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THE DECEASED WIFE'S SISTER.

I. INTRODUCTORY.

Ecce iterum Crispinus! The revolving seasons bring round once more this annual subject of discussion. The poet tells us:—

"In the Spring a young man's fancy lightly turns to thoughts of love."

This might well be read in view of the persistent agitation on the above subject: "In the Spring a Briton's fancy lightly turns to thoughts of marriage with a deceased wife's sister."

Just now the newspaper agitation is warm, and frequent paragraphs of late have told us of Lord Strathcona's renewed efforts —doughty champion that he is—to remove this injustice to certain colonials. Moreover the daily papers have recently given editorial expression to their sense of the imperial importance of the subject. One of them says:—"The people of Canada, and perhaps of some of the other self-governing colonies also, have a very practical grievance under the law as it stands at present. In 1882 the Dominion Parliament, at the instance of the present Mr. Justice Girouard of the Supreme Court, expressly sanctioned marriage with a deceased wife's sister, and, therefore, for over twenty years all such marriages have been perfectly lawful and valid. The legitimacy of children born under these marriages cannot be questioned in this country, but they would be regarded

as illegitimate in England . . . If nothing more can be done in the matter, at least respectful but vigorous protests should be made against subjecting law-abiding and moral-living Canadians to legal and social discrimination which it would be easy to prevent." The object of this present article is to consider how far these statements are true, and to see what is the extent of the grievance, if any, to which "law-abiding and moral-living Canadians" are subject.

The writer does not aim at discussing or solving the main question, a theological one, as to the wickedness or otherwise of the marriages in question. Men of the highest character and learning have differed widely in regard to this. Non nobis tantas componere lites. But he may be permitted to say that in his humble judgment the doctrine in question is an absurd one, and (again speaking with submission), has no warrant for it in the law of God, although Acts of Parliament may have so affirmed.

"All the best modern authorities," says a very learned English jurist, "are against the view that it (the law of Moses) contains any prohibition to marry the sister of a deceased wife. It is notwithstanding quite settled that such marriages are by our law void (in England), and a good deal is to be said on grounds of public policy in favour of the prohibition."

II. History of the law in England.

It is proposed to discuss briefly, from a historical standpoint, the position of the law in England and Ontario respectively as to the marriages in question, and then to consider how far Canadians are injuriously affected by the provisions of the English law.

1. Prior to Lord Lyndhurst's Act.

The starting point of statute law on this subject dates from the reign of Henry VIII. Prior to that time marriage with a deceased wife's sister, or between persons in similar relations, was prohibited by the canon law of the Church of Rome, which was based upon the ruling of a provincial council in A.D. 305, but "the Church was not averse to exercise its dispensing power for a pecuniary compensation." By virtue of this dispensing power the King was enabled to marry Catherine of Arragon, the widow of his deceased brother.

But the King's conscience, quiescent for many years, was awakened by the charms of Ann Boleyn to a sense of his sin in so marrying. To guard the morals of his subjects from similar lapses, and to preserve the purity and sanctity of the marriage relationship, several Marriage Acts were passed in his reign, the first of which was 25 Hen. VIII., c. 22. This Act defined the degrees within which it should not be lawful for persons so related to marry, and declared marriages within those degrees to be "prohibited and detested by God's law." Other Acts dealing with this subject were passed by Henry VIII., Edward VI., Mary and Elizabeth, noticeably 32 Henry VIII., c. 38, the result of which may be stated to be that "marriages contrary to God's law, or within the Levitical degrees, were unlawful by virtue of these statutes." The civil tribunals took no cognisance of these marriages; to annul them was the province solely of the ecclesiastical courts, pro salute animæ, viewing all such marriages as a sin.

"We arrive then at the conclusion," says an eminent Canadian writer (dealing with the law before the Act of 1882), "that it is not a sin (as Blackstone hath it) in the eyes of a temporal court to marry one within the prohibited degrees. That such a marriage is therefore, while it continues, legal, and draws towards it all the civil rights and incidents attributable to the de facto relationship of husband and wife. That the ecclesiastical courts do consider such a marriage sinful; but inasmuch as they proceed pro salute animarum, they must separate the parties in their lifetime, otherwise they will be prohibited from declaring the marriage null. That the marriage de facto 'always legal,' if not so dissolved by the spiritual courts remains legal to all intents and purposes."

Where the marriage had not been avoided by the ecclesiastical courts, it was treated as valid, the wife was entitled to dower, and the children of the marriage were deemed legitimate.

2. Subsequent to that Act.

"Until the year 1835," says another writer, "the propriety of such marriages remained practically in dubio. By the Church and the ecclesiastics they were treated as mala in se, but by the State and the laity, as mala prohibita only. In every year a

number of persons were found willing to brave the censures of the first from the very indulgent view of their conduct which was taken by the second. But at length circumstances arose which gave to our legislation on the subject a character pre-eminently anomalous, even in a system abounding with anomalies. Marriages within the prohibited degrees of affinity had been treated, not as void, but as voidable only on a decree of the ecclesiastical courts, in a suit regularly instituted. Proceedings in such a suit could only be taken during the lifetime of *both* the contracting parties, and as, when a suit was pending, no second suit could be commenced until the first was disposed of, it became a common thing for some friend of the family to take the first formal steps in a cause, and thus prevent any proceedings by parties really anxious to invalidate the marriage. The terrors of the law, therefore, ceased to have any practical effect, and the suit for a decree of nullity had become as much a matter of form as levying a fine or suffering a recovery. But in 1835 an exceptional case arose." The Duke of Beaufort had married his deceased wife's sister, and there was danger that remainder-men might successfully attack the validity of the marriage, and bastardize the issue.

Lord Lyndhurst thereupon introduced an Act, which was intended to remedy some of the hardships of the existing law. All voidable marriages then existing were to be rendered valid, and no such union was in future to be assailed, after the expiration of two years from the time of contracting it.

"The bill had passed both Houses, and had reached its final stage in the House of Lords without material alteration, when the then Bishop of London insisted upon the introduction of a clause providing that from the passing of the Act, these marriages should cease to be voidable only, and should become void absolutely and ipso facto. The Commons demurred, but the Bishop was firm, and his following was sufficiently numerous to make it unsafe to risk a division. The session was near its end, the sacred grouse were on the wing, and everyone was anxious to get away from town. The supporters of the bill were disposed to reject it altogether, rather than accept it in its altered form, but it was urged that to do so would be to leave the interests of the House of Beaufort in jeopardy for a considerable period.

Thus pressed, the Commons gave way, on the understanding that their cause of complaint was to be removed by a supplementary measure early in the following session. Other and more pressing matters, however, interposed to prevent this."

Lord Lyndhurst's Act (5 & 6 Wm. IV. c. 54), as passed, provided, as to marriages between persons within the prohibited degrees of affinity, as follows: 1st. That such marriages, celebrated before the passage of the Act, should not be annulled, except in a suit already pending in the ecclesiastical courts. 2nd. That such marriages, thereafter celebrated, should be absolutely null and void to all intents and purposes whatever. 3rd. That nothing in this Act should be construed to extend to Scotland.

Since then numerous attempts have been made to legalize such marriages by Act of Parliament, but the episcopal element in the House of Lords has, so far, succeeded in blocking all legislation.

The effect of Lord Lyndhurst's Act was considered by the House of Lords in the well-known case of *Brook* v. *Brook* (1861) 9 H.L. Cas. 193. The question arose in the administration of the estate of one William Leigh Brook, who had married his deceased wife's sister in Denmark. At the time of the Danish marriage Mr. and Mrs. Brook were domiciled in England, and had merely gone to Denmark on a temporary visit; after the marriage they returned to England, and continued to reside there until their deaths, when the proceedings in question were commenced. By the law of Denmark marriage with a deceased wife's sister is lawful. The House of Lords held, affirming the judgment appealed from, that the marriage of a man with his deceased wife's sister is expressly within the category of prohibited degrees, and that, therefore, the marriage in question was null and void, "being prohibited by the law of England as contrary to God's law."

In answer to the argument that the lex loci celebrationis, that of Denmark, ought to govern, Lord Campbell, L.C., said: "It is quite obvious that no civilized State can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract to be performed in the place of domicile if the contract is forbidden by the law of the place of domicile as contrary to religion, morality, or to any of its fundamental

institutions." Lord Wensleydale, in giving judgment, said: "The statute law of this country, which is binding on all its subjects, must be considered as pronouncing that this marriage is a violation of the divine law, and therefore that it is void. . . . If our laws are binding, or oblige us, as I think they do, to treat this marriage as a violation of the commands of God in Holy Scripture, we must consider it in a court of justice as prejudicial to our social interest and of hateful example."

Various grounds were taken by the law lords who took part in this judgment, but on one, and only one, they all agreed, namely, that the statute of William IV. made all future marriages of this kind between English subjects, having their domicile in England, absolutely void, because declared by Act of Parliament to be contrary to the law of God, and must therefore be deemed to include such marriages, although solemnized out of the British dominions.

