as a Commissioner, appointed by the government to take evidence and report as to certain alleged abuses in connection with a government contract.

Unfortunately this investigation brought up political disputes and recriminations which led to unseemly criticisms in which the learned Judge came in for a large measure of abuse. Of the rights or wrongs we know nothing and they do not interest us; but the dignified and efficient administration of justice is important to all, and anything which affects it prejudicially should not be allowed to pass without protest.

Whilst it may be desirable from time to time for a government to investigate alleged scandals or improper practices, it is most unwise that any Judge should be asked to adjudicate upon such matters. Judges, moreover, when asked to act as commissioners in such matters, would do well to decline. They have their proper duties to perform and should not be asked to go outside their own sphere of duty. In doing so they step down from their high estate, and there is always trouble when they do.

It may well be supposed that when Judges are appointed in such matters it is because it is imagined that the finding of a person occupying a judicial position would give the finding a judicial complexion, and so carry weight with the public. And then these Judges must remember that, when acting as commissioners and not as Judges, their acts are open to adverse criticism to an extent which would not be proper or even possible if they were acting within their legitimate judicial sphere. The unfortunate result too often is that the ermine is besmirched and the due and dignified administration of justice more or less injured.

SUMMARY TRIALS FOR THEFT.

A correspondent called attention in our last issue to a recent decision of the First Appellate Division of the Supreme Court of Ontario in the case of *Rex* v. *Sinclair*, which, if it be a correct exposition of the law, indicates that on the point in question it is in a truly deplorable condition. In cases of theft of less than $10, a Police Magistrate of a city of over 25,000 inhabitants has an absolute authority to try and convict the accused under sec. 777 (5) of the Cr. Code; and may inflict a punishment of fourteen years imprisonment, see Cr. Code, sub-secs. 355, 358, 359. In such a case it is held by the Court the convict cannot move to quash the conviction nor has he any right of appeal; and if he does move to quash and his motion is refused by a single Judge, there is no right of appeal from his decision. The Court holds that in such cases the Summary Convictions clauses of the Cr. Code do not apply; we presume because it considers a magistrate acting under sec. 777 (5) of the Code as amended by 8-9 Ed. 7, ch. 9, ceases to be an ordinary magistrate, and becomes a Judge from whose decision the only remedy would be by way of appeal, and not by motion to quash, and that the Code had given no right of appeal in such cases.

According to this decision the judgment of a Police Magistrate given under sec. 777 (5) is absolutely final and conclusive, and a man may have to suffer under an erroneous conviction fourteen years imprisonment without any redress, except by appeal to His Majesty in His Privy Council. Whereas if he has a $100 claim in a Division Court he may take an appeal to the Supreme Court of Ontario. It seems to us the case has only to be stated to shew the absolute absurdity of the law on this point and the need for its immediate amendment. As it at present stands, as expounded by the Appellate Division, it seems to involve a very serious blow against the liberty of the subject.

MECHANICS' LIENS—PERCENTAGE TO BE RETAINED BY OWNER.

The construction of section 12 of the Mechanics and Wage-Earners' Lien Act of Ontario has recently been fully considered by Mr. Neville, Official Referee, in the case of *Batts v. Poynte.*

He points out that under the statute the person primarily liable upon any contract, under or by virtue of which a lien may arise, is required to deduct from any payments to be made by him in respect to the contract and retain for a period of thirty days after the completion or abandonment of the contract, 20% of the value of the work, service and materials actually done, placed or furnished as mentioned in section 6, and such value shall be calculated on the basis of the contract price or if there is no specific contract price then on the basis of the actual value of the work, service or materials.

In the case in question the work was abandoned by the contractor; it was under the supervision of an architect who had from time to time issued certificates shewing the value of the work done at $2,312.50. The total contract price of the building was $3,233. The contract contained a clause that the certificates of the architect were not to lessen the total and final responsibility of the contractors nor exempt them from liability to replace work afterwards discovered to have been badly done or not in accordance with the drawings and specifications.

The learned Referee holds that the architect was thus entitled to re-inspect the work and require defects to be made good before issuing the final certificate, and that the contractor not having completed the work, the architect had the right to re-inspect the work actually done, and revise his estimate of its value calculated on the basis of the contract price. Upon the trial the architect placed the value of the work done, calculated on the basis of the contract price, at $2,240.03 instead of $2,312.50.

The Referee finds that this sum $2,240.02 was the value of the work done and material furnished, calculated on the basis of the contract price, and that 20% of this sum should have been retained by the owner, amounting to $448.00, and that the claimants were entitled to a lien upon this sum. He also points out that the cost of completion is generally, and often very

materially, out of proportion to its value compared with the value of the previous work, calculated on the basis of the original contract price. To be a true guide the value of the subsequent work must be calculated on the same basis as the previous work, that is, on the basis of the original contract price, not on the higher basis of cost where done by day labour, or by re-letting the work to a new contractor. It is all a question of proportion and in arriving at the 20% due to lienholders, we must calculate it on the value of the work in proportion to the contract price, without any deductions for damage, or extra cost of completion. We must, in a word, get on to the basis of the original contract as far as we can when the cost of completion is the only evidence we have to go by.

ABANDONING ALLEGIANCE.

The terrible war that is raging over the world to-day has, as we all know too well, created innumerable awkward situations and emphasised existing ones. The need of the hour is man power, and we in this country being anxious to do our share for the Empire, look about for resources in that direction.

The extent of the Dominion and the fact that it includes peoples of varying origins and different ideas as to responsibility of nationhood create difficulties not experienced since the war of 1812. During our war with the United States old Upper Canada passed legislation, which, though not applicable to-day, gives suggestions which may be helpful in meeting present difficulties of a somewhat similar character.

In March, 1814, an Act was passed by the sixth Parliament of Upper Canada, 54 George III., ch. 9, to declare certain persons therein described aliens, and to vest their estates in His Majesty. This was supplemented in 1818 by ch. 12 of 59 George III., an Act for vesting in commissioners the estates of certain traitors and also the estates of persons declared aliens by the Act already referred to. Under the latter Act a commission was appointed which sold the estates of various traitors and aliens, the proceeds being applied towards compensating losses which the King's subjects sustained in consequence of that war after satisfying all debts and claims against such property.

The provisions of these Acts, which doubtless are effete, are

not exactly what would be required at the present time, but something similar should be law now. A number of young Canadians are, to their shame, leaving Canada for the United States to avoid military service. Most of these, if they were compelled to go overseas, when alongside men who from a sense of duty have volunteered for active service, would doubtless make good soldiers; and many of them would, if they saw some of the consequences which would ensue from such desertion of the flag (appropriate laws being enforced), prefer to take up such branch of service as they might best be fitted for. The pains and penalties for such cowardly desertion (or perhaps it would be fairer to say, as to some, such thoughtless desertions and disregard of loyalty and duty), should be the loss of property, if they have any, the declaration that they had lost their British citizenship and were thenceforth aliens, and that they had lost the status which they had in the country. Apparently no action has been taken to prevent this exodus or to keep a record of those who thus decamp.

If the Militia Act had been put in force as an emergency measure at the beginning of the war, as a matter of course, the present situation would not have been so difficult and unmanageable as it is now alleged to be. Some partial enforcement of the Act is spoken of; but this is not what the situation demands so far as the proposal has been outlined. Judging from what has been said in the public press about the enforcement of this Act, there has been apparently, on the part of the government, too much dread of unpleasant results, attributable possibly to supposed political necessities, and partly to the possibility of a rebellious refusal on the part of a certain section of the Dominion to obey the law when put in force. We do not believe that there would be any such result. A government that does what is right need not fear, for the people who are now roused to a sense of the importance of the measure will not stand any holding back by those who ought gladly to respond to the Empire's call. The somewhat traitorous vaporings of a few self appointed leaders should not be taken seriously. The country, moreover, is in no mood to stand anything in the nature of a treasonable act, and if there are those inclined that way the sooner they are known and promptly dealt with the better.

REVIEW OF CURRENT ENGLISH CASES.

SHIP—CHARTER-PARTY—CHARTERERS LIABILITY TO CEASE ON SHIPMENT OF CARGO—VARIANCE BETWEEN CHARTER-PARTY AND BILL OF LADING—SHIPOWNERS' LIEN—CAPTAIN TO SIGN BILLS OF LADING IN PRESCRIBED FORM—NO LIEN AS AGAINST BILL OF LADING—LIABILITY OF CHARTERER FOR DELAY AT PORT OF DISCHARGE.

Jenneson v. *Secretary of State for India* (1916) 2 K.B. 702. This was an action by shipowners against the charterer of the vessel for delay in unloading the cargo. The charter party provided that the Captain should sign bills of lading in a prescribed form, without prejudice to the charter-party; that the discharge should be at a specified rate by day, that the Captain should have a lien on the cargo for freight, demurrage, and other lawful claims, against the charterer; and that the charterer's liability should cease on the shipment of the cargo, provided the cargo was worth the freight and demurrage. The captain signed bills of lading in the prescribed form which did not provide for any rate of discharge, not give any lien to the shipowners for freight, demurrage, or other claims. Delay arose in discharging of the cargo, and the action was brought for four days' demurrage. The defendant, the charterer, claimed to be relieved from liability by reason of the cesser of liability clause: but Rowlatt, J., who tried the action, held, adopting the language of Lord Esher, M.R. in *Chick* v. *Radford* (1891) 1 Q.B. 627 and *Hansen* v. *Harrold* (1894) 1 Q.B. 612, that "It cannot be assumed that the shipowner, without any mercantile reason, would give up by the cesser clause rights which he stipulated for in another part of the contract," the defence therefore failed.

LANDLORD AND TENANT—OUTBREAK OF WAR—ALIEN ENEMY LESSEE—RENT ACCRUED AFTER WAR DECLARED—SUB-LEASE—COVENANT FOR INDEMNITY—THIRD PARTY NOTICE—JUD. ACT 1873 (36-37 VICT. C. 66) S. 24, S.S. 3—(ONT. RULE 165)—TRADING WITH THE ENEMY ACT (4-5 GEO. V. C. 87) S.1, S.S. 2.

