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Canada Law Journal.

VOL. XLVIII. TORONTO, SEPTEMBER. Nos. 16 & 17.

THE RAILWAY COMMISSION.

In its short existence of eight years the Board of Railway Commissioners for Canada has had four chief commissioners. The first of these—Hon. A. G. Blair—resigned voluntarily after a few months' tenure of office, during which he organized the Board, and did excellent work almost single handed. The next chief came from the Bench of the Supreme Court of Canada—Hon. A. C. Killam—whose mature judgment and careful consideration of all matters which came before him created great confidence in, and gave great strength and importance to, this railway court, and his decisions have never been reversed. Mr. Killam's untimely death, after three years' service, seemed at the time to be irreparable.

To fill his place a judge was again taken from the Bench, this time from the High Court of Ontario. The Hon. J. P. Mabee proved a fitting successor to the strong men who had preceded him. His legal attainments, judicial training, and strong common-sense bent of mind made his personality strongly felt, and his decisions were usually satisfactory to the parties concerned. He seemed scarcely to be in the saddle before death removed him, and again the chairmanship was vacant.

During the interval which subvened before a new appointment was made, the duties devolved upon the Assistant Chief Commissioner—Mr. D'Arcy Scott. It seems appropriate here to say that both as assistant chief, and as acting chief, Mr. Scott has an enviable record for capacity and ability in the conduct and disposal of matters before the Board. The Government, however, deemed it desirable to make an appointment from the outside, and the choice fell on a prominent member of the Ontario Bar, Mr. Harry Lumley Drayton, K.C., of Toronto, and it can truly be said that the office sought the man, and that (like the chairman of the Transcontinental Railway Commission) pecuniary considerations had no weight in determining his acceptance.

Mr. Drayton was born in Kingston, Ont., in April, 1869, and although still a young man, he has had considerable experience at the Bar, to which he was called in 1891. Crown Attorney for the County of York from 1904 to 1909, he became, in the following year, Corporation Counsel for the city of Toronto. In 1911 he was appointed a member of the Light and Power Commission of Ontario, both of which offices he held at the time of his appointment as Chief Commissioner of the Board of Railway Commissioners for Canada.

His experience in railway matters has not been inconsiderable, and he brings to his new position a wide knowledge of affairs, an acquisitive mind, sound judgment, and firmness of purpose, all essential attributes for the work now before him. That he should have become at a comparatively early age the senior member of one of the most important tribunals in Canada, is in itself no mean tribute. We believe results will shew that the interests of the public are in safe hands, and that he will be an honour to the railway Bench.

DOMICILE.

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1. *Definition, and to what it applies.*

"A person's domicil is that country in which he either has

or is deemed by law to have his permanent home." (Laws of England VI., sec. 280).

It is the relation of an individual to a particular state which arises from his residence within its limits as a member of its community. (Foote, cap. II., p. 52.)

The domicile of any person is, in general, the place or country which is his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law. (Dicey 1908, p. 82.)

Speaking generally, this is the principle by which English law determines the personal law upon which majority or minority, the capacity to marry, succession to movable property, testacy or intestacy, and the legitimation of children by the subsequent marriage of their parents, depend. "With regard to the beneficial succession on death to movable property, after payment of debts, it is allowed without dispute to cover the whole ground."

"English law determines all questions in which it admits the operation of a personal law by the test of domicile." (Laws of England VI, sec. 280.)

From the point of view of the Roman Jurists "that place was to be regarded as a man's domicile which he has *freely chosen* for his permanent abode, and as the centre at once of his legal relations and his business: the place to which he has transferred his tabernacle and his main establishment (larem rerumque ac fortunarum summum) and the place to which he always intends to return at the end of any temporary absence."

This is a time-honoured quotation, beautifully expressing the common notion of home or residence, but hardly to be called a definition though not the less suited on that account to the Roman notion of domicile. (Westlake (4th ed.), p. 310.)

"Residence and domicile are two perfectly distinct things. It is necessary in the administration of the law that the idea of domicile should exist, and that the fact of domicile should be ascertained, in order to determine which of two municipal laws

may be invoked for the purpose of regulating the rights of the parties. We know very well that succession and distribution depend upon the law of the domicile. Domicile therefore is an idea of law. It is the relation which the law creates between an individual and a particular locality or country. To every adult person the law ascribes a domicile, and that domicile remains his fixed attribute until a new and different attribute usurps its place." (Lord Westbury, in *Bell* v. *Kennedy* (1868), L.R., 1 S. & D.A. 320.)