It is impossible not to sympathize somewhat with the caustic comments of Chief Justice Gray of the Supreme Court of Massachusetts upon the legislation in question. His view of the decision of the judges in *Brook* v. *Brook* is not, however, quite fair to them. They did but declare the law: Boni judicis is jus dicere non jus dare. The learned Chief Justice says: "The law of England, as thus declared by its highest legislative and judicial authorities, is certainly presented in a remarkable aspect. (1) Before the statute of William IV., marriages within the prohibited degrees of affinity, if not avoided by a direct suit for the purpose during the lifetime of both parties, had the same effect in England, in every respect, as if wholly valid. (2) This statute itself made such marriages, already solemnized in England, irrevocably valid there, if no suit to annul them was already pending. (3) It left such marriages in England, even before the statute, to be declared illegal in the Scotch courts, at least so far as rights in real estate in Scotland were concerned. (4) According to the opinion of the majority of the law lords, it did not invalidate marriages of English subjects in English colonies, in which a different law of marriage prevailed. (5) But it did make future marriages of this kind, contracted either in England or in a foreign country, by English subjects domiciled in England, abso-

lutely void, because declared by the British Parliament to be contrary to the law of God. The judgment proceeds upon the ground that an Act of Parliament is not merely an ordinance of man, but a conclusive declaration of the law of God, and the result is that the law of God, as declared by Act of Parliament and expounded by the House of Lords, varies according to time, place, length of life of parties, pecuniary interests of third persons, petitions to human tribunals, and technical rules of statutory construction and judicial procedure. The case recalls the saying of Lord Holt, in *London* v. *Wood*, 12 Mod. 669, 687, 688, that 'an Act of Parliament can do no wrong, though it may do several things that look very odd;' and illustrates the effects of narrow views of policy, of the doctrine of 'the omnipotence of Parliament,' and of the consequent unfamiliarity with questions of general jurisprudence, upon judges of the greatest vigour of mind, and of the profoundest learning in the municipal law and in the forms and usages of the judicial system of their own country:" *Commonwealth* v. *Lane*, 113 Mass. 458.

III. The law in Canada.

Lord Lyndhurst's Act, passed in 1835, was never in force here, and we have to look at the English law as it stood before 1792 when the law of England was adopted as the law of this country. The marriage of a man with his deceased wife's sister was, as we have already seen, not ipso facto void at that time; it was esteemed valid for all civil purposes unless a sentence of nullity was obtained from the ecclesiastical courts during the lifetime of the parties. (See *Hodgins* v. *McNeil*, 9 Gr. 305; *Re Murray Canal*, 6 O.R. 685.)

There were no ecclesiastical courts in Canada; for all practical purposes therefore, such marriages were perfectly good in this country: *Ib.*

By the British North America Act the Parliament of Canada was given exclusive power to legislate in regard to "marriage and divorce." (Sec. 91 (26)). This power was exercised by passing the Dominion Statute of 1882 (45 Vict. c. 42). The first section reads as follows: "All laws prohibiting marriage between a man and the sister of his deceased wife are hereby re-

pealed, both as to past and future marriages, and as regards past marriages as if such laws had never existed." Since this Act was passed such marriages have therefore been perfectly valid in Canada.

Our readers will, however, look in vain for this Act in the Revised Statutes of Canada, 1886, where it should, of course, appear. There is no reference to it in the index. This in itself is not remarkable, as the indices of our statutes are notoriously defective, except those of the Dominion statutes of later years. One would naturally expect to find all public Acts of a general character in this revision, especially one dealing with so important a subject, but it is not there. Strangely enough, however, there is a reference to it in an unexpected and entirely inappropriate place, namely, Schedule B., which claims to refer to "Acts and parts of Acts of a public general nature which affect Canada, and have relation to matters not within the legislative authority of Parliament, or in respect to which the power of legislation is doubtful or has been doubted, and which have in consequence not been consolidated; and also Acts of a public general nature, which for other reasons have not been considered proper Acts to be consolidated." The Act in question manifestly does not come within any of the classes of Acts there enumerated, and it certainly was "a proper Act to be consolidated."

IV. The position in Great Britain of persons contracting such marriages in Canada.

1. Conclusions arrived at.

If such persons were at the time of marriage domiciled in England and returned to England as their matrimonial home, the marriage will in England be held to be null and void under *Brook* v. *Brook* (supra), and the issue will be held to be illegitimate.

If such parties though domiciled in England at the time of the marriage do not intend to return there but to make Canada their matrimonial home, the marriage must be deemed valid in the courts of the United Kingdom, and the issue will be deemed legitimate for all purposes, except for succeeding to English land

upon an intestacy. Possibly, too, the widow would not be entitled to dower in the English lands of her deceased husband.

2. Reasons for these Conclusions.

(1) The general rule of law is that a marriage valid where it is contracted is valid everywhere: Story, Conflict of Laws, ss. 113, 114.

(2) But to this rule there is one well understood exception, namely, that "no Christian country would recognize polygamy or incestuous marriages. But when we speak of incestuous marriages care must be taken to confine the doctrine to such cases as by the general consent of all Christendom are deemed incestuous:" *Ib.*

(3) Lord Cranworth approved of this statement of the law as correctly expressing the law of nations: *Brook v. Brook*, supra, p. 233.

(4) In the very late case of *In re Bozzelli* (1902) 1 Ch. 751, it has been definitely held that "incestuous" for this purpose means incestuous by the general consent of Christendom; and on this ground a marriage celebrated in Italy between an English woman domiciled in Italy and her deceased husband's brother, a domiciled Italian, valid by the law of Italy, the domicile of the parties, has been recognized in England as perfectly valid.

(5) "It is obvious," says Mr Foote (Private International Jurisprudence, 3rd ed., p. 106), "that the principle of this decision must be applicable to the commoner case of marriage with a deceased wife's sister; and in face of the fact that colonial statutes recognizing the validity of such marriages have repeatedly received the sanction of the Crown, it would have been difficult even before *In re Bozzelli* to have maintained the contrary view."

(6) This is evidently Mr. Dicey's view: Conflict of Laws, supra, p. 233.

(7) Lord Cairns, speaking in the House of Lords in 1883, said on this subject: "My view of the law upon the point is this, that if a man, being domiciled in a colony in which it is lawful to marry a deceased wife's sister does marry his deceased wife's sister, his marriage with her is good all the world over; whereas, if the man is a domiciled Englishman, not domiciled in the col-

ony, but merely resident there, his marriage with his deceased wife's sister in such circumstances is bad everywhere, because he carries the impediment of his domicile to such a marriage with him:" Foote P. I. Jurisprudence, p. 107.

(8) Lord Davey, in an article on "Status in connection with colonial marriages," (Journal of Society of Comparative Legislation, Vol. II., N.S., 1900, p. 201) says: "What is the legal status in this country of the wife and offspring of such a marriage? It cannot, in the opinion of the present writer, be denied that the wife has the status of a wife for all purposes, except, possibly, that of a right to dower from real estate in England. There is no actual decision on the point, but it is conceived that a woman who was incapable of contracting the marriage by the law of England, could not claim dower as widow of her deceased husband. It is thought that the lex sitæ would be held to prevail. As to the children, also, they are legitimate for all purposes of succession to personal estate ab intestato, or under the description of children of their father and mother under a will."

(9) But in regard to succession to English land on an intestacy different principles prevail. Here there is required not merely legitimacy by the personal law, but legitimacy by the lex situs, that is, the person concerned shall have been born in what the English law calls wedlock (ex justis nuptiis procreatus. Co. Litt., 7 b), speaking for itself, and not as adopting the principles of international law.

(10) Mr. Foote says (p. 108): "In the absence of authority it would have seemed that such a marriage would have been accepted as justæ nuptiæ by English law; and it has just been shewn that for all purposes other than those of heirships it would be so accepted. Nevertheless such authority as exists is against the right of the child of such marriage to succeed to English land and as heir." (*Fenton* v. *Livingston* (1859) 3 Macq. 497.) "It seems impossible to contend with any hope of success, if *Fenton* v. *Livingston* is to be regarded as a binding authority, that the child of a marriage with a deceased wife's sister, though legitimate by the lex domicilii for all purposes, and by the law of England for all purposes save this, can inherit English land as heir:" *Ib.* p. 109.

(11) In the article above referred to Lord Davey says: "With regard to real estate the case is different. Ever since *Birtwhistle* v. *Vardill*, 7 Cl. & F. 895, it must be taken to be the law of England that, in order to establish a title to real estate by descent, the claimant must predicate of himself that he is the legitimate issue of a marriage which would have been valid if made between domiciled Englishmen. As Chief Justice Tindal said, this rule of descent is a rule of positive law annexed to the land itself, and must prevail even if it be at variance with the ordinary rule of international law."

(12) Lord Justice James has said: "*Doe* v. *Vardill* decides that the heir to English land must be born in lawful wedlock. That English heirship, the descent of English land, required not only that the man should be legitimate, but as it were porphyrogenitus, born legitimate within the narrowest pale of English legitimacy:" *Re Goodman's Trusts* (1881) 17 Ch. D. 266, p. 269.

This was a case of legitimacy per subsequens matrimonium, but the same principle applies to the case under discussion.

3. Anomalies of the Present Law.

This cannot be better put than in the language of Lord Davey: "The question may well occur to many minds whether it is worth while maintaining these fine distinctions, and whether any object is gained by doing so? The people who are affected by this state of the law are, it must be remembered, our own sons, daughters, brothers, sisters, nephews and nieces. It is not an uncommon case for a younger son of a great family to emigrate, and by unexpected deaths without issue, find himself entitled to the family honours and estate. If he has contracted one of these marriages he cannot transmit them to his son, or, if he is dead when the succession would have opened to him, his son cannot succeed in his place. Again, a returned colonist buys an estate 'at home,' and dies suddenly without having made a will, as any man may. A collateral relation steps into the estate in exclusion of his children. On the other hand, leaseholds of whatever length of term, are personal estate, and may be taken by the children. A humorous illustration of the anomalies of the law was given in the course of the debate on second reading. A man, it was said, may have a leasehold house for a long term and a freehold

stable adjoining. His son is legitimate in the house and a bastard in the stable. What is the object, one repeats, of maintaining such anomalies in the law? Who is benefited by their maintenance, or who will be injured by their repeal? You may be opposed to marriages with a deceased wife's sister, but if the colonists are entrusted with plenary powers of legislation, that is for them to decide. There was considerable force in the Lord Chancellor's suggestion, that the bill was really one to alter the law of inheritance in this country. It may be more logical and better to pass a law of general application for that purpose, but in the meantime, and until the government of this country think fit to do so, one does not see why the colonists should not sue for the remedy of their particular grievance, because it is part of a larger general question. The grievance is none the less real because to a large extent it may be sentimental."