Halsey v. *Lowenfield* (1916) 2 K.B. 707. This was an appeal from the decision of Ridley, J. (1916) 1 K.B. 143 (noted ante, vol. 52, p. 187). The action was aginst an alien enemy to recover

rent due under a lease made prior to the war, the rent having fallen due subsequently to the commencement of the war. The defendant had assigned the lease, and taken a covenant of indemnity from his assignee, against whom he had issued a third party notice claiming indemnity—Ridley, J., held that the action was properly maintainable against the defendant, notwithstanding the war, and that the defendant, as an alien enemy, could not, pending the war, enforce any claim for indemnity. The Court of Appeal (Lord Reading, C.J., Warrington, L.J. and Lush, J.) have now affirmed his decision.

MONEY LENDER—BUSINESS CARRIED ON ELSEWHERE THAN AT REGISTERED ADDRESS—ISOLATED TRANSACTION—PROMISSORY NOTE—BONA FIDE HOLDER FOR VALUE—INDEMNITY AGAINST MONEY LENDER—MONEY LENDERS' ACT, 1900 (63-64 VICT. c. 51) s. 2—(R.S.O. c. 175, s. 11).

Finegold v. *Cornelius* (1916) 2 K.B. 719. This was an action brought by a *bonâ fide* holder for value of a promissory note made by the defendant Cornelius in pursuance of a money lending transaction. Phillips was a money lender, and the defendant applied to him for an advance, and Phillips advanced £200 on the promissory note for £300 which Phillips indorsed to the plaintiff *bonâ fide* for value, and which was the note sued on. The defendant claimed that as the transaction had been carried out at a place which was not Phillips' registered address, the transaction was illegal, and that Phillips (who was made a third party) was liable to indemnify him against the note. Ridley, J., who tried the action, gave effect to this contention, but the Court of Appeal reversed his decision, holding that the transaction was, in the circumstances, a breach of the Act, although it was an isolated transaction; but the Court was divided as to the effect of such a breach. Eady and Banks, L.JJ., holding that it merely subjected Phillips to the penalty for breach of the Act, as provided by s. 2, s.s. 2 (see R.S.O. c. 175, s. 12) but did not render the transaction void; Phillimore, L.J., on the other hand, considered that a breach of the provisions of s. 2 (R.S.O. c. 175, s. 11) also rendered the transaction void.

PRACTICE—COSTS—PAYMENT INTO COURT WITH DENIAL OF LIABILITY—RECOVERY OF SUM LESS THAN PAID INTO COURT—COSTS OF ISSUES FOUND FOR PLAINTIFF—RULE 260.

Davies v. *Edinburgh Life Assurance Co.* (1916) 2 K.B. 852. The English Rule 260 provides that where money is paid into Court

with a denial of liability, if the plaintiff does not accept the money paid in, but proceeds to a trial and recovers less than the amount paid in, he shall not be entitled to the costs of the issue of liability. The present action was brought to recover damages for personal injuries caused by negligence of the defendants. The defendants denied liability, and paid into Court a sum of money in satisfaction, this the plaintiff refused to accept, and proceeded to trial, and established the negligence, but failed to recover as much as the amount paid in; Laurence, J., who tried the action, gave the defendant his costs of the action subsequent to the payment into Court, but the Court of Appeal (Eady, Phillimore and Bankes, L.JJ.) held that there was no jurisdiction under the above mentioned Rule to order the plaintiff to pay the costs of the issue on which he had succeeded, and the order as to costs was modified accordingly.

ALIEN—NATURALIZATION—PRIVY COUNCILLOR — REPEAL BY IMPLICATION—ACT OF SETTLEMENT 1700 (12-13 W. 3, c. 2) s. 3—NATURALIZATION ACT 1870 (33-34 VICT. c. 14) s. 7—BRITISH NATIONALITY AND STATUS OF ALIENS ACT 1914 (4-5 GEORGE V. c. 17) s. 3.

The King v. *Speyer* (1916) 2 K.B. 858. In this case the question was whether a foreigner naturalized under the Naturalization Act 1870 (33-34 Vict. c. 14) was competent to be a Privy Councillor, or whether the prohibitory section of the Act of Settlement (12-13 W. 3, c. 2) s. 3 was still in force. The Divisional Court (1916) 1 K.B. 595 held that the prohibition in the Act of Settlement had been impliedly repealed and therefore that an alien naturalized under the Naturalization Act of 1870 was now competent to be a Privy Councillor, and this decision is now affirmed by the Court of Appeal (Eady, Phillimore and Bankes, L.JJ.).

PHOTOGRAPH—RIGHT TO TAKE PHOTOGRAPHS IN EXHIBITION OPEN TO PUBLIC.

Sports & General Press Agency v. *"Our Dogs" Co.* (1916) 2 K.B. 880. The promoters of a dog show, to which the public were admitted by ticket, purported to assign to the plaintiffs the sole right to take photographs of the exhibits, and this action was brought to restrain the defendants from infringing this alleged right by publishing photographs they had taken at the show of animals exhibited thereat. The tickets of admission

contained no prohibition, nor was the taking of photographs at the show otherwise forbidden. Horridge, J., who tried the action, held that it could not be maintained, inasmuch as the promoters of the show had not in law any exclusive right of photographing anything at the show and therefore could not assign any such right, but that their possession of the land on which the show was held would have entitled them to make their purported assignment effective, by making conditions as to the admission, and stipulating that no one should enter unless he agreed not to make photographs. The action was therefore dismissed.

COMPANY—ARTICLES OF ASSOCIATION—CONSTRUCTION—ELECTION OF DIRECTORS—NOTICE—DAY OF ELECTION—ADJOURNED MEETING—INJUNCTION.

Catesby v. *Burnett* (1916) 2 Ch. 325. This was an action by a shareholder on behalf of himself and all other shareholders of a limited company to restrain the defendants from acting as directors of the company, and the present decision is by Eve, J., on a motion for an interim injunction until the trial. The facts were that the articles of association provided that no one should be elected as director unless written notice of the intention in that behalf was given to the company not less than fourteen clear days before "the day of election" of directors. The ordinary general meeting of the company was held December 10, 1915, at which time the two defendant directors retired by rotation. The report of the directors was not then adopted, and the meeting was adjourned to 10 March, 1916, and a committee of shareholders was appointed to investigate the affairs of the company, and report at the adjourned meeting. On 21 February, 1916, written notice was given to the company by a shareholder, stating that at the adjourned meeting he proposed to move the election of four named directors. On 10 March, 1916, the meeting was held to consider the report and to transact the unfinished business. The chairman ruled the notice of 21 February, 1916, to be out of order, and after declaring the election of auditors, left the chair saying that there was no further business. Subsequently the shareholders appointed a chairman and elected the four persons named in the notice directors of the company. The two former directors having continued to act, the motion was now made to restrain them from so doing until the trial. Eve, J., who heard the motion, granted the injunction holding that the notice

of 21 February, 1916, was a sufficient compliance with the articles, and that the first two persons elected as directors at the adjourned meeting in lieu of the two who retired were validly elected and he granted the injunction as asked.

MORTGAGE—SETTLEMENT OF DEBENTURES—TRANSFER TO TRUSTEE OF SETTLEMENT—NON REGISTRATION OF TRANSFER—NEGLIGENCE OF TRUSTEE—SETTLOR'S SUBSEQUENT EQUITABLE MORTGAGE BY DEPOSIT—PURCHASER FOR VALUE WITHOUT NOTICE—PRIORITIES—QUI PRIOR EST IN TEMPORE POTIOR EST IN JURE.

Coleman v. *London County and Westminster Bank* (1916) 2 Ch. 353. The facts of this case were as follows. In 1893 forty-five debentures of a limited company, secured by a trust deed, were settled by the registered owner upon trust for herself for life, with remainder to her three sons in equal shares, and she executed a deed of transfer of the debentures to Edward Coleman the sole trustee of the settlement, and he had possession of the transfer and debentures, but did not register the transfer in the books of the company. Edward Coleman was also sole trustee of the debenture trust deed. In 1894 one of the sons assigned his share for value to Florence Coleman. In 1911 the settlor who was a director of the company, and in some way then had possession of the forty-five debentures deposited them with the defendants, who were bankers of the company, as security for the company's overdraft, and signed the usual declaration of charge. Before taking the charge the bank ascertained that the settlor was the registered owner of the debentures in the books of the company, and they had no notice of the settlement. The bank two years afterwards gave notice of their charge to Edward Coleman as the trustee of the debenture trust deed which he acknowledged, but made no reference to the settlement. In 1914, after Edward Coleman's death, the defendants first had notice of the settlement, and of the transfer to Edward Coleman, and they at once took a transfer of the forty-five debentures from the settlor, and got an assignment of the interest of two of the sons under the settlement, and were registered as owners in the books of the company. The present action was brought by Florence Coleman, and the executors of Edward Coleman, claiming fifteen of the debentures in priority to the bank. Neville, J., who tried the action, held that neither Edward Coleman's omission to register his transfer, nor his silence when he received notice of the bank's charge,

estopped the plaintiffs from asserting their title, and also that Florence Coleman's assignment, being prior in date to the bank's charge, gave her the better equity and entitled her to priority.

WILL—CONSTRUCTION—"ISSUE"—"PARENT."

In re Timson, Smiles v. *Timson* (1916) 2 Ch. 362. The Court of Appeal (Lord Cozens-Hardy, M.R., and Pickford and Neville, L.J.J) have affirmed the decision of Younger, J. (1916), 1 Ch. 293 (noted ante vol. 52, p. 225).

WILL—CONSTRUCTION—PROVISION AGAINST LAPSE OF LEGACY BY DEATH OF LEGATEE—BEQUEST BY CODICIL.

In re Smith, Prada v *Vandroy* (1916), 2 Ch. 368. The Court of Appeal (Lord Cozens-Hardy, M.R., Pickford, and Warrington, L.J.J.) have affirmed the judgment of Sargant, J. (1916) 1 Ch. 523 (noted ante vol. 52, p. 312).

WILL—SPECIFIC LEGACIES—SHARES—FREEHOLD MORTGAGES—COSTS OF TRANSFER TO SPECIFIC LEGATEES.

In re Grosvenor, Gosvenor v. *Grosvenor* (1916) 2 Ch. 375. The point decided in this case is simply this: that where an executor assents to specific legacies of shares in a limited company, or of freehold mortgages, the cost of transfers to the specific legatees must be borne by them, and not by the residuary estate.

WILL—RULE AGAINST PERPETUITIES—GIFT OF REALTY TO BACHELOR FOR LIFE—REMAINDER TO ANY WOMAN HE MAY MARRY FOR LIFE—REMAINDER TO CHILDREN OF FIRST LIFE TENANT IN EQUAL SHARES.