"Such," says Mr. Westlake, "is domicile in its modern and particularly in its English aspect" (p. 311).

Domiciles are of three kinds:—

1. Of birth or origin.
2. By operation of law.
3. Of choice.

It is proposed in this article to deal chiefly with the present state of English law in regard to the third of these.

II. *Domicile of Origin.*

English law attributes to every one at birth a domicile which is called a domicile of origin. This domicile may be changed, and a new domicil, which is called a domicil of choice, acquired; but the two kinds of domicile differ in the following respects:— The domicil of origin is received by operation of law at birth; the domicile of choice is acquired at a later date by the act of an individual.

The domicil of origin is retained until the acquisition of a domicile of choice, and cannot be divested by mere abandonment; the domicile of choice is lost by abandonment.

The domicile of origin is never destroyed but only remains in abeyance during the continuance of a domicile of choice; the domicile of choice, when it is once lost, is destroyed for every purpose. (Laws of England VI., sec. 281.)

The law attributes to every child, as soon as he is born, the domicile of his father if the child be legitimate; of his mother, if the child be illegitimate.

III. *Domicile of Choice.*

How can the domicile of origin be changed and a domicile of choice acquired?

It was the Roman law that a person sui juris can establish for himself a domicile of choice animo et facto, by establishing for himself in fact a residence in the territory in question, combined with an animus manendi in that territory. (Westlake (4th ed.), sec. 256.)

The change of residence must be accomplished animo et facto; the factum required is a change of residence, voluntarily assumed, and permanent in character; the animus required is an intention to settle in a new country as a permanent residence.

IV. *Doctrine of Moorhouse* v. *Lord.*

Subject to some considerations which will follow, this would seem to be the English law; it was certainly the older doctrine up to the year 1863, when what was spoken of as "the modern improved views of domicile" were distinctly avowed by the House of Lords in *Moorhouse* v. *Lord*, 10 H.L. 272.

"According to that doctrine a domicile of choice, even in a Christian country, is not acquired by any residence, however preponderant and permanent, unless the person in question has the intention of subjecting himself and his movable succession to the law of that country, or at least, if he does not think expressly of the law, the intention of so incorporating himself with the population of that country that the application of its law to him and to his movable succession must be considered to be in accordance with his feelings." (Westlake, 4 ed., p. 328.)

But this summary of the effect of that case modifies and attenuates very much, speaking with respect, the actual doctrine there laid down. The quotations which follow shew that much more was intended, and that it was "designed to substitute political nationality for domicile as the ground of personal law, or at any rate to negative a domicile of choice as the ground of personal law unless accompanied by such circumstances as to infer a preference for the political nationality of the adopted territory."

Mr. Westlake argues that "a careful study of the speeches of the noble lords will shew that it was the civil and not the political society of the adopted territory, with which they required that the person who established a domicile of choice should desire to incorporate himself."

The following are the quotations referred to:—

Lord Cranworth, "For all or some or one of these motives he quitted Clippens, he went first to Berne, where he sent his children to school at Hoffwyl for a few months, and went to Paris, and eventually established himself in a house or apartments which he took unfurnished, and for which he got expensive furniture, meaning (if you please) to live there always, but then *that* does not change the domicile.

"In order to acquire a new domicile, according to an expression which I believe I used on a former occasion, and which I shall not shrink on that account from repeating, because I think it is correct statement of the law, a man must intend quatenus in illo exuere patriam.

"It is not enough that you merely mean to take another house in some other place, and that on account of your health or for some other reason you think it tolerably certain that you had better remain there all the days of your life, that does not signify. You do not lose your domicile of origin or your resumed domicile merely because you go to some other place that suits your health better, unless indeed you mean either on account of your health of for some other motive to cease to be a Scotchman and become an Englishman or a Frenchman or a German. In that case if you give up everything you leave behind you, and establish yourself elsewhere, you may change your domicile, but it would be a most dangerous thing in this age when persons are so much in the habit of going to a better climate on account of health or to another country for a variety of reasons, for the education of their children, or from caprice, or for enjoyment, to say that by going and living elsewhere, still retaining all your possessions here and keeping up your house in the country as this gentleman kept up his house at

Clippens, you make yourself a foreigner instead of a native. It is quite clear that that is inconsistent with all the modern improved views of domicile." (10 H.L., p. 283.)