It is to be remarked that a measure which proposes to legalize marriage with a deceased wife's sister is an incomplete measure. For if it is to rest upon any principle at all it should also legalize marriage with a deceased husband's brother.

It has been said, however, that if a child is born, the wife becomes of the flesh of her husband, and that, therefore, a brother marrying her marries into his own family flesh, and so in that sense marries his sister, rather than his sister-in-law.

V. Conclusion.

It will be seen from the above that the only disability of the children of Canadians, issue of such marriages celebrated in Canada, is the possible failure to inherit English land upon an intestacy; there is no other grievance, legal or social, of which they can complain.

The married pair themselves must for all purposes be recognized, both in society and in the Courts, as validly married and as "law-abiding and moral-living Canadians," subject to no "legal and social discrimination."

None the less, however, the restriction, purely sentimental as it is, should be removed, but the prejudice on the subject in ecclesiastical circles in England is so deep-rooted that possibly it may be a long time yet before remedial legislation can be successfully achieved.

N. W. Hoyles.

The Minister of Justice spoke as a statesman when he said on the floor of the House recently that "it would be a calamity to this country for municipalities to undertake the business which is being done by private corporations." It has been said that we Canadians are perhaps too much in the habit of taking up some subject or phase of thought and "running it to death." The cry for public ownership is the one which at present occupies, as we think, an undue share of the attention of a certain section of the press. It is, for obvious reasons, very attractive to municipal councillors and officials, who as a class are scarcely in a position to take either a fair or a far-sighted view of this important subject. We do not propose to discuss the objections to, and evils sure to result from important enterprises being under the management of the average alderman or municipal councillor; all we desire at present is to draw attention to that aspect of the question which was touched upon by Mr. Fitzpatrick in his statement in regard to the matter then in hand (and his remarks are of general application) when he said that "he was a believer in the private enterprise that had developed the resources of the country. Neither the supplying of power nor electric lighting would have amounted to anything but for the enterprise of private individuals and the duty of Parliament is to protect the individual investors who have put their money into these enterprises in good faith." The encouragement of private enterprise should be the aim of every Government. Anything which would tend to check that or to drive capital elsewhere should be studiously avoided as distinctly injurious to the public welfare. This surely is so important that it should be emphasized on every occasion, and we are glad that the Minister of Justice had the courage, in the face of the clamour of a certain section of the public, to speak as he did.

There have been "wigs on the green" in the Provincial Parliament of British Columbia; the occasion being the discussion of a Bill to abolish the wearing of wigs in Court. On one occasion the writer travelled from England to the Pacific Coast, following the setting sun. Before leaving conservative England he visited the Law Courts; and, as he viewed Bench and Bar arrayed in their horse-hair helmets, was duly impressed with the

solemnity of the scene, so much so that the comical side of it did not then occur to him. A few weeks later the legal fraternity of Ontario were seen in Court dressed in the simpler style more appropriate to their position as mere colonials. He still "went West" as exhorted by Horace Greeley. But speaking of simplicity in this regard, the habits of the legal profession of the "wild and woolly west" in the territories of our neighbours to the south of us were exceedingly so, for judges and lawyers were not only wigless and gownless, but some of them (the weather being immoderately hot) were also coatless, and occasionally the weary judge would rest his feet on the desk in front of him. Again entering His Majesty's dominions the writer eventually came to Victoria, the jumping off place of, or for, the occident or the orient, as the case may be, and the headquarters of the profession in the most westerly Province of the British Empire. It might now be supposed that the climax would be reached, and imagination painted a Court clad in cow-boy costume or possibly in the cast-off finery of some Indian chiefs. But no! for here again the ubiquitous Britisher once more asserted his national abhorrence of change; and, with a gasp of surprise and a severe shock to his nervous system, the writer again viewed the familiar horse-hair helmets.

A member of the Provincial legislature of the Province in question having come to the conclusion that this ancient headgear had ceased to be a thing of joy or even a harmless joke, brought in a Bill which read as follows:—"The wearing or use of the customary official wigs, or of robes of any colour other than black, by judges, barristers, or registrars of the Court, during the sitting of the Court, or in chambers, is hereby prohibited." Fearing, however, that some one might be incorrigibly addicted to the vice of wig-wearing, this heartless iconoclast added a clause that "anyone violating the above provision should b subject to a fine not exceeding twenty-five dollars and not less than ten for each offence." One honourable member came to the conclusion that justice was not assisted by the wearing of wigs. Another was inclined to withhold his vote altogether; for, if the judges chose to make fools of themselves, he did not see that Parliament should step in to prevent them. Another again, with sad flippancy, remarked that "if the House were called upon to say a lawyer should not wear a wig it might per-

haps say that he should not wear any pants." Another insisted that the custom was an abomination and a relic of barbarism. The House seemed to agree with this for the second reading of the Bi was carried by a vote of 16 to 14. Sic transit gloria, "galeri"

We are glad to see that the new Premier of Ontario takes exception, as we have frequently done, to the annual tinkering of statutes, notably, those affecting municipal law. In reference to the alleged unsatisfactory condition of this branch of the statute law of this Province he is reported to have said: "One remedy might be to allow no amendment oftener than once in four years. The difficulty is that if any township, or village or city suffers a little hardship from any section of the law, which might be an excellent piece of general legislation, the suffering municipality immediately introduces a Bill to amend the Municipal Act, and in order to remove its own disability, imposes a law on the whole Province."

We are also glad to see that he is apparently not much impressed with the wisdom of the very questionable proposal to relieve municipalities from liability for damages resulting from accidents on highways, or to substitute for the ordinary system of legal procedure in such cases an assessment of damages by some municipal official. This, as it seems to us, would be a most crude and unwise proceeding. Why should not municipalities be liable if highways are kept in a dangerous condition? And what is to be gained by organizing some new Court for the trial of such cases? Arbitrations (except in some very special cases) are notoriously dilatory, uncertain, expensive and unsatisfactory. That the ordinary Courts of the country are considered to be more generally satisfactory than proceedings by arbitration is evidenced by the fact that the public very seldom resort to the latter. Arbitrations are very uncommon nowadays. Moreover, litigants will, as they always have done, employ trained advocates (otherwise known as "lawyers") to conduct their cases. Those persons who clamour most about expensive litigation, and who indulge most largely in foolish and ignorant talk about lawyers, are just as ready as others to fly to them for aid when they get into trouble.

REVIEW OF CURRENT ENGLISH CASES.

PRINCIPAL AND AGENT—SUB-AGENT—SECRET PROFIT MADE BY SUB-AGENT—PRIVITY OF CONTRACT—FIDUCIARY RELATION—RIGHT OF PRINCIPAL TO CALL SUB-AGENT TO ACCOUNT—MONEY HAD AND RECEIVED—DECLARATORY JUDGMENT.

Powell v. *Jones* (1905) 1 K.B. 11 was another action involving the right of principals to recover a secret profit; but in this action the secret profit had been received by a sub-agent, and consequently the case was complicated by questions of privity of contract and the legal relationship of the parties. The plaintiffs had been employed as agents for a commission, to procure for the defendants a loan, and with the assent of the defendants the plaintiffs employed one C. as sub-agent on the footing that he should share the commission to be paid by the defendants; and the defendants were aware that C. was acting in the matter for them; C. secured the required loan to be made; but, without the knowledge of the plaintiffs or the defendants, C. secured from the lenders a commission for introducing the business to them, and by the same agreement further sums were to be payable to C. in the future in respect to the transaction. The plaintiffs sued to recover their commission, and the defendants set up by way of defence and also by counterclaim, to which C. was made a party, but to which the lenders were not parties, that the plaintiffs by permitting C. to receive the commission from the lenders had forfeited their right to any commission from the defendants, and that the defendants were moreover entitled to be paid the commission received by C. from the lenders. Kennedy, J., who tried the action, gave judgment for the plaintiffs on the claim, and for defendants on their counterclaim as against C. only. C. appealed from this decision, and the Court of Appeal (Collins, M.R., and Stirling and Mathew, L.JJ.) affirmed the judgment of Kennedy, J., on the ground that privity of contract between C. and the defendants had been established, and even if it had not, C. was in a fiduciary position in relation to the defendants, which debarred him from making a profit on the transaction unknown to them; therefore, that the defendants were entitled to recover from him the amount he had actually received, but in regard to the future payments, as the

parties to pay were not before the Court, the defendants were only entitled to a declaration that they were entitled to any further moneys which should be received by C. in respect of such commission.

CONTRACT TO PROCURE A HUSBAND—ILLEGALITY—MARRIAGE BROKAGE.