In re Garnham, Taylor v. *Baker* (1916) 2 Ch 412. The will in question in this case devised realty in trust for the testator's son for life, and after his death for any woman whom he should marry, for her life, with remainder in equal shares to the children of his son; and the question was whether or not this disposition infringed the rule against perpetuities. Neville, J., held that as the children entitled in remainder could be ascertained, and their estate would vest, on the death of the first tenant for life, the disposition did not infringe the rule, and was valid. But he held that a trust for sale after the wife's death was void for perpetuity, and did not operate as a conversion. The rule is usually stated as follows: "Where the vesting of an interest in

any property, whether legal or equitable, is postponed for a period exceeding a life or lives in being at the date of the instrument creating it, or (where the disposition is by will) at the death of the testator, and twenty-one years after such life or lives such interest is void." In this case it will be noted that the vesting of no estate is postponed beyond the limits of a life in being at the death of the testator, and twenty-one years after, although the possession of the ultimate remainder might possibly be postponed beyond that period. It nevertheless seems open to question whether this decision is not an invasion of the principle of the rule.

COMPANY—WINDING-UP—"JUST AND EQUITABLE"—COMPANIES ACT, 1908 (8 EDW. 7, c. 69) s. 129—(THE WINDING-UP ACT, R.S.C. c. 144, s. 11 (e)).

Re Yenidje Tobacco Co. (1916) 2 Ch 426. This was an application for a winding-up order against a limited company. The company was formed by two persons who were the sole shareholders and directors. The constitution of the company provided that in case of differences arising they should be referred to arbitration, and the award should be entered on the books of the company as a resolution duly passed by the directors. Differences having arisen, they were referred to arbitration, involving an expense of £1,000. One of the parties declined to give effect to the award, and brought an action for fraudulent representation against the other member of the company. The relations between the two became so strained that they refused to speak to each other and communications from one to the other had to be conveyed throught the secretary of the company. The business of the company, notwithstanding the disagreement, was still carried on successfully, and large profits were made. In these circumstances Astbury, J., held that it was "just and equitable" that the winding-up order should be granted, and this decision was affirmed by the Court of Appeal (Lord Cozens-Hardy, M.R. and Pickford and Warrington, L.JJ.).

PRACTICE—COSTS—APPORTIONMENT.

Holloway v. *Cromplin* (1916) 2 Ch. 436. This case, although turning on certain Rules of Court which have not been adopted in Ontario, may nevertheless furnish a guide as to the proper disposition of costs in a like case. Upon the construction of the English Rules in question it was held by Sargant, J., that where

an order is made giving a plaintiff part of the relief asked for, and ordering taxation of his costs of the action, except so far as it relates to specified claims on which he has failed, and ordering taxation of the defendant's costs of those claims, with a direction to set off; the plaintiff is entitled to the general costs of the action, and the defendant is not entitled to have them apportioned.

EASEMENT — WATER — UNDERGROUND PIPE—SEVERANCE OF TWO TENEMENTS—APPURTENANCES — IMPLIED GRANT OF EASEMENT—TWENTY YEARS' ENJOYMENT—JUS TERTII.

Schwann v. *Cotton* (1916) 2 Ch. 459. This was an appeal from the judgment of Astbury, J. (1916) 2 Ch. 120 (noted ante vol. 52, p. 359) and the Court of Appeal (Lord Cozens-Hardy and Pickford and Warrington, L.JJ.) have affirmed his decision.

INDEMNITY—ASSIGNMENT OF AGREEMENT TO INDEMNIFY—AMOUNT RECOVERABLE AS INDEMNITY.

British Union and National Ins. Co. v. *Rawson* (1916) 2 Ch. 476. This was an appeal from the judgment of Astbury, J. (1916) 2 Ch. 152 (noted ante vol. 52, p. 360) and the Court of Appeal (Lord Cozens-Hardy, M.R. and Pickford and Warrington, L.JJ.) have affirmed the decision. This it may be remembered was the case where a married woman debtor not possessed of any separate property, except a contract of indemnity against the debt, assigned this contract to her creditor, and it was contended that the married woman having no property out of which the debt could be levied, therefore the surety could not be compelled to pay anything on his contract of indemnity, but this contention failed both before Astbury, J., and in the Court of Appeal. The Courts holding that the measure of the surety's liability is his principal's liability, and not his capacity to pay.

WILL—CONSTRUCTION—"NEAREST OF KIN OF MYSELF"—ARTIFICIAL FUTURE CLASS.

In re Bulcock, Ingham v. *Ingham* (1916) 2 Ch. 495. This was a summary application for the construction of a will whereby the testator devised certain lands, which, on the death of a tenant for life were limited "to the use of the nearest of kin of myself who shall then be living, and who shall be a male bearing the name of Bulcock, his heirs and assigns for ever, provided nevertheless that such person shall not claim through, or under, my late brother Ambrose Bulcock." At the death of the testator,

and of the tenant for life, all of his next of kin were disqualified either by surname, or descent from Ambrose Bulcock, consequently there were none of the real next of kin qualified to take. But at the death of the tenant for life there were blood relations of the testator alive named Bulcock, being grandsons of paternal uncles of the testator. Peterson, J., who heard the application, held that the effect of the will was to create an artificial class, to consist of persons living at the death of the tenant for life, who were related to the testator, bore the name of Bulcock, and were not descendants of Ambrose, and that of the persons so ascertained, the nearest in blood to the testator were entitled.

CONTRACT—SALE OF ARTICLE BY SUB-CONTRACTOR TO BE ERECTED ON PREMISES OF PURCHASER FROM CONTRACTOR—SUB-CONTRACT—PROPERTY IN INCOMPLETE ARTICLE—LIEN OF SUB-CONTRACTOR FOR PURCHASE MONEY—SALE OF GOODS ACT, 1893 (56-57 VICT. c. 71) s. 18, R.5.

Pritchitt v. *Currie* (1916) 2 Ch. 515. The facts were that Mrs. Currie had contracted with a company, which was a co-defendant, for an electrical installation including, *inter alia*, a storage battery for £1,363. The defendant company then sub-contracted with the plaintiffs to supply and erect the battery on Mrs. Currie's premises. The plaintiffs sent the materials for the battery to the specified station, whence they were carried by the defendant company to Mrs. Currie's premises, but the plaintiffs did not proceed with the erection of the battery, and it was ultimately completed by the defendant company, which subsequently went into liquidation. In pursuance of an order made in the case, Currie paid into Court £269, part of the balance due by her to the defendant company, whereupon proceedings were stayed as against her. And the contest was between the plaintiffs and the defendant company as to which of them was entitled to the money in Court. The *Sale of Goods Act*, s. 18, lays down certain rules for determining the question whether or not the property of goods sold passes to the buyer; and the Court of Appeal (Lord Cozens-Hardy, M.R., and Pickford and Warrington, L.JJ.), overruling Sargant, J., held upon the construction of the sub-contract, that it was not a contract for the sale of a completed article, but of the component parts of the battery, with a supplemental contract that after delivery they should be erected on Currie's premises; that the delivery of the parts was an unconditional appropriation to the contract of goods in a deliverable state within s. 18, r. 5 of the *Sale of Goods Act*,

1893, and that, under that rule, the property therein passed to the defendant company: but (2) assuming the property did not pass, the plaintiffs could have no lien on the money in Court which represented a portion of the price payable to the defendant company under the original contract. Their Lordships intimate a doubt as to the correctness of *Beclamy* v. *Davey*, 1891, 3 Ch. 540.

WILL—REAL ESTATE—DEVISE AFTER DEATH OF TENANT FOR LIFE TO HIS HEIRS AND ASSIGNS—GIFT OVER IN CASE OF DEATH LEAVING, OR NOT LEAVING, ISSUE—DEFEASABILITY RESTRICTED TO DEATH IN LIFETIME OF TENANT FOR LIFE.

In re Brailsford, Holmes v. *Crompton & E. El. Bank* (1916) 2 Ch. 536. The testator, by the will in question in this case, devised lands to trustees in trust for the testator's widow for life, and after the death of his widow he devised the lands to his son "his heirs and assigns" and he further devised the property to his daughter if his son should die without issue, and if he died leaving issue, then he devised it to such issue in equal shares. The question, therefore, which Sargant, J., had to determine was, whether the gift over took effect on the death of the son whenever it might happen, or whether the gift over only took effect in case he should die in the lifetime of the tenant for life, and the learned Judge adopted the latter alternative, being of the opinion that the gift in fee simple was not intended to be reduced, in any event, to a mere life estate, as it would be, if the other alternative were adopted. He therefore held that the gift in fee indicated an intention that the contingency provided for by the testator was the death of the son in the lifetime of the tenant for life, and not his death at any time.

CHARTER-PARTY — EMPLOYMENT FOR CARRIAGE OF OIL AS CHARTERERS SHOULD DIRECT—LIBERTY TO SUB-LET ON ADMIRALTY OR OTHER SERVICE—REQUISITION OF SHIP BY ADMIRALTY—EMPLOYMENT OF FOR TRANSPORT OF TROOPS—EFFECT OF REQUISITION.

Tamplin S.S. Co. v. *Anglo-Mexican P.P. Co.* (1916) A.C. 397. This was an appeal from the decision of the Court of Appeal (1916) 1 K.B. 485 (noted ante, vol. 52, p. 217). The question was whether, on the proper construction of the charter-party, the requisitioning of the vessel by the Admiralty for war purposes put an end to the charter-party. The Courts below held that it did not, and the House of Lords (Lord Buckmaster, L.C., and Lords Loreburn and Parker—Lords Haldane and Atkinson dissenting), have now affirmed the decision.

SLANDER—CAUSE OF ACTION—WORDS IMPUTING MORAL MISCONDUCT TO SCHOOLMASTER—ABSENCE OF SPECIAL DAMAGE—WORDS NOT SPOKEN OF PLAINTIFF IN RELATION TO HIS CALLING.

Jones v. *Jones* (1916) A.C. 481. This was an appeal from the decision of the Court of Appeal (1916) 1 K.B. 351 (noted ante, vol. 52, p. 215). The action was for slander imputing immorality to the plaintiff, who was a schoolmaster. No special damage was proved, nor did it appear that the words were spoken in relation to the plaintiff's calling. The Court below held that, in the absence of the proof of special damage, the action would not lie; and the House of Lords (Lords Haldane, Sumner, Parmoor and Wrenbury) have now affirmed that decision.