Lord Kingsdown: "Upon the question of domicile I would only wish to say this, that I apprehend the change of residence alone, however long and continued, does not effect a change of domicile as regulating the testamentary acts of the individual. It may be and it is a *necessary* ingredient. It may be and it is *strong evidence* of an intention to change the domicile, but unless in addition to residence, there is intention to *change the domicile*, in my opinion no change of domicile is made; a *man must intend* to become a Frenchman instead of an Englishman" (ib., p. 292).

It seems to be clear that in the opinion of these Judges, removing from England and taking up a residence in France, with the intention of continuing such residence permanently and never again changing it, was not sufficient to effect a change of domicile. There must be a definite and, as far as possible, an effective change of nationality and allegiance. It was not necessary to lay down any such doctrine for the decision of the case then before the Court. The circumstances in evidence were quite sufficient to warrant the conclusion which the Court arrived at, that the testator had not in fact formed the intention of residing permanently in France and never returning to Scotland.

"This doctrine," says Mr. Dicey, "has now been pronounced erroneous by the highest authority." (Dicey, 2nd ed., p. 1[illegible].)

V. *Effect of Udny* v. *Udny*.

The authority referred to by Mr. Dicey is the important case of *Udny* v *Udny* (1869) L.R. 1 Sc. App. 441, in regard to which he says: "This is the leading case on the change of domicile, and taken together with *Bell* v. *Kennedy*, L.R. 1 Sc. App. 309, contains nearly the whole of the law on the subject. The judgment of Lord Westbury, pp. 458, 459, should be particularly studied" (p. 123 (4)).

The question involved in that case was as to whether the

respondent, the son of the late Colonel Udny, "though illegitimate at his birth, was legitimated by the subsequent marriage of his parents." This depended upon the domicile of Colonel Udny at the time of such birth and marriage.

Colonel Udny's domicile of origin was Scotch, he settled in England and lived for thirty-two years in London. Having fallen into pecuniary difficulties, he gave up his London house, sold everything in it, and crossed over to France and resided in Boulogne for nine years. He then returned to London where the respondent was born, and where after the birth his parents were married.

What was Colonel Udny's domicile at the time of the birth and marriage? If Scotch, the effect of the marriage would be to legitimate the respondent. The House of Lords came to the conclusion that whatever might have been the effect of Colonel Udny's long and habitual residence in England upon the Scotch domicile of origin, which they considered to be a question of great nicety, that at any rate when he sold his house, and broke up his English establishment with the intention not to return to England there was an abandonment animo et facto of the English domicile which effectually destroyed it, and that thereupon his domicile of origin revived, and was in force at the time of the birth and marriage; and as the law of that domicile permitted legitimation per subsequens matrimonium, the respondent was legitimate.

The Lord Chancellor (Lord Hatherley) referring to *Moorhouse* v. *Lord* (supra) said:—

"I think some of the expressions used in former cases of the intent 'exuere patriam,' or *become a Frenchman* instead of an Englishman, go beyond the question of domicile. The question of naturalization and of allegiance is distinct from that of domicile. A man may continue to be an Englishman and yet his contracts and the succession to his estate may have to be determined by the law of the country in which he has chosen to settle himself. He cannot, at present at least, put off and resume at will obligations of obedience to the government of the country

of which at his birth he is subject, *but he may many times change his domicile*" (p. 452).

In the same case Lord Westbury says: "In adverting to Mr. Justice Storey's work I am obliged to dissent from the conclusion stated in the last edition of that useful book and which is thus expressed, 'the result of the more recent English cases seems to be that for a change of national domicile there must be a definite and effectual change of nationality.' In support of this proposition the editor refers to some words which appear to have fallen from the noble and learned Lord in addressing this House in the case of *Moorhouse* v. *Lord*, when, in speaking of the acquisition of a French domicile, Lord Kingsdown says, 'A man must intend to become a Frenchman instead of an Englishman'; these words are likely to mislead if they were intended to signify that for a change of domicile there must be a change of nationality, that is of natural allegiance. That would be to confound the political and civil status of an individual and to destroy the difference between patria and domicilium" (p. 459-460).