Hermann v. *Charlesworth* (1905) 1 K.B. 24. The plaintiff, a mature young lady of thirty-three summers, apparently considering that her manifold attractions were running to waste for want of a suitable partner, applied to the defendant, the editor of a paper, to introduce her to suitable persons in the hope that among some of them she might find the looked-for mate. This the defendant agreed to do on the terms that the plaintiff should pay him as a "special client's" fee £52, of which £47 was to be repaid in nine months, if by that time no husband had been secured. If, on the other hand, a husband should be secured, on the date of the marriage the plaintiff agreed to pay the defendant a further sum of £250. Several gentlemen were introduced to the plaintiff, but no marriage or engagement took place, and the plaintiff having rued her bargain, before the nine months had elapsed brought the action to recover the £52 on the ground that the contract was a marriage brokage contract, and as such illegal and void. The County Court Judge who tried the case gave effect to this contention, but the Divisional Court (Lord Alverstone, C.J., and Kennedy and Ridley, JJ.) reversed the decision, because in their judgment a marriage brokage contract is a contract to bring about a marriage with a particular person, which this was not, but a contract merely to introduce persons to the plaintiff in the expectation or hope that one among them would desire to become her husband. This not being a marriage brokage contract was not illegal; and although the plaintiff would at the expiration of the nine months have been entitled to recover the £47, she could not do so in the present action, because it was brought prematurely.

ATTACHMENT—DISOBEDIENCE OF ORDER—PERSONAL SERVICE—EVASION OF SERVICE.

In *Kistler* v. *Tettmar* (1905) 1 K.B. 39 the plaintiff had recovered judgment against the defendant, who was a married woman, and had attained an order for her examination as to her means of satisfying the debt, etc. An attempt was made to serve the order personally, but the defendant refused to be seen, whereupon a copy of the order was delivered to her husband together with the conduct money. The defendant having made

default, a motion was made to attach her for contempt, when she set up that she had not been personally served with the order as required by rule; it was not denied that the defendant had not had notice of the order. Phillimore, J., granted the application, but ordered the writ to lie in the office for a few days to enable the defendant to attend and submit to examination. The Court of Appeal (Stirling and Mathew, L.JJ.) held that this order was right, and the rule requiring personal service of an order could not be relied on by a defendant who evaded service of an order of which he had notice.

MINING LEASE—CONSTRUCTION—COVENANT TO WIN, WORK, AND GET, ETC., THE WHOLE OF THE COAL.

Watson v. *Charlesworth* (1905) 1 K.B. 74 was an action by the lessors of a mining lease against the lessees to recover damages for breach of a covenant whereby the lessees covenanted "to win, work and get, fairly, duly and honestly, the whole of the coal" as lay under certain lands of the lessors. The rent was to be an annual rent of £100 an acre as soon as the lessees commenced to work the coal, and until then an annual rent of £5 an acre. Owing to faults in the ground the lessees found that they could not win and work the coal except at a loss, and they therefore desisted from any attempt to get it. Channel, J., who tried the action, gave judgment for the lessees, the Court of Appeal (Collins, M.R., and Stirling and Mathew, L.JJ.) came to the conclusion that he had erred, and that, upon a proper construction of the lease it did not mean that the lessees were to mine if it could be done in the fair, due and honest course of working, but, on the contrary, it was an absolute undertaking to win and mine it, from which they were not excused by the fact that it would be unprofitable to themselves to do so, and that the plaintiffs were entitled to damages to the amount which would probably have been payable to them if the lessees had in fact won and got the coal under their covenant.

TRADE MARK—INVENTED WORD—"ABSORBINE."

Christy v. *Tipper* (1905) 1 Ch. 1 may be briefly noticed for the fact that Joyce, J., decided, and the Court of Appeal (Williams, Romer and Cozens-Hardy, JJ.) affirmed his decision, that the word "absorbine," as applied to a veterinary preparation for absorbing and removing swellings, is a mere variation of an existing English word, and therefore is not an "invented word" capable of registration as a trade mark.

MARRIAGE SETTLEMENT—COVENANT TO SETTLE AFTER ACQUIRED PROPERTY—"BECOME ENTITLED"—PROPERTY VESTED IN WIFE IN REVERSION BEFORE MARRIAGE AND FALLING INTO POSSESSION DURING COVERTURE.

In re Bland, Bland v. *Perkin* (1905) 1 Ch. 4. Kekewich, J., was called on to construe a marriage settlement whereby it was agreed and declared that all property to which the wife during her then intended coverture should "become entitled" should be settled. At the time of the settlement the wife was entitled to certain property in reversion which fell into possession during the coverture. Was this property caught by the settlement? The learned judge decided in the negative, because it was not property to which the wife became entitled during coverture.

SETTLEMENT—CONSTRUCTION—TRUST FOR WIFE IF SHE SHALL "SURVIVE" HER COVERTURE—DETERMINATION OF COVERTURE BY DIVORCE.

In re Crawford, Cooke v. *Gibson* (1905) 1 Ch. 11. In this case the settlement contained a trust in favour of the wife in case she "survived" her intended coverture. The marriage had been dissolved by a decree absolute for divorce on the petition of the husband. Both the spouses were still living, and the trustees applied by summons for the determination of the question whether the trust in favour of the wife in case she survived the coverture had taken effect. Kekewich, J., held that it had.

DEVISEE—ELECTION AGAINST WILL—COMPENSATION TO PERSONS DISAPPOINTMENT BY ELECTION, FROM WHAT DATE TO BE ASCERTAINED.

In re Hancock, Hancock v. *Pawson* (1905) 1 Ch. 16. A testator having only a power of appointment over certain property, purported to dispose of it by his will, which was held not to be an exercise of the power. The person who was entitled in default of appointment was a beneficiary under the will, and elected to take against the will. The testator died July 13, 1901, but the election was not made until July 8, 1903; in estimating the compensation to the beneficiaries who were disappointed by the election, the question arose as to whether it was to be ascertained as of the date of the death of the testator, or the date of the election. Kekewich, J., decided that the date of the death of the testator was the period from which the compensation must be reckoned.

TRUSTEES—BREACH OF TRUST—JOINT AND SEVERAL LIABILITY—PART PAYMENT BY ONE TRUSTEE—RIGHT TO PROVE AGAINST A CO-TRUSTEE FOR FULL AMOUNT OF DEBT NOTWITHSTANDING PART PAYMENT BY ANOTHER.

In *Edwards* v. *Hood-Barrs* (1905) 1 Ch. 20 Kekewich, J., decides that where several trustees are found liable for a breach of trust a compromise on payment of part of the debt by one of the trustees does not relieve the others from liability—and where one of the trustees had become bankrupt, the cestui que trust was entitled to prove in bankruptcy for the full amount of the debt and to receive dividends thereon until the same, together with the payments received from the other trustees, should be sufficient to pay the debt in full.

COMPANY—EXCEEDING STATUTORY POWER—INJUNCTION.

In *Attorney-General* v. *Metropolitan Electric Supply Co.* (1905) 1 Ch. 24 the defendants were an incorporated company empowered by statute to furnish electric power to customers within three defined areas in the County of London, but were prohibited from supplying energy outside of these areas. Being unable to generate sufficient electricity within the three specified areas, they obtained, in 1898, statutory power to erect generating works in an urban district, and from thence to supply energy to their statutory areas. The urban district was outside the County of London. In 1903 the company began to supply electric energy to a railway in this district, and the action was brought to restrain their so doing as being an excess of their statutory powers. Farwell, J., granted the injunction as prayed.

COMPANY—PROSPECTUS—IRREGULAR ALLOTMENT—RETURN OF APPLICATION MONEY—OPTION TO REFUSE TO ACCEPT ALLOTMENT—RESCISSION—ULTRA VIRES.

In *Finance and Issue* v. *Canadian Produce Corporation* (1905) 1 Ch. 37 the plaintiff in consideration of certain payments to be made by the defendants issued a prospectus of the defendant company inviting subscriptions for shares in the defendant company. The prospectus stated that the minimum number of shares to be allotted would be 40,000. Subscriptions and application money having been received for 40,003 shares, the directors proceeded to make an allotment, but it was found that some of the applications were not effective and that the minimum subscription had not been reached. Thereupon, the directors issued a circular giving all subscribers the option of accepting the allotments made to them, or of refusing same and

getting back their application money. Th plaintiffs, finding that if this were carried out, the defendant company would not have funds for paying the moneys agreed to be paid to the plaintiffs, brought the present action, claiming an injunction to restrain the company from paying back any of the application money, or giving the allotees power to refuse the allotments. Buckley, J., however, held that the company was only doing what in the circumstances they were bound to do, having regard to the terms of the prospectus, and he dismissed the action.

DISTRESS—LEASE—UNDER-LEASE EXCEEDING ORIGINAL TERM—REVERSIONARY LEASE—INTERESSE TERMINI—4 GEO. II., c. 28, s. 5—(R.S.O. c. 342, s. 1).

Lewis v. *Baker* (1905) 1 Ch. 46 involves a question of real property law. The action was brought to recover damages for a wrongful distress. The defendant Baker in 1902 was an assignee of an unexpired term which would expire on July 6, 1904. He had obtained, in May, 1902, an agreement with the reversioner to grant a reversionary lease for 73 years from July 6, 1904. In October, 1903, the defendant agreed to let the premises to one Haddon for 21 years from September 29, 1903, for £300 per annum. This rent being in default the defendant distrained the plaintiff's property, he being an occupant of part of the premises. The plaintiff claimed that the defendant, Baker, had no right of distress because he had no reversion. Baker endeavoured without success to support the distress under 4 Geo. II. c. 28, s. 5 (R.S.O. c. 342, s. 1). Eady, J., however, agreed with the plaintiff's contention, that the fact of Baker having granted the lease for a longer term than the original lease, amounted to an assignment of that term; and that under the agreement for the lease for the 73 years he had only an interesse termini until he entered into possession under that lease when granted, and that at present, having thus no reversion, he had no right of distress, and he accordingly gave judgment for the plaintiff.