NEGLIGENCE—OBSTRUCTION IN HIGHWAY—LEGALIZATION OF OBSTRUCTION BY STATUTE—PUBLIC REGULATIONS AS TO HIGHWAY.

Great Central Ry. v. *Hewlett* (1916) A C. 511. This was an action by a cab driver against a railway company to recover damages for maintaining an obstruction in a public highway, by reason whereof the plaintiff's cab was injured. The obstruction in question consisted of a gate post which was erected without authority, and judicially found to be a nuisance; but, after this decision, the railway company procured an Act of Parliament authorizing them to maintain the post, and it was suffered by the company to remain as originally erected. In consequence of the war regulations as to lights at night, the plaintiff, owing to the want of light while driving his cab, collided with the post, and the cab suffered injury. The jury at the trial found a verdict for the plaintiff and Darling, J., gave judgment in his favour, which was affirmed by the Court of Appeal (Lord Reading, C.J., Warrington, L.J., and Scrutton, J.) but the House of Lords (Lords Parker, Sumner and Wrenbury) unanimously reversed the judgment, holding that after the Act of Parliament the post ceased to be an illegal obstruction of the highway; and that the omission to light the post was not due to the defendants' default, but to the public regulation forbidding its being done, for which the defendants were in no way answerable. We may note that the company forbore to ask for costs, or for the return of the £50 damages, being simply desirous of having their rights and duty defined.

STREET RAILWAY—FRANCHISE—GRANT IN REVERSION—CONFIRMING ACT—DECLARATION IN CONFIRMING ACT AS TO AGREEMENT—STREET RAILWAY ACT (R.S.O. 1887. c. 171) s.18—55 VICT. c. 99 ONT.

Toronto v. *Toronto Railway Co.* (1916) A.C. 542. This was an appeal from the Supreme Court of Ontario. The point in controversy was as to the rights of the Toronto Railway Company in a portion of Yonge Street originally excepted from the franchise granted to the Company, but over which the city had subsequently acquired control. Under the Street Railway Act (R.S.O. 1887, c. 171) the city had power to grant a franchise for a street railway, for a period not exceeding 20 years. In September, 1891, the city made an agreement with the Toronto Railway to grant a franchise for 20 years from that day, and also for a further period of ten years, provided the agreement should be confirmed by the Legislature. The Legislature, by 55 Vict. c. 99 Ont., approved the agreement. At the time of the agreement the city limits extended beyond the Canadian Pacific Railway tracks on Yonge Street 1,320 feet, but on this 1,320 feet the County of York had previously granted to the York Radial Ry. exclusive rights to operate a street railway which was still existing, and this franchise did not expire until 1915. The agreement between the city and the Toronto Railway provided that the company was to have the exclusive right to operate its railway in Toronto, except, *inter alia*, over the 1,320 feet of Yonge Street but that the railway should have exclusive rights on the excepted part, so far as the city could grant the same. In 1915 the franchise of the Radial Railway over the 1,320 feet having expired, the city became entitled to grant a franchise over that part, and the Toronto Railway applied to the Ontario Municipal Railway Board for leave to extend its railway over the same. The Board granted the leave, and the Appellate Division of the Supreme Court of Ontario affirmed the order, and it is from that decision that the present appeal was brought. The main contention on the part of the city was that in 1891 it had no present right to grant a franchise over the 1,320 feet, and that they had no power to grant a franchise to take effect at some future time. The judicial committee of the Privy Council (Lord Buckmaster, L.C., and Lords Loreburn and Shaw) overruled these contentions and dismissed the appeal. Their Lordships held that a declaratory clause in the Confirmatory Act purporting to give the effect of the agreement could not be considered as in any way controlling, modifying, or affecting, the construction of the agreement which it confirmed.

PATENT—CLAIM OF PRINCIPLE—SPECIFICATION OF PRINCIPLE TO BE CLEARLY MADE.

Ridd Milking Machine Co. v. *Simplex Milking Machine Co.* (1916) A.C. 550. This was an appeal from the Court of Appeal of New Zealand. The action was for the alleged infringement of a patent. The plaintiffs claimed that their patent covered not merely apparatus, but a principle. The Court below dismissed the action, on the ground of want of novelty, and the Judicial Committee of the Privy Council (Lord Buckmaster, L.C., and Lords Loreburn and Shaw and Sir A. Channell) dismissed the appeal on the ground that where a principle is claimed by a patentee, it must be clearly and specifically claimed in his specification, which had not been done by the appellants.

CANADA—PROVINCIAL TAXATION—ASSESSMENT—DOMINION LANDS—LESSEE OF CROWN—B.N.A. ACT 1867 (30 VICT. c. 3) s. 125.

Smith v. *Vermillion Hills* (1916) A.C. 569. By the B.N.A. Act 1867, s. 125, it is provided that no lands or property belonging to Canada, or any province shall be liable to taxation. The appellant in this case was a lessee of certain Dominion lands, and was assessed under Provincial Statutes of Saskatchewan, in which statutes land is defined as including, for the purposes of the Act, any estate or interest therein. The appellant contended these Acts were *ultra vires*, as being in conflict with the B.N.A. Act, s. 125, and an interference with the Dominion's rights in the land, as the appellant's lease provided that it should not be assigned without leave. The Judicial Committee of the Privy Council (Lord Buckmaster, L.C., and Lords Haldane, Atkinson, Shaw, and Parmoor) affirmed the decision of the Supreme Court of Canada, holding that the Statutes could be read as imposing the tax upon the appellant's interest in the lands, and should be so read, to make them consistent with s. 125 of the B.N.A. Act.

CANADA—LEGISLATIVE AUTHORITY—WORK DECLARED BY STATUTE TO BE FOR GENERAL ADVANTAGE OF CANADA—REPEAL OF ACT—B.N.A. ACT 1867 (30 VICT. c. 3) s. 91 (29), s. 92 (10*e*).

Hamilton Grimsby & B. Ry. Co. v. *Attorney-General for Ontario* (1916) A.C. 583. This was an appeal from the Appellate Division of the Supreme Court of Ontario. The question in controversy was as to the jurisdiction of the Ontario Municipal & Railway Board over a railway in Ontario which had been declared by the

Dominion Parliament for the general advantage of Canada, but which Act had been subsequently repealed except as to such parts of the railway as crossed any Dominion railway. The Judicial Committee of the Privy Council (Lord Buckmaster, L.C., and Lords Haldane, Shaw and Parmoor) affirmed the decision of the Appellate Division, though not for the same reasons as that Court proceeded on. That Court held that the Act relied on as declaring the railway to be one for the general advantage of Canada did not really apply to the railway in question. Whereas the Committee thought that, even if it did, nevertheless its subsequent repeal restored the railway to provincial control.

SPECIFIC PERFORMANCE—VENDOR AND PURCHASER—TIME OF ESSENCE OF CONTRACT—PURCHASER IN DEFAULT—UNDISCHARGED MORTGAGE—VENDOR ALBE TO CONVEY.

Brickles v. *Snell* (1916) A.C. 599. This was an action by a purchaser for specific performance of a contract for the sale of land. It appeared by the evidence that time was of the essence of the contract, and that the plaintiff was in default (although the Judge at the trial found the contrary, and granted specific performance). The Appellate Division of the Supreme Court of Ontario found that the plaintiff was in default, and dismissed the action. The Supreme Court of Canada, though agreeing that the plaintiff was in default, considered that the decision of the Judicial Committee in *Kilmer* v. *British Columbia Orchard Lands*, 1913 A.C. 319, governed the case, and therefore restored the judgment pronounced at the trial. (The Chief Justice, and Anglin, J., dissenting). The Judicial Committee (Lord Buckmaster, L.C., and Lords Haldane, Atkinson, Shaw, and Parmoor) distinguished the *Kilmer* case on the ground that there, there was a waiver of the condition as to time, and here there was none. The appeal was consequently allowed, and the judgment of the Appellate Division restored.

RULE OF PROVINCIAL LEGISLATURE—CONTRACT EXTENDING OVER TWO YEARS NOT TO BE BINDING UNTIL APPROVED BY LEGISLATURE—CONTRACT IN CONTRAVENTION OF RULE.

Commercial Cable Co. v. *Newfoundland* (1916) A.C. 610. By a Rule of the House of Assembly of Newfoundland it is provided that in all contracts extending over two years, entered into by the Government of that Colony, there is to be inserted a condition that the contract shall not be binding until it is approved by the House of Assembly. In 1909 the Governor-in-Council

entered into a contract with the appellants extending over 25 years, whereby it agreed that they should have entry, duty free, for all cables etc., necessary for carrying out their operations. The contract did not contain the provision required by the Rule, and was never approved by the Assembly. The Supreme Court of Newfoundland held that the agreement was not binding on the Government, and the Judicial Committee of the Privy Council (Lord Buckmaster, L.C., and Lords Haldane, Atkinson, Shaw and Parmoor) affirmed the decision. Their Lordships, in doing so, held that an Act of the Colony authorizing the Governor-in-Council to remit any duty or toll payable under an Act of the Colony extended only to the remission of duties, or tolls, in a particular case, and not to granting a prospective and continuing exemption.

MUNICIPAL CORPORATION—CONSTRUCTION OF SEWER—INTERFERENCE WITH GAS MAIN—"LAND"—INJURIOUS AFFECTION ONTARIO MUNICIPAL ACT (R.S.O. 1913, c. 192) s. 321, s. 325 (1).

Toronto v. *Consumers Gas Co.* (1916) A.C. 618. This was an appeal from the Appellate Division of the Supreme Court of Ontario. The appellants, a municipal corporation, constructed a sewer under a street in Toronto, the freehold of which was vested in them. In doing so, it became necessary to lower the respondents' gas main, and the question at issue was, whether or not the corporation was bound to compensate the Gas Company for the expense occasioned to them by this interference. The Judicial Committee of the Privy Council (Lord Buckmaster, L.C., and Lords Haldane, Shaw and Parmoor) agreed with the Court below, that as the word "land" under s. 321 (*b*) of the Municipal Act includes a right or interest in, and an easement over land, the Gas Company was under s. 325 (1) entitled to compensation as for land injuriously affected by the corporation's operations, and the appeal was accordingly dismissed.

PRIZE COURT — JURISDICTION — ABANDONMENT OF VOYAGE — FREIGHT.