The case of *In re Martin* (1900), p. 241, may well be referred to next. The question was as to the validity of a will made by a Frenchwoman, who thereafter married a Frenchman domiciled, at the time of the marriage, in England, and died domiciled in France. It was held that her will was null and void according to English law. The question of the domicile of the husband at the time of the marriage was dealt with and was held by the majority of the Court of Appeal to have been English.

In commenting on this branch of the case, Mr. Julius Hirschfield says: "I may in the first place observe that the exacting doctrine of *Moorhouse* v. *Lord*, even in its attenuated interpretation, as read by Mr. Westlake is apparently quite dead.

"The case is not so much as mentioned in any of the judgments. The view that a man, in order to establish a domicile of choice, must intend quatenus in illo exuere patriam is hereby unmistakably repudiated." (26 Law Magazine, p. 350.)

In *Winans* v. *Attorney-General* (1904), A.C. 287 we have

what Mr. Westlake calls "a remarkable case of protracted actual r sidence not changing the domicile." The facts of this case were as follows: The testator, whose domicile of origin was the United States of America, went for trade purposes to live in Russia, from which country he yearly paid visits to England. Afterwards, being advised by his doctors, on account of his bad health, not to live in Russia, he came to England, and took a house at Brighton. For a few years he paid visits to Russia, but on giving up his trade connections he ceased to do this. For the last *twenty-seven years of his life* he lived in Great Britain, having leases of houses in London and Brighton, and spending the shooting season in Scotland, where he rented deer forests. He also used to go for his health's sake to visit a watering-place in Germany. While living in England he bought an estate in the United States, apparently for the purpose of selling it again as a speculation, but *he had no residence in America during the period for which he lived in Great Britain.* He described himself in certain American documents as an American citizen sojourning in England. He was advised by his doctors that a voyage to America would be dangerous in his state of health, but he sometimes expressed an intention of returning to America in a vessel which he invented, and took out patents for, which was intended not to roll or pitch when at sea.

The Court of Appeal held, on the facts, affirming the decision of the King's Bench Division, that there was an unrebutted presumption in favour of the testator having abandoned his domicile of origin and acquired a domicile of choice in Great Britain. The Master of the Rolls said: "Domicile of choice was a thing which it was difficult to define. It had been clearly settled by the House of Lords in *Udny* v. *Udny* (L.R. 1 H.L. Sc. 441) that it did not embrace the idea of a man's putting off his nationality and substituting another nationality. It must be taken that the notion of exuere patriam was not contained in domicile of choice. The element of choice must enter into the matter. It seemed to him that the nearest equivalent was the word "home."

"The essentials of domicile were to be found in the judgment of Lord Westbury in *Udny* v. *Udny* (18 T.L.R. 81)."

In the House of Lords the arguments turned entirely on the true inference of fact to be drawn from the evidence, and the Court differed from the conclusions drawn by the Courts below and reversed their judgments. Lord Halsbury, L.C., (p. 288) dealing with the question of domicile said, "Although many varieties of expression have been used, I believe the idea of domicile may be quite adequately expressed by the phrase—Was the place intended to be the permanent home?" Lord Macnaghten held that the Crown had not discharged the onus cast upon it of proving that the domicile of origin had been lost and that some other domicile had been acquired by Mr. Winans "When he came to this country he was a sojourner and a stranger, and he was, I think, a sojourner and a stranger in it when he died."

It was not proved that "Mr. Winans ever formed a fixed and settled purpose of abandoning his American domicile and settling finally in England" (p. 298).

Lord Lindley differed from the other Lords as to the conclusion to be drawn from the facts and arrived at the same conclusion as that arrived at by the Courts below; he was of the opinion that "Mr. Winans' home—his settled permanent home—was in Great Britain" (p. 300). "An intention to change nationality, to cease to be an American and to become an Englishman, was said to be necessary in *Moorhouse* v. *Lord;* but that view was decided to be incorrect in *Udny* v. *Udny*" (p. 299).

It is remarkable that *Moorhouse* v. *Lord* (supra), is only referred to in the judgment of Lord Lindley, and then as an overruled decision.

The doctrine of that case would have been decisive in the Winans case; there could be no doubt that Mr. Winans never for one moment contemplated a change of nationality, he never intended quatenus in illo exuere patriam. As pointed out by Lord Macnaghten, he was engrossed in certain large schemes: "Of course to us these schemes of Mr. Winans appear wild, visionary, and chimerical. But I have no doubt that to a man like Mr. Winans, wholly wrapt up in himself, they were very real. They were the dream of his life. For forty years he kept

them steadily in view. And one was anti-English, and the other wholly American" (p. 297).