WILL—LEGACY—REPAIR OF BURIAL GROUNDS—RESTRICTION TO MEMBERS OF A PARTICULAR SECT—ADVANCEMENT OF RELIGION.

In re Mauser, Attorney-General v. *Lucas* (1905) 1 Ch. 68 a testator had bequeathed a legacy of £1,000 for the purpose of keeping in good order a burial ground of the Society of Friends, and the question was whether this was a good charitable bequest, though its benefits were restricted to the members of a particular society. Warrington, J., considered that it was to be deemed a gift for the advancement of religion, and therefore a good charitable bequest.

TRUSTEE AND CESTUI QUE TRUST—ADMINISTRATION—OVER-PAYMENT BY TRUSTEE—ADJUSTMENT—TRUSTEE ALSO A BENEFICIARY—RIGHT TO IMPOUND MONEYS COMING TO CESTUIS QUE TRUST TO RECOUP OVER-PAYMENT.

In re Horne, Wilson v. *Cox* (1905) 1 Ch. 76. In the administration of a trust estate one of the trustees, who was himself a beneficiary, had, in distributing the income of the trust estate among the other beneficiary tenants for life, paid them £182 6s. 8d. more than their proper proportion. This trustee having died, his executors applied to the surviving trustee to recoup the amounts thus overpaid by the deceased trustee, whereupon application was made to the Court to determine the question whether he ought to pay or allow to the executors the over-payment, and, if so, whether out of capital or income. Warrington, J., considered that if the deceased had not been a trustee, but merely a beneficiary, his representatives would have been entitled to have had the over-payments adjusted and recouped out of the growing payments due to those who had been overpaid; but that a trustee who had himself made the over-payment had no right to any such relief.

WILL—CONSTRUCTION—ANNUITY—CHARGE ON LAND—SPECIFIC DEVISE—ESTATE DUTY.

In re Trenchard, Trenchard v. *Trenchard* (1905) 1 Ch. 82. A testator gave his wife during widowhood an annuity of £500 which he declared to be a first charge on all his freehold properties at Greenwich. He gave various legacies and then devised and bequeathed all the residue of his real and personal estate upon trust for sale and conversion, etc. For the purpose of determining the incidence of he estate duty payable on the annuity of £500 it became necessary to decide the legal effect of the gift of the annuity to the widow, the other beneficiaries claiming that it was in effect the gift of a rent charge payable out of the Greenwich properties. Warrington, J., however, decided that it was a mere personal annuity, secured by a charge on the Greenwich property, and that the estate duty on the annuity was a testamentary expense.

LUNATIC SO FOUND—LUCID INTERVAL—DEED MADE DURING LUCID INTERVAL BY LUNATIC SO FOUND.

In re Walker (1905) 1 Ch. 160. A lunatic so found by inquisition, had during an alleged lucid interval made a deed poll purporting to dispose of part of his property, the inquisition not having been superseded; and the question was, whether this

deed was a valid disposition of the property therein referred to. The Court of Appeal (Williams, Romer and Cozens-Hardy, L. JJ.) determined that the deed was inoperative, and the Court would not even direct an issue to determine whether it had been made during a lucid interval. The difference between a will and a deed executed by a lunatic is explained by Williams, L.J., the former only taking effect after the lunatic's death may be valid, but a deed to take effect during the lunatic's life would, if allowed to be operative without the sanction of the Court first had and obtained, lead to a conflict of control over the lunatic's property. The effect of the decision, therefore, is that so long as a declaration of lunacy remains in force and unsuperseded, no disposition can be made by the lunatic of his property by deed, without the sanction of the Court.

SETTLEMENT—COVENANT TO SETTLE AFTER ACQUIRED PROPERTY —PROPERTY PURCHASED WITH ACCUMULATIONS OF INCOME.

In re Clutterbuck, Bloxam v. *Clutterbuck* (1905) 1 Ch. 200. By a settlement it was agreed that if during the coverture the wife should become seized or possessed of property at any one time of the value of £200 or upwards it should be settled upon the trusts of the settlement. During the coverture the wife accumulated her income derived out of the settled estate to the amount of £300, which she laid out in the purchase of land. The question was whether this was after acquired property within the covenant. Buckley, J., held that it was not, following the decision of Romer, J., in *Finlay* v. *Darling* (1897) 1 Ch. 719 in preference to that of Kekewich, J., in *Re Bendy* (1895) 1 Ch. 109.

TRUSTEE—APPOINTMENT OF NEW TRUSTEE—APPOINTMENT OF CORPORATION AS TRUSTEE JOINTLY WITH INDIVIDUAL—BODIES CORPORATE (JOINT TENANCY) ACT, 1899 (62 & 63 VICT. C. 20).

In re Thompson, Thompson v. *Alexander* (1905) 1 Ch. 229 draws our attention to what may perhaps be regarded as an omission in the Trust Companies Act (R.S.O. c. 206), which enables trust companies to act as trustees. At common law a natural person and a corporation could not hold property as joint tenants, but only as tenants in common: Co. Lit. 190*a*. The law in this respect has, however, been altered in England by 62 & 63 Vict. c. 20, which provides that a body corporate shall be capable of acquiring and holding real and personal property in joint tenancy in the same manner as if it were an individual.

Consequently there is now no difficulty in England in appointing a corporation a joint trustee with an individual, as Eady, J., shews in this case.

WILL—CONSTRUCTION—GIFT OF INCOME FOR LIFE—PROPERTY INVESTED IN WASTING SECURITIES—TENANT FOR LIFE.

In re Chaytor, Chaytor v. *Horn* (1905) 1 Ch. 233 was a contest between tenant for life and remainderman. By a will a testator devised and bequeathed real and personal property to trustees, upon trust to sell and convert the same, with power to postpone conversion as long as the trustees thought proper and to retain any investments subsisting at his death whether of the kind authorized or not, and out of proceeds to pay debts and legacies, and invest the residue, and pay the income to the testator's widow for life. At the time of his death most of the trust property was invested in the shares of a coal mining company, being a security not authorized by the will. Part of these shares remained unconverted, and the question raised was whether the tenant for life was entitled to the dividends from time to time received therefrom, pending conversion. Warrington, J., decided that she was not, but only to interest at 3 per cent. per annum on the value of the shares at the testator's death and that the rest of the dividends must be invested as capital; and he laid down that the like rule applies to all unauthorized securities, whether of a wasting character or not.

MORTGAGOR AND MORTGAGEE—PROVISO FOR COMPOUNDING INTEREST IN ARREAR—MORTGAGEE IN POSSESSION—ACCOUNT—SALE OF PART OF MORTGAGED PROPERTY—RESTS.

Wrigley v. *Gill* (1905) 1 Ch. 241 was an action for redemption; part of the mortgaged property had been sold, and the mortgagee was in possession of the remainder. The usual mortgage account had been directed. There was a proviso in the mortgage that interest in arrear for twenty-one days should thereafter bear interest. Warrington, J., held that the mortgagee was not entitled on the taking of the account to compound interest, unless he was able to shew that after crediting the rents received each half year, the interest was actually in arrear at the times specified in the proviso. He also held that the mere fact that the mortgagee had sold part of the property did not of itself entitle the mortgagor to have the account taken with a general rest of the rents and profits and proceeds of sale as on the date of the receipt thereof.

CONTRACT—PENALTY OR LIQUIDATED DAMAGES—TIME—WAIVER.

In *Clydebank Engineering Co.* v. *Castadena* (1905) A.C. 6 the appellants had entered into a contract with the Spanish Government for the building of war vessels, and by the contract it was provided that the vessels were to be delivered at stated periods, and that "the penalty for later delivery shall be at the rate of £500 per week for each vessel." The vessels were built and delivered some time after the specified time, and the contract price paid without any deduction or reservation of right. The present action was brought on behalf of the Spanish Government against the appellants to recover the penalty for late delivery. The appellants contended that by paying the contract price the respondents had waived the right to sue for the penalty, and that, at all events, they were only entitled to recover actual damages for breach of the contract, but the House of Lords (Lord Halsbury, L.C., and Lords Davey and Robertson) agreed with the Scotch Court of Session that there was no waiver, and the sum fixed by the contract was to be regarded as liquidated damages, and that the plaintiffs were entitled to recover, and the appeal was accordingly dismissed.

LICENSE, ISSUED PURSUANT TO STATUTE—MUNICIPAL AUTHORITY —ULTRA VIRES.

Rossi v. *Edinburgh* (1905) A.C. 21 was an appeal by an ice cream vendor against a license proposed to be issued by the magistrates to the appellant, but which he claimed was ultra vires inasmuch as it unduly restricted the appellant's statutory rights. By the statute in question vendors of ice cream were forbidden to sell ice cream without a license which the defendants were empowered to issue. The statute gave no power to the defendants to restrict the hours or days of sale. The license in question was granted upon the condition, inter alia, that the licensee should not sell on Sunday or any other day set apart for public worship by lawful authority, or open his premises between certain hours. The House of Lords, reversing the Court of Sessions, held that these restrictions were ultra vires and unwarranted. That the power to issue the license did not include any power to make regulations for the sale of ice cream.

LEASE—COVENANT TO PAY TAXES—USUAL COVENANT BY LESSEE— —INTEREST ON RENT IN ARREAR—DELAY BY LESSOR IN SHEWING TITLE.