The St. Helena (1916) A.C. 625. The facts in this case were that a British vessel before the outbreak of the war shipped a cargo for an American corporation to be delivered to the consignor's order at Hamburg. Before the voyage was completed war broke out with Germany, and the vessel abandoned the voyage, and proceeded to a British port where the cargo was seized as prize, but subsequently released, without any formal order of the Prize Court, to the owners. The cargo being then

in the Manchester Canal Co's. warehouse, the shipowners notified the Canal Company of their claim for freight, and the Canal Company delivered the cargo ot the owners against a deposit of £1,680 to meet the claim for freight. The shipowners then commenced an action claiming to be entitled to be paid freight, but this action was dismissed on the ground that, as the voyage had been abandoned, no freight was payable. The shipowners then applied to the Prize Court for a declaration that they were entitled to some remuneration in lieu of freight for carriage of the goods and Evans, P.P.D., referred it to the registrar and merchants to determine what remuneration the shipowners were entitled to in the circumstances, and it was from this order that the owners of the cargo appealed, claiming that the Prize Court had no jurisdiction to make any such order, and even if he had, it ought not to have been made. The Judicial Committee of the Privy Council (Lords Parker, Sumner, Parmoor, and Wrenbury) were of the opinion that the Prize Court had jurisdiction to determine all incidental matters arising in regard to property seized as Prize, even though it may be released, but on the merits of the case they reversed the order of Evans, P.P.D., on the ground that, the voyage having been abandoned, the shipowners could have no right to freight, or any compensation in lieu of freight, in respect of cargo seized in an English port subsequent to the abandonment of the voyage.

ALBERTA—HUSBAND AND WIFE—MARRIED WOMEN'S RELIEF ACT (ALBERTA 1910 c. 18) s.s. 2, 8, 10.

Dreury v. *Dreury* (1916) A.C. 631. By a statute of the Province of Alberta 1910, c. 18, it is provided that the widow of a testator whose will gives to his widow, in the opinion of the Court, less than she would get if he had died intestate, may apply to the Supreme Court for relief, and on any such application the Court is empowered to make such allowance to the applicant out of her deceased husband's estate disposed of by his will as may seem just and equitable; but it is also provided that any answer or defence that would have been available to the husband in any suit for alimony shall be equally open to his executors or administrators, in any application under the Act. The widow of the deceased testator in this case, had twenty-four years prior to his death, without any legal justification, separated from him, and lived apart from him during the remainder of his life. Notwithstanding this fact, the Courts of Alberta granted the widow relief. The Judicial Committee of the Privy Council (Lord Buckmaster, L.C., and Lords Haldane, Atkinson, Shaw and Parmoor) reversed the decision, holding that in such circumstances the wife could have had no claim to alimony.

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Que.] [Oct. 18, 1916.

MONTARVILLE LAND CO. *v.* ECONOMIC REALTY, LIMITED.

Appeal—Jurisdiction—Matter in controversy—Supreme Court Act s. 46 (b) and (c)—Action to remove cloud on title—Discharge of mortgage—Deferment of payment of instalments or of price—Title to land—Future rights.

The judgment appealed from maintained the plaintiff's action brought to obtain an order that it should not be obliged to pay certain deferred instalments of the price of land sold to it by the defendants (appellants) with warranty against all hypothecs, save one for $2,000, until the discharge of certain other incumbrances alleged to be registered as affecting the said lands and for costs of protest, etc., amounting to $33.90. On motion to quash an appeal taken from this judgment to the Supreme Court of Canada:—

Held (Duff, J., taking no part in the judgment), that, as there was no amount in controversy of the sum or value of $2,000, nor any matter in controversy relating to the title to lands or to matters where future rights thereto might be bound, the Supreme Court of Canada had no jurisdiction to entertain the appeal under the provisions of s. 46, s.s. *b* and *c* of the Supreme Court Act, R.S.C. 1906, c. 139. *Carrier* v. *Sirois* (36 Can. S.C.R. 221) applied.

Appeal quashed with costs.

C. Dessaules, K.C., for the motion; *St. Germain*, K.C., *contra*.

Ont.] [Dec. 30, 1916.

CITY OF TORONTO *v.* LAMBERT AND INTERURBAN ELECTRIC RWAY. CO.

Negligence—Electric shock—Action against two defendants—Findings of jury—Joint liability—Agreement between defendants—Right to indemnity.

In an action against two parties claiming from them jointly and severally compensation for the death of plaintiff's son from electric shock caused by negligence of both defendants, may be

held liable if the negligence of each was a real cause of the accident; for either to escape liability it must be proved that the negligence of the other was the sole cause.

By an agreement between the Interurban Electric Co. and the City of Toronto, operating the Hydro-Electric System, the former undertook to "save harmless and indemnify the said corporation . . . against all loss, damages . . . which the corporation may . . . have to pay . . . by reason of any act, default or omission of the company or otherwise howsoever." An employee of the company was killed in course of his employment and in an action by his personal representative the jury found that the city and the company were each guilty of negligence which caused the accident.

Held, that the agreement did not apply to the case of damages which the city would have to pay as a consequence of its own negligence and neither relieved it from liability nor entitled it to indemnity. Judgment of the Appellate Division (36 Ont. L.R. 269), affirmed.

Appeal dismissed with costs.

C. M. Colquhoun, for appellant; *B. N. Davis*, for Lambert; *D. Inglis Grant*, for Interurban Electric Co.

Ont.] [Dec. 30, 1916.

COUNTY OF WENTWORTH *v.* HAMILTON RADIAL ELECTRIC RAILWAY CO. AND CITY OF HAMILTON.

Portion of county road—Railway franchise—Annual payments—Divisibility after annexation—Ontario Railway and Municipal Board—Order for annexation.

In 1902, the County of Wentworth passed a by-law by which an electric railway company was given the privilege of running cars over a county road on paying annually a certain sum for each mile of the operated road. In 1909, territory of the county, including part of said road, was annexed to the City of Hamilton.

Held, that the agreement with the railway company remained in force in respect of the portion of the road so annexed and the county was entitled to the whole of the annual payment as if the annexation had not taken place.

The railway company, by agreement in writing, accepted the said by-law of the county and covenanted with the latter "their successors and assigns" to perform all the conditions thereof.

Held, that the City of Hamilton did not, as a consequence of the annexation of county territory, become the "successor" of the county under said agreement and by-law so as to be entitled to a proportion of the payments to be made by the railway company thereunder.

Judgment of the Appellate Division (35 Ont. L.R. 434), reversed and that of the trial Judge (31 Ont. L.R. 659), restored.

Lynch-Staunton, K.C., and *Counsell*, for the appellants.

Rose, K.C., and *Waddell*, K.C., for the City of Hamilton, respondent.

Leighton McCarthy, K.C., and *Gibson*, for the Hamilton Radial Railway Co., respondents.

Ont.] [Feb. 6.

MACEWAN V. TORONTO GENERAL TRUSTS CORPORATION.

Contract—Consideration—Settlement of action — Statute of Frauds —Trade agreement—Restraint of trade—Criminal Code, sec. 498.

In 1905, M. and his two brothers entered into a contract with R. by which they gave him exclusive control of their salt works with some reservations as to local trade. R. assigned the contract to the Dominion Salt Agency, a partnership consisting of his firm and two salt manufacturing companies, which agency thereafter controlled about ninety per cent. of the output of manufacturers in Canada.

Held, that, as the output was exceeded by the quantity imported which may have competed with it, and as the price was not enhanced by reason of this control by the agency, the contract had not the effect of unduly restraining the trade in salt and did not contravene the provisions of sec. 498 of the Criminal Code.

In 1914, M., as administrator of his father's estate, brought action against the estate of C. who, in his lifetime, had been president of the Dominion Salt Agency and president of and largest shareholder in one of the companies comprising it. This action was based on an alleged agreement by C., in connection with the settlement of a prior action against the three partners in the agency, by which he promised to pay five-sixteenths of the difference between the amount claimed and that paid on settlement. Evidence of the agreement was given by the plaintiff's solicitor in the former action and by defendant's solicitor also.

Held, reversing the judgment of the Appellate Division (36 Ont. L.R. 244), Fitzpatrick, C.J., and Duff, J., dissenting, that the settlement of the action was good consideration for C's contract; that his agreement was not a promise to answer for the

debt of another and did not need to be in writing; that it was sufficiently proved; and that the evidence of the plaintiff's solicitor in the former action was corroborated (R.S.O. 1914, ch. 76, sec. 12), by that of the solicitor for the defendants.

Per Anglin, J.:—The solicitor was not an interested party and corroboration was not required for that reason; if required for any other it was furnished.

The original agreement transferring the salt business to R. was executed by the three brothers "as representing the estate of M., deceased." The action which was settled was brought by the same three persons. After the settlement letters of administration to M's estate were taken out.

Held, that the present action was properly brought in the name of the administrator but, if necessary for defendant's protection, his two brothers might be added as plaintiffs.

Appeal allowed with costs.

Garrow, for appellant. *Weir*, for respondent.

EXCHEQUER COURT.

Audette, J.] [Dec. 30, 1916.

LA COMPAGNIE GENERALE D'ENTREPRISES PUBLIQUES v. THE KING.

Collision—King's ship—The Exchequer Court Act, sec. 20 (c)—"Public work"—Negligence.

Except under special authority the Crown cannot be impleaded in the Courts, nor will an action in tort lie against it.

2. The Crown is not responsible in damages for collision with a King's ship in the absence of any statutory provision therefor.

3. A collision occurred on the River St. Lawrence between Levis and Quebec wherein the suppliant's scow-derrick was injured by a ship belonging to the Crown.

Held, that the suppliant could not recover under sub-sec. (*c*) of sec. 20 of *The Exchequer Court Act* as the accident did not happen on a public work.

A. Marchand, for suppliant.

F. E. Meredith, K.C., and *J. Gosselin*, for respondent.

Audette, J.] JACOB v. THE KING. [January 8.

Death resulting from negligence—Crown's servant Sub-sec. (f) sec. 20 The Exchequer Court Act—"Upon, in or about."

In the course of a shift of a gang of men fron one bunker to another in the hatchway of a collier, being unloaded by means

of a clam from a crane trestle on a government pier upon which extended spur lines of the Intercolonial Railway, the clam was kept in operation during such shift, and the suppliant was struck by the same and killed.

Held, that the omission to stop the operation of the clam during the shifts "in, on or about," the Intercolonial Railway, was negligence for which the Crown was liable under sub-sec. (*f*) of sec. 20 of *The Exchequer Court Act*.