To the layman it would seem clear that the doctrine in *Moorhouse* v. *Lord* was not only "dead" but buried. And so it appeared to Mr. Westlake; for very many years he had advocated the doctrine of *Moorhouse* v. *Lord* as being correct in principle. But in the fourth edition of his Private International Law (1905), he concedes that this view is no longer tenable in the face of the Winans case in conjunction with the cases that had preceded it.

He says: "Finally the doctrine of *Moorhouse* v. *Lord* must be considered to have been dismissed by the judgment of Lord Macnaghten in *Winans* v. *Att.-Gen.* (1904), A.C. 287, in which he repelled an asserted change of domicile from the United States to England in circumstances so strong that the change had been maintained in the Courts below by Kennedy and Phillimore, JJ., and by Collins, Stirling, and Mathew, L.JJ., and was maintained by Lord Lindley on the final appeal, Lord Halsbury declaring himself not satisfied, and giving his deciding vote against the change only because the burden of proof lay on the party asserting it. The important point is that although it would have been easy to overrule all the adverse facts by observing that Mr. Winans had never shewn a disposition quatenus in illo exuere patriam in any sense, Lord Macnaghten does not allude to that as a test, and does not even mention the famous case."

But the uncertainty of law is proverbial. In the year 1774, counsel argued that a bet upon the result of an appeal from a decision given in a case was a bet upon a certainty and therefore was not enforceable. "The laws of this country are clear, evident, and certain. All the Judges know the laws, and knowing them, administer justice with uprightness and integrity. The event therefore, was certain, and of course the wager such, as in its nature was impossible to be lost." To this specious and original argument Lord Mansfield replied: "As to the certainty of the law mentioned by Mr. Dunning, it would be very hard

upon the profession if the law was so certain that everybody knew it; the misfortune is that it is so uncertain, that it costs much money to know what it is even in the last resort": *Jones* v. *Randall*, 1 Cowp, 37, p. 40; and in more modern times we have Lord Halsbury's oft-quoted statement: "I entirely deny that it (a case) can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer knows that the law is not always logical at all." *Quinn* v. *Leathem* (1901), A.C. 495, p. 506.

"Mr. Westlake, it will be remembered, in the last edition of his work, expatiated on the importance of the Winans case as finally dismissing the quatenus in illo exuere patriam theory of domicile, if we may so term it brevitatis causâ. Hardly were his sheets cold from the press when the House of Lords in *Huntly* (sic) rehabilitated the doctrine in its entirety." Jurid. Rev. XX., 276.

VI. *The Case of Huntley* v. *Gaskell.*

In the case just referred to, the testator, Sir William Cunliffe Brooks was an English banker, born and domiciled in England. He was member of Parliament for an English constituency down to 1892. He had his chief residence or home in Scotland for thirty years prior to his death in 1900. During this time he retained his interests in England as principal partner in a private bank at Manchester, and as proprietor of large landed estates, and continued his occupancy as tenant of a mansion house near Manchester and of a house in London. He was by his own directions buried in Scotland. What was his domicile? The House of Lords held, affirming the decision of the First Division of the Court of Session, Scotland, that he had not lost his English domicile: *Huntley* v. *Gaskell* (1906), A.C. 56.

Lord Macnaghten did not sit on the hearing of this appeal, and the principal judgment was given by Lord Halsbury. The language of his judgment bearing upon the question under discussion is as follows:—

"I myself think in my view of the law that it is expressed very well indeed by Lord Curriehill, approved and quoted by Lord President Inglis in the case of *Steel* v. *Steel.* (1) "It is, I think," says the learned Judge, "by no means an easy thing to establish that a man has lost his domicile of origin, for as Lord Cranworth said in the case of *Moorhouse* v. *Lord* (2), 'In order to acquire a new domicile, a man must intend quatenus in illo exuere patriam,' and I venture to translate these words into English as meaning that he must have a fixed intention or determination to strip himself of his nationality, or, in other words, to renounce his birthright in the place of his original domicile. The serious character of such a change is very well expounded by Lord Curriehill in the case of *Donaldson* v. *M'Clure.* (3) He says: 'To abandon one domicile for another means something for more than a mere change of residence. It imports an intention not only to relinquish those peculiar rights, privileges and immunities which the law and constitution of the domicile confer on the denizens of the country in their domestic relations, in their business transactions, in their political and municipal status, and in the daily affairs of common life, but also the laws by which the succession of property is regulated after death. The abandonment or change of a domicile is therefore a proceeding of a very serious nature, and an intention to make such an abandonment requires to be proved by satisfactory evidence" (p. 66).