In *Canadian Pacific Railway* v. *Toronto* (1905) A.C. 33 the Judicial Committee of the Privy Council (The Lord Chancellor,

and Lords Macnaghten, Davey, Robertson and Lindley and Sir Arthur Wilson) have affirmed the judgment of the Court of Appeal, 27 A.R. 54. The appellants agreed to accept a lease of lands from the City of Toronto, and the principal question was whether the lease, in the absence of any express agreement on the point, should contain a covenant by the lessees to pay taxes. The city contended that it should, on the ground that such a covenant is a "usual covenant" in an open agreement, but the Judicial Committee agreed with the courts below that the question turned upon other considerations: viz., that the burden of paying taxes falls by the Assessment Act on the lessee, and that the covenant was usual in the sense that the corporation invariably insisted on it in their leases. There was another point in regard to the liability of the lessees for interest on rent in arrear. They had gone into possession before 1st January, 1895, from which date the rent was to begin, but the lessors had failed to shew title until May 28, 1898, and their Lordships considered that the lessees could not be considered to be in default until the latter date, from which date they would be liable for interest on the rent in arrear.

B. N. A. ACT, s. 51, s.-s. 4; ss. 3, 146—READJUSTMENT OF REPRESENTATION—"AGGREGATE POPULATION OF CANADA."

Attorney-General of Prince Edward v. *Attorney-General of Canada* (1905) A.C. 37 deals with the construction of the B. N. A. Act in regard to the clauses relating to the readjustment of the representation from time to time in the Dominion House of Commons. The case came before the Judicial Committee of the Privy Council on appeal from the Supreme Court of Canada, and it may suffice to state briefly the conclusions at which their Lordships of the Privy Council (Lords Macnaghten, Davey, Robertson and Lindley, and Sir Arthur Wilson) have arrived. They hold first: that for the purpose of determining whether the representatives of New Brunswick are liable to be reduced, the expression "aggregate population of Canada," in s. 51 (4) of the B. N. A. Act means the whole of Canada as constituted by the Act, and not merely the four Provinces originally federated, but includes those and all other Provinces subsequently incorporated by Order in Council under s. 146. The decision of the Supreme Court on this point was affirmed. Secondly, they hold that Prince Edward, which had been admitted under s. 146 by Order in Council directing it to have six members, its representation to be readjusted from time to time under the provisions of the Act, was not by s. 51 (4) protected from reduction, until an increase thereof had been previously effected. On this point also the judgment of the Supreme Court was affirmed.

B. N. A. Act, ss. 91, 92(10)—43 Vict. 3. c. 67(D.)—45 Vict. c. 71 (O.)—Powers of Dominion Parliament—Powers of Provincial Legislature—Local undertakings extending beyond Province.

In *Toronto* v. *Bell Telephone Co.* (1905) A.C. 52 the Judicial Committee of the Privy Council (Lords Macnaghten, Davey, Robertson and Lindley, and Sir Arthur Wilson) have affirmed the judgment of a Court of Appeal, 6 O.L.R. 335, holding that the Bell Telephone Co., under the Dominion Act of incorporation, 43 Vict. c. 67, have power and authority to enter upon the streets and highways of the City of Toronto, and construct conduits or lay cables thereunder or erect poles or string wires therefrom along the streets without the leave or license of the corporation. This Act the Committee hold to be intra vires of the Dominion Parliament under B.N.A. Act, s. 92 (10), and the Provincial Act, 45 Vict. c. 71, passed to authorize the exercise of the above powers, subject to the consent of the corporation, was held to be ultra vires.

Principal and agent—Contract—Obligation of agent to pass goods through custom house—Neglect to expedite clearance so as to avoid impending duty.

Commonwealth Portland Cement Co. v. *Weber* (1905) A.C. 66 was an action brought by principals against an agent employed to pass goods through the custom house within a reasonable time after their arrival in port. The plaintiffs alleged that by reason of the defendants' negligently delaying the passage of the goods, they had to pay £997 5s. 10d. for duties on the importation. The ship was reported on Tuesday, 8th October, and the goods were then entitled to entry free of duty; it was proved that there was ample time to clear the goods on that day before the afternoon, when an ordinance was passed whereby they became liable to duty, but owing to the defendants' neglect to pass them in time they became subject to the duty. The Judicial Committee of the Privy Council (Lords Macnaghten and Lindley, and Sir Ford North and Sir Arthur Wilson) held, that upon a proper construction of the contract, it did not contemplate that the defendants should take upon themselves to attend to taxation likely to be imposed, or to protect the plaintiff's goods from taxation; that as they had cleared the goods within the time ordinarily allowed for the purpose, and no want of good faith was imputed to them, there was no evidence of any breach of duty on their part, and the action had been properly dismissed.

DAMAGE CAUSED BY EXPLOSION — ABSENCE OF EXACT PROOF OF CAUSE OF INJURY—VERDICT—EVIDENCE.

McArthur v. *Dominion Cartridge Co.* (1905) A.C. 72 was an appeal from the Supreme Court of Canada, 30 S.C.R. 285, involving an important question. The action arose in Quebec, the plaintiff being an employee of the Dominion Cartridge Company. It appeared by the evidence that while engaged in operating an automatic machine for filling cartridges, an explosion took place whereby the plaintiff was injured. There was no proof as to the exact cause of the explosion, but the flash communicated through a pipe with a powder box fixed on the outside of the building in which the machine stood. This box was placed outside so that in case of an explosion it would spend itself in the open air, but the sides of this box had been strengthened externally, for some reason or other, unexplained, and the result was that the explosion took effect inwards. There was some slight evidence that the machine itself was defective, and the jury at the trial found the defendants had been guilty of neglect in not supplying suitable machinery, and that the injury to the plaintiff was not in anyway caused by his own fault or negligence. The judge at the trial reserved the case for the Court of Review; that Court dismissed the defendants' motion for a new trial, and gave judgment for the plaintiff. The Supreme Court, however, reversed that decision and granted a new trial. Girouard, J., who delivered the judgment of the majority of the Court, apparently being influenced by some decisions in France which are stated to be "unanimous in exacting proof of a fault which certainly caused the injury," but with regard to this Lord Macnaghten observes: "French decisions though entitled to the highest respect and valuable as illustrations are not binding authority in Quebec. . . . It is enough to say that although the proposition for which they are cited may be reasonable in the circumstances of a particular case, it can hardly be applicable when the accident causing the injury is the work of a moment, and the eye is incapable of detecting its origin or following its course. It cannot be of universal application, or utter destruction would carry with it complete immunity—for the employer." Their Lordships, considering that there was some evidence on which the jury might reasonably find as they did, thought the verdict should not be disturbed, and they accordingly reversed the judgment of the Supreme Court. In view of this decision it is possible that some other decisions of the Supreme Court in cases under the Workmen's Compensation and Fatal Accidents Acts may need to be reconsidered.

BUILDING CONTRACT—CONSTRUCTION — ARCHITECT'S CERTIFICATE —FINALITY—REFERENCE OF DISPUTES TO ARBITRATION.

In *Robins* v. *Goddard* (1905) 1 K.B. 294 the Court of Appeal (Collins, M.R., and Stirling and Mathew, L.JJ.) have reversed the decision of Farwell, J. (1904) 2 Ch. 261 (noted ante, vol. 40, p. 836). One would have thought that the editor of the reports would have been better advised had he placed this report in the current Chancery, instead of in the K.B., volume. This, by the way. The case it may be remembered turns upon the construction of a building contract of a somewhat special character. By its terms the work was subject to the control of an architect and payments were to be made thereunder upon his certificate, but the contract also provided that defects which might appear within twelve months from the completion were to be made good by the contractor at his own expense upon the written direction of the architect, unless the architect should certify that he was entitled to be paid therefor. The contract also provided that the architect's certificates for payment were not to be conclusive evidence as to the sufficiency of the work. The architect had given certificates for payment; and to recover the amounts thus certified the action was brought. The architect had not certified as to any defects to be made good by the contractor. The first clause provided that any disputes were to be settled by arbitration, and that the arbitrator should have power to review and revise any certificates given. The defendants set up by way of defence and counterclaim that the work done was defective and not in accordance with the contract. Farwell, J., held that in the absence of any certificate by the architect as to defective work to be made good, his certificates for payment were conclusive. The Court of Appeal, however, held that the arbitration clause destroyed the finality of his certificate, and that the defendants were entitled to set up the defence and counterclaim.

COMPANY — LIMITED LIABILITY — COMPANY TRADING IN FOREIGN COUNTRY — PERSONAL LIABILITY OF SHAREHOLDERS UNDER FOREIGN LAW—CONFLICT OF LAWS.

Ridson Iron and L. Works v. *Furness* (1905) 1 K.B. 304 is a somewhat singular case, in which a question was raised of some importance in company law. The defendant was a shareholder in an English limited company formed for the purpose of carrying on a mining business in the United States. The company acquired and worked mines in California, and, in the course of their business, contracted a debt with the plaintiff company in that State. By the law of California the share-

holders of every company, whether incorporated in California or elsewhere, are personally liable for the debts of the company in the proportion which the shares which they hold bear to the whole subscribed capital. The plaintiff company, therefore, claimed to recover from the defendant the proportion of the debt due by the defendant under this California law. Kennedy, J., however, held that though the defendant might have been made liable therefor if sued in California, while within the jurisdiction of the Courts of that State, yet that the plaintiffs could not succeed in an English Court, because under English law the limitation of liability was the legal basis of the shareholder's relation to the company. English Courts cannot recognize as a valid cause of action a debt arising by virtue of a foreign law, which is inconsistent with the English law of the limited liability of shareholders; and that the defendant in becoming a shareholder upon the terms of the memorandum and articles of association, did not authorize the directors of the company to pledge his personal credit for the price of the goods supplied.