E. Belleau, K.C., for suppliant. *E. Gelly*, for respondent.

Province of Ontario

SUPREME COURT.

Sutherland, J.] DODDS *v.* HARPER. [32 D.L.R. 22.

Mortgage—Assignment of charge—State of account.

The state of accounts can only affect the assignee of a charge or mortgage under the Land Titles Act, R.S.O. 1914, ch. 126, in so far as payments have been made subsequent to the date of the mortgage; if without actual notice when the assignment is made the assignee is not affected by the fact that the amount for which the mortgage was given has in fact never been paid.

[Land Titles Act, R.S.O. 1914, ch. 126, sec. 54; Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, considered.]

2. *Mortgage—Blanks—Charge fraudulently named—Bona fide assignee.*

The fact that a mortgagee is fraudulently named in a mortgage executed in blank does not affect the right of a *bonâ fide* assignee to treat the person named as the valid holder of the charge, although in fact the latter had paid nothing to the mortgagor; it is only in so far as payments have been made that an assignee is affected by "the state of the account."

J. E. Jones and *V. H. Hatten*, for plaintiff.

Bradford, K.C., for defendant.

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

The prominent features of this case are as follows:

1. A document signed in blank.

2. A mortgage or charge, without consideration—no money having been advanced.

3. A receipt for the mortgage money contained in the body of the charge.

4. An assignment of the charge for value to a purchaser, without notice that no money had been advanced.

5. No notice of the assignment to the chargor, and no concurrence by him in the assignment.

6. The defence of purchase for value without notice, not considered in the case.

1. *Document signed in blank*.—At the common law, a document under seal executed in blank is not a deed, and can only be filled up by someone other than the signer upon proper authorization: Armour on Real Property, 2nd ed., p. 392.

There may be some difference of opinion as to whether this principle should be applied to dealings under the Land Titles Act, R.S.O. ch. 126.

By sec. 30 (1). Every registered owner may, in the prescribed manner, charge the land, etc. By sec. 38 (1), he may, in the prescribed manner, transfer the land. The prescribed manner is not defined in the Act. But sec. 69 (1) declares that every transfer or charge signed by a registered owner shall confer a right to be registered. And sec. 102 provides that "notwithstanding the provisions of any statute, or any rule of law, any charge or transfer of land registered under this Act may be duly made by an instrument not under seal," and it is to have the same effect as to stipulations therein as if it were under seal. (It is noticeable that transfers of charges are not included in these provisions, although the custom is to dispense with a seal.) So far as these provisions are concerned, sealing alone is dispensed with. And it might be inferred that the other provisions of law respecting conveyances should apply, were it not for the fact that when a signed transfer or charge is presented to the Master of Titles, the transferee becomes entitled to be registered as owner or chargee under sec. 69, and to receive a certificate of ownership. It seems, therefore, that if the transfer or charge were originally void by reason of its having been signed in blank, it becomes effective by the registration, and enables the transferee or chargee to pass on to his purchaser a good title to the land or charge.

2. *Mortgage without consideration*.—It cannot be doubted that where a mortgage is made for an anticipated advance, and the advance is not made, nothing can be recovered by the mortgagee; and the mortgagor has a clear right to have the instrument delivered up to be cancelled.

3. *Receipt embodied in conveyance*.—By R.S.O. ch. 109, sec. 6, "A receipt for consideration money or securities in the body of a conveyance shall be a sufficient discharge to the person *paying or delivering the same*, without any further receipt being endorsed on the conveyance." The English practice was to ignore the receipt in the body of the conveyance, and, when the purchase money was paid, to endorse a receipt therefor on the conveyance; and absence of such endorsed receipt was constructive notice to a subsequent purchaser that the money had not been paid. This was not the practice in Ontario; but, in any event, this enactment renders a separate receipt for the purchase money unnecessary. But the purchase money must be actually paid or the securities actually delivered. It is difficult to see what, if any, change has been made by this enactment as to the relations between vendor

and purchaser. Equity always allowed a vendor to shew the non-payment of the consideration notwithstanding the receipt. Under this enactment, the receipt is a discharge only if the money has been paid; and it is still open to the vendor to shew, as against his purchaser, that the money has not been paid, notwithstanding the receipt. In other words, as between vendor and purchaser, if the money has been paid the embodied receipt is a discharge to the purchaser; if it has not been paid the enactment does not operate to make the receipt a good discharge.

It is as against a subsequent purchaser only that this section becomes of real importance.

4. *Purchase for value without notice—Embodied receipt.*—By sec. 7 of the same Act it is provided that a receipt in the body of a conveyance "shall, in favour of a subsequent purchaser, not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof."

The conditions necessary for the application of this section are that there should be a receipt in the conveyance, and no notice to the purchaser that the consideration has not been paid wholly or in part. Under these circumstances the receipt is "sufficient" evidence of the payment of the whole.

"Sufficient evidence" in recitals under the Vendor and Purchaser Act, R.S.O. ch. 122, means *primâ facie* evidence only of the facts recited, because it is qualified by the phrase "except in so far as they are proved to be inaccurate."

Under the present enactment, sufficient evidence is interpreted to mean conclusive evidence.

In *Jones* v. *McGrath*, 16 O.R. 617, such a receipt was held to be conclusive, in favour of a purchaser who had no notice that the consideration mentioned in the deed had not been paid. Ferguson, J., delivering the judgment of a Divisional Court, said (p. 623) that the purchaser is "by law authorized to deal on the footing of that consideration having been paid upon the execution of the conveyance." And he further remarked that, if the receipt was sufficient evidence at the time he was paying away his money, it should not be held to be insufficient evidence in his favour of the same fact at any subsequent time when it is out of his power to regain his former position.

In *Lloyds Bank* v. *Bullock*, [1896] 2 Ch. 192, a trustee, entitled to sell, executed a conveyance containing a receipt for the purchase money to A., who deposited the deed with the plaintiffs for an advance, without having paid the trustee anything, and the plaintiffs were held to be entitled to rely on the statutory effect of the embodied receipt as proof of payment to the trustee.

Bateman v. *Hunt*, [1904] 2 K.B. 530, was very like the principal case. The defendants applied to a solicitor for a loan, and executed a mortgage containing a receipt to the solicitor's clerk. The full amount of the loan was not advanced. The solicitor's clerk subsequently, at the instance of the solicitor, assigned the mortgage to him, and he made a sub-mortgage thereof to the plaintiff's testator. It was held that the plaintiffs were entitled to

protection under the receipt, which to them was conclusive evidence of the payment of the whole consideration expressed in the original mortgage.

By the interpretation clause of the same Act (R.S.O. ch. 109) the word "conveyance" includes assignment, mortgage, etc.: sec. 2 (*a*), and mortgage includes charge: sec. 2 (*c*).

The effect of this enactment standing alone is therefore to put the assignee of a mortgage in almost the same position as the purchaser of land, where the fact is that none, or some part only, of the consideration has actually been advanced. The assignee is entitled to assume (in the absence of notice to the contrary) that the whole consideration has been paid, and need make no inquiry of the mortgagor or chargor. But he takes subject to the state of the accounts between the mortgagor and mortgagee as to subsequent dealings between them.

5. *No notice of assignment to mortgagor.*—A mortgage or a charge is a chose in action and subject to the enactment relating to the assignment of choses in action. By R.S.O. ch. 109, sec. 49, it is provided that any absolute assignment of a chose in action "of which express notice in writing shall have been given to the debtor" shall be effectual in law to pass and transfer the legal right to such chose in action "from the date of such notice."

It is clear from this enactment that the right to the debt, as distinguished from the title to the land, depends upon the giving of the notice. The title in the assignee is not legally perfect if the notice is not given. No time is fixed or limited for the giving of the notice, except that it must be given before action brought, otherwise the plaintiff's title will not be complete. In *Bateman* v. *Hunt*, [1904] 2 K.B. 530, *supra*, the notice was not given by the sub-mortgagee, but it was given by his executors, the plaintiffs, before action brought, and it was held to be effectual.

In *Pringle* v. *Hutson*, 14 O.W.R. at p. 1085, it is pointed out that the assignee of a mortgage cannot sue without adding the mortgagee if he has not given notice of the assignment to the mortgagor. It does not appear from the report of the principal case whether notice of the assignment was given. But it may be assumed that, if such a notice had been given to the mortgagor, he could have been put on the alert, and that something would have been heard of that at the trial. It may be good policy, however, on the part of the assignee of a mortgage, not to give the notice until his transaction is completed, inasmuch as he is so well protected by the receipt clause. And in any event, the requirement as to notice is no protection to the mortgagor, in a case where the mortgage money is not advanced, because it is not required to be given until after the assignment has been effected.

6. *The defence of purchase for value of a mortgage.*—This point was not dealt with expressly in the case, except in so far as the embodied receipt protected the plaintiff. There is another enactment, the effect of which is problematical, in view of the present case and the authorities upon which it was decided. By R.S.O. ch. 112, sec. 12, it is enacted that "the purchaser in good faith of a mortgage may, to the extent of the mortgage, and *except as against the mortgagor*, set up the defence of purchase for value without notice in the same manner as a purchaser of the mortgaged property might do." Reference may be made to two articles on defence of purchase for

value without notice; 3 C.L.T. 1, by A. H. Marsh, Q.C., and 17 C.L.T. 282, by John S. Ewart, Q.C. Purchase for value without notice was always a defence, and not an instrument of attack. The defendant holding the legal estate was protected, under the circumstances, as against equities, under the maxim, where equities are equal the law will prevail. As between equitable interests only, the defence had no place. Consequently the provision that a mortgagee may set up the defence in the same manner as the purchaser of the mortgaged property (an equitable interest only) is somewhat cryptic. An assignee of an equity of redemption never could have set it up in a Court of Equity, because he had not the legal estate. But attributing full significance to it, as if it stood without this qualification, what is its effect? It is still a defence only. Possibly, matter of form in pleading might be disregarded. But if the defendant in the principal case had counterclaimed for rescission of the charge and assignment, the plaintiff would have been put to her defence of purchase for value without notice. Similarly, if the action had failed for want of notice of the assignment, and after dismissal the defendant had commenced an action for rescission, the plaintiff would have been put upon the same defence. But the obvious answer would have been—that defence cannot be set up against the mortgagor.