EMPLOYER AND WORKMAN—"WORKMAN"—COMPENSATION FOR INJURIES—PARTNER WORKING AT WAGES.

In *Ellis* v. *Ellis* (1905) 1 K.B. 324 a very simple question was involved, viz., whether the partner of a firm who worked as a foreman for wages, was a workman within the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37) s. 1, and as such entitled to compensation for injuries sustained in the course of his employment. The Court of Appeal (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) decided that he was not. That the Act contemplates that the workman shall be employed by some other person or persons, and that the deceased, being himself one of the partners of the firm for which he was working, could not be said to be employed by them. This decision would probably be deemed an authority on the construction of the word "workman" in The Workman's Compensation for Injuries Act (R.S.O. c. 160).

WEIGHTS AND MEASURES—WEIGHING MACHINE—FALSE OR UNJUST SCALES—WEIGHTS AND MEASURES ACT, 1878 (41 & 42 VICT. c. 49,) s. 25—(R.S.C. c. 104 s. 4).

London County Council v. *Payne* (1905) 1 K.B. 410 is another instance of the strictness with which the Weights and Measures Act, 1878 (see R.S.C. c. 104, s. 4) is construed. In this case the defendants were wholesale tea merchants and received orders from some of their customers for quantities of tea to be

weighed out in packets of a particular weight, and in those cases the tea was weighed at the customer's request with a paper bag supplied by the customer, under the goods scoop of the weighing machine: the effect being that the tea put into the scoop weighed less than the weight on the opposite side of the machine by the weight of the paper bag. It was not customary to use the scales in that condition for weighing goods for other customers, but an inspector of weights and measures entered the defendants' premises and found the scales standing on a shelf not in use, with the paper bag under the scoop, and the question was whether this was having scales "false and unjust" and an infraction of the Act. The Divisional Court (Lord Alverstone, C.J., and Kennedy and Ridley, JJ.) held that it was, and within the previous decision of the Court in *London County Council* v. *Payne* (1904) 1 K.B. 194 (noted ante, vol. 40, p. 188).

ANCIENT LIGHTS — PRESCRIPTION — EASEMENT— LIGHT —QUANTUM OF LIGHT.

Ambler v. *Gordon* (1905) 1 K.B. 417 was a case stated by an arbitrator on a question of ancient lights. The plaintiff claimed that his ancient lights were being interfered with by a building being erected by the defendant, and the matter was referred to arbitration. The arbitrator found that the defendant's building did not interfere with the plaintiff's lights for ordinary purposes, but that if, as an architect, he was entitled to the extraordinary amount of light he had theretofore enjoyed prior to the erection of the defendant's building, then his damages would amount to £600. It was not stated whether or not the owners of the servient tenement knew that the plaintiff required or was using any special or extraordinary amount of light for the purpose of his business, but Bray, J., was of opinion that even if they did, it would not have the effect of enlarging the plaintiff's right to any more than the light ordinarily required, and he therefore held that the plaintiff was not entitled to anything.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.] ASSELTINE *v.* SHIBLEY. [Jan. 23.

Elections—Offences—Punishment for—"On conviction"—Penalty—Imprisonment—Proceeding by action.

The effect of the amendment of s. 159 (2) of Ontario Election Act, R.S.O. c. 9, made by 63 Viet. c. 4 (O.), is to take the penalties imposed by the amended clause out of the category of those which may be recovered by action under s. 195.

Only one proceeding is contemplated by the amended section, and that is one in which both the penalty may be recovered and the imprisonment imposed: both must follow on the conviction in one and the same proceeding taken to enforce them. Imprisonment cannot be adjudged in an action under section 195, which seems to intend a proceeding by action to recover the money penalty alone and not a proceeding in which imprisonment is sought or is to be imposed in addition to the penalty.

There are, however, numerous election offences for which a pecuniary penalty only is imposed and for which an action is maintainable under section 195.

Aylesworth, K.C., for the appeal. *Mowat*, K.C., contra.

Full Court.] REX *v.* IRVINE. [Feb. 24.

Criminal Code—Conviction—Trade or traffic in bottles with trade mark or name thereon—Registration of—Trade Mark and Design Act.

The defendant, a soda water manufacturer, who had filled and placed on the market for sale bottles with the name of another soda water manufacturer stamped thereon, was convicted by a Police Magistrate under section 449 of the Code and fined. On a case reserved, in which it was objected that the

"name" mentioned in the section should be registered under the Trade Mark and Design Act and amendments thereto:—

Held, that when Parliament made it an offence to trade or traffic in any bottle, etc., which has upon it the duly registered trade mark *or name* of another person, they must have meant something more than one having a duly registered trade mark upon it, and to forbid also trade or traffic by one person in bottles with the name of another person: that the words "duly registered" are confined to the trade mark, and do not apply to the name: and that it is sufficient if the name of another person is upon the bottle, and it is not necessary that such name should be registered as a trade mark.

Cartwright, K. C., Deputy Attorney-General, for Crown. *Gordon Henderson*, for defendant.

HIGH COURT OF JUSTICE.

Divisional Court.] [Jan. 11.

BLACKLEY *v.* ELITE COSTUME CO.

Service out of the jurisdiction — Contract to be performed in Ontario—Con. Rule 162 (c).

The defendants gave an order in writing to the plaintiffs' traveller while he was in Montreal, which was to be and was accepted by the plaintiffs by letter from Toronto, the plaintiffs' place of business.

Held, upon the facts, that an acceptance by post was within the contemplation of the parties, and that the contract was made when the plaintiffs' letter accepting the order was mailed.

Plaintiffs' claim was endorsed for breach of contract and for goods sold and delivered. The contract provided that the goods were to be delivered f.o.b. at Toronto.

Held, 1. The property in the goods passed on such delivery being made, and that a breach of the contract by non-acceptance was a breach within Ontario of an obligation of a contract to be performed within Ontario.

2. Even if the rule of law, that a debtor must seek out his creditor to pay him, unless the application of it is inconsistent with the terms of the contract, is to be excluded, it was in the contemplation of the parties that payment was to be made at Toronto, and the obligation to pay was therefore one to be performed in Ontario.

3. An order for service out of the jurisdiction under Con. Rule 162 (*e*) was properly made.

The difference between the Rule in Ontario and the Rule in England considered.

Judgment of BRITTON, J., affirmed.

Geo. Kerr, Jr., and *J. Montgomery*, for the appeal. *Eyre*, and *Wallace*, contra.

Falconbridge, J., Street, J., Anglin, J.] [March 20.

IN RE INGLIS AND CITY OF TORONTO.

Municipal law—Bonus to manufacturing industry—Motion to quash—Private interest—Registered plan.

Motion to quash a by-law of the City of Toronto providing for the closing of part of Strachan Avenue and conveying the same to the Massey Harris Company by way of bonus for the promotion of the manufacturing industry carried on by them, and to promote an intended enlargement of their works in Toronto. No contract by the company to add to their works, or to increase the manufacture of their implements, or to employ any additional number of men had been entered into:—

Held, that this fact did not invalidate the by-law, or prove that it was passed solely in the private interest of the company and not also in the public interest. The council did not take action in passing the by-law without much consideration, and the Court could not find that it was wrong in the conclusion to which it must be assumed that it arrived, viz., that the public interest would be served by closing and conveying the portion of Strachan Avenue in question. The by-law must, therefore, be held valid under sections 632 and 591 of the Municipal Consolidated Act, 1903, as amended by 4 Edw. VII., c. 22, s. 26, by which it is declared that the bonus which municipalities are empowered to grant under s. 591, sub-s. 12, for the promotion of manufactures within the limits of the municipality may be given by closing up any portion of a street, and conveying it for the use of a manufacturing industry.

Held, also, that the fact that the applicant had bought his land under a registered plan which shewed Strachan Avenue to have a width of 80 feet, did not prevent the municipal corporation passing the by-law in question, though by it the width of the street was reduced at the part affected to 66 feet.

H. S. Osler, K.C., and *B. Osler*, for applicants (appellants). *Watson*, K.C., and *Mackelcan*, K.C., for City of Toronto (respondents).

Province of Manitoba.

KING'S BENCH.

Richards, J.] THE KING *v.* OSBERG. [Feb. 27.

Bawdy house—Evidence—Crim. Code, 1892, s. 195.

s. 195.

Application for a writ of habeas corpus on behalf of the prisoner, who had been convicted of keeping a bawdy house, and committed to gaol for default in payment of the fine imposed.

The woman lived in a house by herself, and had been, and still was, reputed to be a prostitute, and the house was reputed to be a house of prostitution. On the day in question a detective visited it. He was delayed at the door, the lights were turned out before he was admitted, and on entering he found a young man in company with another woman known to be a prostitute. Apparently both were fully clothed, and the detective saw no evidence of acts of prostitution. It was also shewn that on a shortly previous occasion, another woman, who had formerly been a prostitute, had visited the house. One witness testified generally that he had seen women go there, without saying how many or what character the women bore. There was also evidence that men frequently resorted to the house during the night, and that many of them drove to it in cabs, and the place was a source of great annoyance to reputable people living in the neighbourhood:—

Held, 1. Following *King* v. *Young*, 14 M.R. 58, and *Singleton* v. *Ellison* (1895), 1 Q.B. 607, that a woman, living by herself in a house, cannot be convicted of keeping a bawdy house therein, unless other women than herself resort to it for purposes of prostitution, and that the evidence in this case was not sufficient to shew that any other woman had so resorted to the house in question.