The case would now stand thus:—"Conveyance" includes "mortgage," and "mortgage" includes "charge" (R.S.O. ch. 109, sec. 2 (*a*) and (*b*)). Applying these enactments to sec. 7 of the Act, in so far as it applies to the particular case, it would read as follows: "a receipt for consideration money in the body of a charge shall, in favour of a subsequent purchaser of the charge, not having notice that no consideration was paid, be sufficient evidence of the payment of the whole consideration." On the other hand, defence of purchase for value without notice cannot be set up against the mortgagor. And, if the defence of the assignee under the former enactment is in fact the defence of purchase for value without notice, we have here two contradictory enactments. The enactment as to the receipt can only be taken advantage of by a purchaser without notice, but apparently it does not constitute the defence of a purchase for value without notice as formerly understood. And if the assignee relies on it, he need not resort to that defence at all. It seems clear that in order to call for the application of sec. 12 of R.S.O. ch. 112, the mortgagor must be a party to the proceedings; and he must *ex hypothesi* also be an attacking party in order that the defence may be set up. If so, he cannot set up the defence of purchase for value, but he may set up that the embodied receipt is conclusive proof that the mortgagor received the mortgage money.

An assignee of a mortgage might be attacked by another assignee from the same assignor. Or he might be attacked by some other person who had an equitable right to the land, and defend his legal estate to the extent of the mortgagee. In both of these cases he might set up the defence. But, where the mortgagor attacks, the saving of the right to set up the defence against him, is poor satisfaction, if the mortgage contains a receipt for the money.

E. Douglas Armour, K.C.

Province of Manitoba.

KING'S BENCH.

Full Court.] [32 D.L.R. 57.

STUBBS *v.* STANDARD RELIANCE MORTGAGE CO.

Interest—Mortgage—Statement of rate.

The provisions of s. 6 of the Interest Act, R.S.C. 1906, c. 120, are not sufficiently complied with, if a mortgage, under which payments of principal and interest are blended, states the amount of principal and the rate of interest, but does not state whether the interest is calculated yearly or half-yearly. The intention of the Act is that the rate of the interest and how it is computed shall be stated plainly on the face of the mortgage.

Wilson, K.C., *McAlister* and *Garland*, for appellants.

Bergman, for respondent.

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

Three decisions involving an interpretation of the Interest Act (R.S.C. 1906, ch. 120), have been given in Alberta, and one in Manitoba. The decision of Beck, J. (Alberta), in *Canadian Mortgage Investment Co.* v. *Baird*, 30 D.L.R. 275, was in opposition to the opinion expressed in the other three decisions.

The section to be construed reads as follows:

6. Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement shewing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

In the *Colonial Investment Co.* v. *Borland*, 6 D.L.R. 211 (1912), the mortgage contained a covenant to pay $600 and interest at 12 per cent. per annum by equal monthly instalments.C Harvey, J. (delivering the judgment of the Court), said: "There is nothing in the covenant to pay the principal and interest at 12 per cent. to suggest that it is in the result the same so far as amount is concerned as the payments under the proviso, and slight computation shews that it is not." It will be noted, therefore, that though the mortgage *stated* the amount of principal and the rate of interest per annum, the Court held that this was not the "statement" required by sec. 6 of the Interest Act. "Moreover," said the Court, "it is not a compliance with the statute, since it provides for interest monthly, and not yearly or half-yearly in ad-

vance." But the Interest Act, sec. 6, does not say that interest shall not be payable except yearly or half-yearly, but merely that it shall contain a statement shewing "the rate of interest, calculated yearly, or half-yearly, not in advance." It is submitted as beyond the possibility of successful dispute that interest calculated yearly or half-yearly may nevertheless be made payable in equal monthly instalments.

In the *Canadian Northern Investment Co.* v. *Cameron*, 32 D.L.R. 54, the mortgage *stated* that the principal was $1,400 and the interest thereon at the rate of 10 per cent. per annum, the blended amounts being made payable in ten half-yearly instalments of $179.90 each. The action was tried by Harvey, C.J. (Alta.), and in the judgment he said: "There is no statement conveying the information the statute demands. Only by a somewhat involved calculation can the rate of interest be determined. The instalments are payable half-yearly, but it by no means follows that the amount is ascertained by calculating it half-yearly. It may, perhaps, be said that the statement does not require to shew that it is calculated not in advance, because the statute prohibits it being calculated in any other way, but inasmuch as interest may be calculated either yearly or half-yearly (that is, the statute permits it), it is necessary for the mortgagor to know which it is. The mortgage fails to comply, both in form and substance, with the conditions of the statute."

The *Canadian Mortgage Investment Co.* v. *Baird*, 30 D.L.R. 275, was tried before Beck, J. (Alta.), and his judgment was given less than one month after the one last mentioned. The mortgage in question contained a clause to the effect that the parties agreed that the principal sum was $1,300, and the rate of interest 10 per cent. per annum. The Judge said: "I think this a sufficient compliance with the Act." He held that no statement in figures indicating the method of calculation was necessary. "Statement," in his opinion, meant no more in the Interest Act than "Statement of claim" meant in the Judicature Act. The words "not in advance" were, he said, merely a prohibition. The purpose of the Act was, he thought, to enable the mortgagor to make his own calculations.

In *Stubbs* v. *Standard Reliance Mortgage Co.* (Man.) *supra*, the mortgage contained precisely the same information as in the action last mentioned, but the Court of Appeal preferred the opinions given by the Alberta Court of Appeal and by Harvey, C.J., both above stated, to that of Beck, J. In delivering the judgment of the Court, Richards, J.A., said: "I think that the intention of the Act is, that there shall be stated plainly, on the face of the mortgage, not only the rate of interest, but how the same is computed, so that the mortgagor shall, when entering into the contract, be informed how the named interest had been calculated (whether yearly or half-yearly) and that he shall afterwards, if he be able, check over the amounts and see how he stands."

This last decision goes nearer than any other to expressing distinctly what seems to have been the feeling of all the Judges except Beck, J., as to the purpose of the Act. It seems to mean that in a mortgage providing for periodical payments of blended amounts, there shall be a calculation in figures shewing how each amount is constituted, by distinguishing principal and interest, and stating that the interest is calculated yearly or half-yearly, as

the case may be, at a named rate. No other method would enable an illiterate or inexperienced man to do what the mortgagor, it is said, should be enabled to do.

But the purpose of a section of the Act must be gathered from its words, if they can be construed precisely, and, if not, they should be given a sense which, though not correct grammatically, is in harmony with the whole Act. If the words of the section admit of more than one construction, the true meaning is to be sought in the context, but the language must not be strained on account of the supposed intention of the legislature. (Maxwell on Statutes, Let us then examine the words of sec. 6 with their context. They deal with mortgages on real estate under which payments of principal and interest are blended. It is provided that the mortgage shall contain a statement shewing the rate of interest chargeable thereon, but no restriction as to the rate which may be charged, and though the rate shewn must be "*calculated*" "yearly or half-yearly," it is not said that the payments shall not be weekly, monthly, or otherwise.

"No interest whatever shall be chargeable unless the mortgage contains a statement shewing the rate of interest, calculated yearly or half-yearly, not in advance."

Beck, J., held that the mortgage need not shew that the interest was not calculated in advance, since "not in advance" were merely prohibitory words, and need not contain figures shewing the rate of interest, and that it was calculated yearly or half-yearly, since, in his opinion, a covenant to pay a named rate yearly or half-yearly was a "statement" in the sense that word is used in "statement of claim," etc. But upon critical examination it appears that the word "statement" cannot be construed in that detached way; it must be "a statement shewing the rate *calculated* yearly or half-yearly;" *not* the rate at which it was calculated, but the calculation itself.

In sec. 4, dealing with mortgages not on real estate, it is provided that if the contract does not contain "an express statement of the yearly rate or percentage of interest," certain consequences shall follow. This is the kind of a statement that Beck, J., thinks sec. 6 aims at, which it clearly is not, for, by the very words of section 4, mortgages on real estate are excepted. A statement of a yearly or half-yearly rate is a different matter then from a "statement shewing a rate *calculated*."

It is submitted, therefore, to be the better opinion that mortgages on real estate under which payments of principal and interest are blended should contain a detailed statement in figures shewing how each payment to be made thereunder is made up, distinguishing principal and interest, and shewing that a named rate is charged yearly or half-yearly.

The fact that so much uncertainty admittedly exists about a matter of frequent occurrence and great importance is a reflection upon the draftsmanship of sec. 6. Indeed, the whole Interest Act could be improved easily in its construction.

Book Reviews.

Mounted Police Life in Canada A record of thirty-one years' service. By CAPTAIN R. BURTON DEANE. Cassell & Co., Ltd., London, New York Toronto and Melbourne. 1916.

This is the first attempt so far as we know to give a view of the North West Mounted Police from the inside and no one better qualified for the task could undertake it than the author.

The history of this force is replete with romantic incidents, records of devoted service, soldierly discipline and heroic deeds. The North West Mounted Police have played a striking part in the orderly development of that portion of our Dominion where its services were required. As a factor in the administration of justice it has been both paternal and fraternal—a wise parent as well to unruly white men as to the wayward and uneducated Indians when called upon to control, to punish and to protect, and a brother to those in trouble and in need of advice.

Stories many have been told of the fearlessness of the brave men who seemed naturally to drift into such a service; and who therein exemplified the dominance and the innate love of law and order, justice and fair play which has made our great Anglo-Celtic race the best and most successful colonising people the world has ever seen. As an illustration, it is known that one policeman has travelled many miles over the pathless prairies to an Indian Reservation, and there, single-handed, arrested an Indian accused of some serious crime, perhaps, murder; no resistance being attempted, for the accused knew not only that the policeman was the best man of the two, but he and his friends also knew that escape was not worth the risk, and that at the back of this lonely but fearless determined man was England's justice: If guilty he knew he would be punished, hanged if that should be the sentence, but if innocent that he would be returned safely to his people.

The writer, when travelling through Dakota, Montana and Idaho some years ago, met many of the officers of the United States army stationed there and they all expressed the greatest admiration for the Canadian force and the results obtained; comparing it with the methods of their Government which left their Indians to the tender mercies of unscrupulous agents and sutlers whose frequent ill treatment and cheating of the Indians often led to reprisals and bloodshed.

The book before us begins with a sketch of the author's life at the various posts where he was stationed, interwoven with many stories of prominent men with whom he was brought in contact, and incidents telling of the nature and hardships of the service of this splendid body of men. The later chapters are the most interesting to lawyers, giving as they do records of numerous criminal trials which Captain Deane was called upon to manage, and, in connection with them, to hunt up and arrest offenders, to collect evidence and often to instruct magistrates as to their duties. These interesting and picturesque chapters make most interesting reading.

The Journal of the Society of Comparative Legislation, edited by SIR JOHN MACDONNEL, K.C.B., LL.D., F.R.A., and EDWARD MANSON. New Series, vol. 16. London. John Murray, Albamoral St., W. 1916.

The contents of this series are varied and interesting, covering a great variety of subjects, giving a bird's-eye view of much that is going on of legal interest in British jurisprudence throughout the Empire.

War Notes.

On the 1st instant the Huns began the threatened intensified ruthless submarine war. All ships within a certain area to be sunk without warning, whether neutral or belligerent. All pledges as to submarine warfare are cancelled. One American ship only to be permitted to sail once a week to and from England and such ship not to be molested if it goes on a described course and to a named port.

On the 5th instant the President of the United States severed diplomatic relations with Germany and instructed Mr. Gerard to leave Berlin and handed Count Von Bernstorff his passports.

We have remarked before now that the legal profession has sent more men to the front in proportion to its numbers than any other class of citizens. This is well illustrated by a report from the Calgary Bar Association. At the outbreak of the war the

Association had a membership of 126 duly qualified lawyers practising in Calgary. Of these 30 have gone to the front, some of them never to return. In addition to the Bar 30 law students from the Calgary offices have also joined the ranks. The record of Western Canada is splendid. When we compare this with a certain province in Eastern Canada one naturally asks the reason why one province shirks its responsibility as a component part of the Dominion, and lets the other eight provinces protect them, their wives and their children. There must be a reckoning for this some day. In the meantime why should not the Government enforce the Militia Act of Canada, and put all parts of the Dominion on the same footing so far as military service is concerned?

Bench and Bar.

Law Society of Alberta.

The proceedings of the sixth general meeting of the Bar, held at Edmonton under the auspices of this society, in December last, was one of great interest to the profession of Alberta, and several of the matters discussed had also an interest for members of the profession in other provinces. We regret that want of space prevents our giving an extended report of what was done and said. We can only refer to a few of them:—

A report was presented of the committee on the evils of a patronage system which resulted in a resolution to the effect that the efficient administration of justice would be promoted by the appointment of an independent commission to make appointments to the land titles and other legal offices of the province. We have frequently referred to the objectionable practice of appointing ignorant laymen to positions which, certainly for the benefit of the public, should be occupied by members of the profession. Another resolution seeks to prevent unlicensed conveyancers and agents from doing business which properly comes within the province of lawyers. Other matters discussed were: Costs in probate and administration matters, mode of election of Benchers, etc.

At a meeting of the Benchers held in January last, James Muir, K.C., LL.D., was elected President, and Mr. C. F. Conybeare, K.C., D.C.L., Vice-President; Mr. Charles F. Adams being Secretary.

It was reported that the following members of the profession were killed in action or died of wounds during the last half-year: George Thorold Davidson, Medicine Hat; Norman Murray, Vermillion; and Horace A. Dickey, Edmonton; and E. F. J. V. Pinkham, Frank P. Oldroyd, Joshua S. Wright, Harry H. Dinning, students. One hundred practitioners were reported as having enlisted for active service.

Sir Henry Bargrave Deane, of the Probate, Divorce and Admiralty Division of the Supreme Court of Judicature in England, has retired from the Bench owing to ill health. He was a distinguished counsel in divorce, ecclesiastical and probate causes before his appointment. It is said that his distinguished appearance and courtesy of manner were a great asset in maintaining the dignity of his Court. He is succeeded by Sir Maurice Hill, a successful practitioner in the Commercial Court, and also well known in artistic and scientific circles.

Flotsam and Jetsam.

TURNER v. COATES.
(115 L.J. 766).

Good farmer Coates a colt once had of quite a tender age,
It frisk'd about as colts will do, for colts are not quite sage
A walk, he thought, his colt should take all in the summer air
And for to lead its infant steps he got a good old mare,
And Bunce, a boy, to guide them right, he also did procure,
And in the darkness of the night he thought they'd be secure.

Behold the trio now do start upon their darksome way
Young Bunce with care the mare did lead—. The colt behind did stay:
And as he ambled in the dark a brilliant light appeared
Which terror struck into his heart and made him most afeared.
And when Miss Turner, on her bike, approached the startled colt—
He straightway kicked her off her wheel, and then away did bolt.

To justice then away went she and asked that farmer Coates
Should, for the damage thus sustained, shell out some golden oats.
The Judge looked wise and stroked his beard, and said "I do declare
The damage that your colt has done, now Coates you must repair!"
And thus said Lush & Bailhache, JJ., who on the case did sit,
"Coates, for his want of care, is bound to pay the maid a bit."

G.S.H.

The Morality of the Advocate.

Some discussion in the public press has followed the publication of Mr. Purcell's Reminiscences, which we noted last week. Mr. Purcell has frankly confessed that he did his best to win his cases by every honest means which legal etiquette permits to the advocate, and that in many cases he succeeded in securing a favourable verdict for accused persons of whose guilt he himself felt little doubt; although, at the same time, he mentions the fact, also recorded by Serjeant Ballantine as his experience of prisoners, that not one of his clients has ever admitted to him that he was guilty. Naturally to the lay critic this suggests the old accusation, against advocates, that they help to pervert justice by securing the escape of the guilty or the punishment of the innocent. We do not think that the latter often happens nowadays. The tradition that prosecuting counsel should act fairly, recently endorsed emphatically by the Court of Criminal Appeal, is a strong one at the English Bar, and offences against it are rare. We cannot say that no breach of this honourable tradition ever occurs, for now and then—usually in a private prosecution—a zealous counsel, too eager for triumph, allows himself to ride for a verdict of guilty. But such cases are rare and are universally condemned by the public opinion of the Bar. They would probably be eliminated altogether if private prosecutions were abolished, as is practically the case in Scotland, and if the practice of granting out Treasury briefs on circuit to counsel whose qualifications are derived from political work rather than the extent of their legal practice was finally abandoned. But the case of defences is different. Here an advocate always will do his best to win the case for his client by every proper means, and it would be prudery to deny that in practice the normal advocate does so. If he did not, clients—whether innocent or guilty—would seek a less pedantic and more enthusiastic advocate.—*Solicitors' Journal.*

Changes in the Mode of Conducting Criminal Trials.

Englishmen read with pleasure the unstinted praise which Americans bestow on the conduct of criminal trials in this country. This praise is particularly directed to the large powers exercised by the presiding Judge and to the confidence of the Bar that these powers will be exercised with fairness and impartiality. But if we are to accept the statement of the late Mr. E. D. Purcell, in his recently published work, "Forty Years at the Criminal Bar,"

there was a time within living memory in which the excellence of our criminal procedure was by no means conspicuous. Mr. Purcell tells us that his early experiences of a trial conveyed the idea that it was a formal preliminary to passing sentence upon the accused, who had the effrontery to plead not guilty. No doubt was entertained of his guilt, but it was necessary to make the jury realise it, and their untrained minds required guidance. The prisoner's counsel, often treated with scant courtesy and little consideration, was endeavouring to defeat justice, and his endeavour must be promptly checked; any point that he might make in the accused's favour must instantly have its baselessness exposed. Sir Peter Edlin, who was Judge in the metropolitan county Courts for more than twenty years, is said to have regarded an acquittal as a personal insult, and to have been in the habit of interposing to displace anything favouring the defence which had been elicited in the cross-examination. At the present day, we are assured, while there is much less difficulty in obtaining an acquittal, there is much more difficulty in obtaining a conviction. This improvement in the administration of criminal justice would seem to be due to the influence of particular Judges rather than to differences in the course of business at assizes and sessions. Americans who are interested in the reform of criminal procedure may be encouraged by the fact that in nearly all the States the bench is respectable in point of character and is occasionally adorned by men of the highest eminence.—*Solicitors' Journal.*

A good story is current at Osgoode Hall in reference to the late Chancellor Boyd's handwriting, which, as all who are familiar with it, know was of a peculiarly crabbed character, and generally illegible to any but experts in calligraphy, it is this:—A party of Judges were at luncheon one day when the conversation turned on the subject of handwriting, and that of the Chancellor not unnaturally came in for rather free criticism. The Chancellor, who was present, remarked that it would probably surprise his critics to know that he had once taken a prize for handwriting, whereupon the late Mr. Justice Ferguson replied that he thought that it must have been for Arabic. Those who are familiar with Arabic and the late Chancellor's writing will appreciate the appropriateness of the remark. The curious twists and turns in which the late Chancellor's writing abounded have puzzled many a reader, but there was at least one official at Osgoode Hall who

was rarely if ever "stuck" by them; and as to him we may remark that he thought his writing was "copperplate." Printers, however, as we happen to know, at least stuck when his writing appeared and said life was not long enough in these strenuous days to decipher it, and they accordingly insisted that his "copy" should be typewritten.

Circumstantial Evidence.

The weakness of circumstantial evidence, and the danger of presuming guilt upon this class of evidence alone, is well exemplified by a case referred to in the *Solicitors' Journal* as follows:—

At a recent inquest at Croyden upon the body of a young woman who appeared to have been killed by a fall from a railway train in which she was a passenger, the glass in one compartment was broken, and soldiers in the adjoining compartment had heard screams and the breaking of glass before the train arrived at its destination. Attention was naturally directed to a man named Batty, who was the only other passenger in the compartment in which the deceased travelled, and although there was not the slightest evidence that he had offered her any violence, or that she had been in any struggle between them, there are unfortunately many unthinking persons who are ready to form unfavourable suspicions without any evidence to support them. Such persons are capable of believing that the fact that Batty was the last person seen with the deceased was enough to charge him with having behaved towards her in such a manner that she was alarmed and fell from the carriage while attempting to escape from it. But the evidence of Batty, delivered in the most straightforward manner, and that of the doctor who had attended him, quickly dispelled any mystery which hung about the case. Batty suffered from epileptic fits, and his contortions during one of these fits which had attacked him while in the compartment were calculated to terrify the deceased and cause her to force the door and to endeavour to escape from the carriage. The coroner and jury were satisfied with this evidence and there was a verdict of death from an accidental fall. One is reminded that in the year 1699, Mr. Spencer Cowper, a rising barrister on the Home Circuit, who was afterwards raised to the Bench, was most unjustly put on his trial for the murder of Miss Sarah Stout without any evidence to support the charge apart from the circumstance that he was the last person in her company.