2. Following *Reg.* v. *St. Clair*, 3 C.C.C. 557, that there was not even sufficient evidence to shew that the prisoner was keeping a house of prostitution at the time. To prove that, more would have to be shewn than the prisoner's bad reputation and the resorting of men to the house. Actual proof would have to be given of some act or acts of prostitution, though definite proof of one might be sufficient.

3. The definition of a bawdy house given in section 195 of the Criminal Code was not intended to effect any change in the law as to what is necessary to constitute a bawdy house as laid down

in Stephen's Digest of Criminal Law, art. 201, and in the standard law lexicons.

Judgment that prisoner should be discharged and that no action should be brought against the magistrate, the informant, or the gaoler.

Patterson, for the Crown. *Bonnar*, for prisoner.

Perdue, J.] WALKER v. ROBINSON. [March 13.

Practice—Motion to rescind order not made ex parte—Jurisdiction of Referee in Chambers—Dismissal of action—King's Bench Act, Rules 442, 449—Entering judgment for defendant.

Appeal from the Referee in Chambers on November 11th, 1904, the cause being then at issue and on the list of causes for trial, the Referee made an order, purporting to be with the consent of both plaintiffs and defendants, directing that judgment be entered and signed in the action in favour of the defendants without costs. Judgment was afterwards entered upon this order, but it recited the order as one dismissing the action, and then ordered and adjudged that the action *be dismissed* without costs. A motion was then made before the Referee on behalf of the plaintiff Walker, and Mr. Elliott, the solicitor who had acted for the plaintiffs, to set aside the order of 11th November, and for an order that the defendant Robinson and Mr. Haney, his solicitor, be directed to pay to Mr. Elliott his costs as between solicitor and client, also for an order that the judgment entered in the action be set aside.

The main grounds of the application, as appearing in the material filed, were that the defendant Robinson had, with the aid of Mr. Haney, made a settlement of the suit with the plaintiffs, without the knowledge of their solicitor, Mr. Elliott, and that an alleged understanding between the plaintiff Walker and the defendant Robinson as to the payment of Mr. Elliott's costs, had not been carried out.

The Referee dismissed the motion, and the present appeal was from that dismissal. There had been no appeal from the original order of Nov. 11:—

Held, 1. The Referee had no power to rescind his own order, as it was not made ex parte: *Re Nazure*, 12 Ch.D. 88; *Preston* v. *Allsopp* (1895), 1 Ch. 141; and, therefore, an appeal from his refusal to do so must fail.

2. The Referee had no jurisdiction, under Rule 449 of the King's Bench Act, or otherwise, even with the consent of the parties, to make an order for the entry of judgment for the defendants after the action had been entered for trial; and that such a judgment can then only be pronounced by a judge sitting in Court. The Referee has power to dismiss an action by the consent of the parties. That would be a matter relating to the conduct of the action, and is covered by Rule 442 (*d*). But entering a judgment for the defendants is an adjudication and final disposition of the cause of action involved, and is widely different from a mere dismissal of the action.

3. The judgment entered in the action was unauthorized and unsupported by any order or pronouncement of the Court, and could have been set aside by the Referee on the application before him, and should now be set aside on this appeal. No costs, as the appeal succeeded only on grounds not taken before the Referee.

Elliott, for plaintiffs. *Robson*, for Harvey. *McKerchar*, for Robinson.

Province of British Columbia.

SUPREME COURT.

Full Court.] RASER *v.* MCQUADE. [April 18, 1904.

Contract Consideration of marriage—Ante-nuptial agreement by woman to make future husband her sole heir—Will made after excluding husband—Effect of—Specific performance—"Voluntarily"—Meaning of—Costs payable out of estate.

Appeal from judgment of DRAKE, J., dismissing the action.

A woman, in consideration of a man marrying her, promised him that she would make him her sole heir: he married her, and after marriage, in acknowledgment of the ante-nuptial contract, she signed a writing stating: "I voluntarily promised . . . before and after marriage that I would make him my sole heir . . . by virtue of this contract he is my sole heir." She died having (after the acknowledgment) disposed of her estate by will to the exclusion of her husband:—

Held, that the ante-nuptial agreement was a binding contract on the part of the woman to leave by will her property to her husband, and should be specifically performed: and that "voluntarily" in the acknowledgment meant "of her own free will."

Held, also, that under all the circumstances the executor named in the will acted reasonably in defending the action and resisting the appeal, and he was therefore entitled to charge the estate for his costs.

Davis, K.C., for appellant. *A. E. McPhillips*, K.C., and *Heisterman*, for respondents.

North-West Territories.

SUPREME COURT.

Full Court.] SASKATCHEWAN LAND CO. *v.* LEADLEY. [March.

Action commenced in wrong sub-judicial district—Transfer—Chamber summons—Irregularity—Rules 538-540.

The decision of Scott, J., reported ante, vol. 40, p. 47, was overruled by the Full Court, which held in effect that the commencement of an action in the wrong subjudicial district was a nullity and not an irregularity, and the judge was wrong in making an order to transfer it.

Scott, J.] BISHOP *v.* SCOTT. [March.

Contract—Place of performance—Contract by correspondence—Tender of deed rendered unnecessary—Completion of contract.

This was an application by the defendant to strike out the writ of summons and for the disallowance of all the proceedings in the action on the ground that it was not one in which an order for service out of the jurisdiction, under s. 18 of the Judicature Ordinance or otherwise, should have been made.

In his statement of claim the plaintiff, who resides in Edmonton, alleged that the defendant, who resides in Hamilton, Ont., contracted to sell to him a lot in Edmonton upon certain terms, and that the contract was made and concluded by correspondence between the parties by means of letters, the plaintiff's being written and posted at Edmonton and those of the defendant at Hamilton, Ont. The plaintiff claimed damages

for breach by defendant of the contract in refusing to convey, alleging that the defendant had already conveyed the lot to another person.

SCOTT, J.:—The correspondence is not set out in the statement of claim, but it is before me on this application. The material portion of it so far as this application is concerned consists of a letter written by the defendant to the plaintiff Oct. 4, 1903, offering to sell the lot for $500 on certain terms of payment. A letter from the plaintiff to defendant dated Oct. 17, in which, after referring to defendant's offer and specifying the lot, he says, "I accept your offer as stated and will forward you the agreement for sale on Monday." A letter from the plaintiff to the defendant dated Oct. 20, enclosing the down payment under the agreement and an agreement for signature by the defendant, and a letter from defendant to the plaintiff dated Oct. 28, on the ground that it provides for the payment by the latter of the taxes up to the end of 1903, and stating that he had heard he had sold the lot to some one else.

It was contended on behalf of the defendant that the contract is one which should be performed where he lived, as the purchase money must be paid to him there and the transfer executed by him there or tendered to him there for execution.

The plaintiff's letter of acceptance of defendant's offer to sell having been mailed here by the former the contract must be taken to have been made here: *Empire Oil Co.* v. *Vallerand*, 17 P.R. 27, and *Household Fire Ins. Co.* v. *Grant*, 4 Ex. D. 216. Such being the case I cannot see that this case is distinguishable from *Reynolds* v. *Coleman*, 36 Ch. D. 453. There the defendant, who resides in United States, was sued for specific performance of a contract made by him in England with the plaintiff, who carries on business there, to transfer to the plaintiff certain shares in an English joint stock company, and it was held by the Court of Appeal that the contract was one which ought to be performed in England. Cotton, L.J., says at p. 464, "The contract was to transfer shares. It was said that such a contract might be performed by the defendant's executing a deed of transfer in the United States. But that would not perform the contract. It would not be enough to execute in the United States or out of the jurisdiction a deed of transfer because the transferor must deliver that deed of transfer to the transferee, that is to say, to the plaintiff, and having regard to the fact that the contract to transfer the shares was a contract made in England and with the plaintiff, who was at that time carrying on business in and resident in England, the

contract in this case ought in my opinion, according to its terms, to have been performed within the jurisdiction."

A distinction was sought to be drawn by defendant's counsel between a contract to transfer shares and a contract to convey lands, his contention being that in the latter case, it would be the duty of the purchaser to tender a transfer for execution before seeking specific performance of the contract, and the transfer in this case would have to be tendered to the defendant at Hamilton.

Mooney v. *Prevost*, 20 Grant 418, seems to imply that the omission to tender the transfer before action would at most be merely a question of costs of the action. But apart from that the plaintiff in his statement of claim alleges that the defendant refused to perform the contract and has since conveyed away the lands. Also the correspondence put in by the defendant on this application shews that he did so refuse. It appears to me that under these circumstances the tender of a transfer to the defendant would have been an entirely useless and unnecessary proceeding.

It was also contended by defendant that the correspondence shews that there was no completed contract between the parties and there being no contract there was not one which ought to be performed within the jurisdiction. The ground of this contention is that plaintiff's acceptance of defendant's offer was conditional, viz.: that the construction which must be placed upon the portion of the letter which I have quoted is that the acceptance was subject to the defendant entering into the agreement for sale which plaintiff said he would forward, and that the agreement when forwarded contained conditions other than those stated in defendant's offer. A number of authorities were cited in support of this contention. Reference to them shews that the question is not free from doubt. Such being the case, and as the question is one which goes to the root of the action I think I ought not to dispose of it on this application.

I dismiss the application with costs to the plaintiff in any event on final taxation.

C. F. Newell, for the motion. *J. R. Boyle*, contra.