VII. *Summary and effect of Huntley* v. *Gaskell.*

What is the effect of this judgment, does it, as has been said, "rehabilitate the doctrine of *Moorhouse* v. *Lord* in its entirety"? It is submitted that it does not, and that the law still stands as laid down in *Udny* v. *Udny* and the important cases which have followed it.

The language of Sir P. O'Brian, C.J., in *Davis* v. *Adair* (1895), 1 Ir. Chy. 379, p. 437, are still true: "To take the language of that great master of this and every other branch of the law, Lord Westbury, in *Udny* v. *Udny* (L.R. 1 H.L. Sc. 457).

He says there: 'Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be a residence fixed, not for a period or particular purpose, but general and indefinite in its future contemplation. It is true that residence, originally temporary, or intended for a limited period, may afterwards become general and unlimited; and in such a case, so soon as the change of purpose, or animus manendi, can be inferred, the fact of domicil is established. This is the language of Lord Westbury in what appears to me to be the greatest, the most luminous, and though not long, the most comprehensive judgment that is to be found in our English law books upon the law of domicile."

The reasons for supporting this as still the law are as follows: (1) From an examination of the *Huntley* case itself. Although Lord Halsbury gives the great weight of his own opinion in favour of the doctrine of *Moorhouse* v. *Lord*, he does not base his judgment upon it. He discusses the facts of the case, the character of the residence, etc., and finds that it would be "a very monstrous proposition" for anybody to draw an inference from these facts that the testator meant to change his domicile.

The other Judges, Lords Robertson and Lindley do not base their judgments, very brief ones, upon *Moorhouse* v. *Lord*, but upon the facts. We are entitled to look at the headnote in such a case as this in order to see what Sir F. Pollock thought to be the point decided. It runs as follows: "The abandonment or change of a domicile is a proceeding of a very serious nature, and an intention to make such an abandonment must be proved by satisfactory evidence. A person having a domicile of origin in England does not lose it and acquire a Scottish domicile by

making his home in Scotland for many years, unless in the circumstances his doing so clearly shews his intention to abandon his original domicile," p. 56.

Is it going too far to treat Lord Halsbury's reference to *Moorhouse* v. *Lord* as a mere dictum, entitled of course to great respect as coming from so eminent an authority, but yet not of such weight as to "rehabilitate" *Moorhouse* v. *Lord*.

2. The silence of Professor Dicey is very significant; as already stated he refers to the *Huntley* case three times, but merely incidentally in the notes of cases, as bearing upon well-settled rules as to domicil.

It is noticeable also that the Law Quarterly Review does not refer to the case.

3. One naturally turns to "The Laws of England" for a decisive statement of the proper rule of law, but the supporters of *Moorhouse* v. *Lord* will find no comfort there.

The rule is stated as follows: "Any person not under disability may at any time change his existing domicile and acquire for himself a domicile of choice by residing in a country other than that of his domicile of origin with the intention of continuing to reside there for an indefinite time.

"The state of mind or animus manendi, is that a person should have formed a fixed and settled purpose of making his principal or sole permanent home in the country of residence, or in effect a deliberate intention to settle there.

"It is not necessary that a change of nationality should be intended, or that steps should be taken to secure naturalization in the new domicile, even if naturalization is possible" (vol VI., p. 185).

In a note to the latter statement reference is made to *Whicker* v. *Hume* and *Moorhouse* v. *Lord*, as follows: "The dicta in these cases were interpreted as requiring an intention to change the political status; but they do not necessarily bear that meaning."

This would seem to be absolutely conclusive on the point.

The discussion of this subject is the result of a perusal of the opening chapter of Mr. Norman Bentwich's interesting and

useful book on The Law of Domicile in its relation to Succession, being the Yorke Prize Essay for 1910. The opening chapter is an "Historical Introduction," and deals somewhat too concisely with the cases above referred to. Mr. Bentwich seems to put an undue emphasis upon the *Huntley* case. He says: "The retrogression has been made, and the confusion of domicile and allegiance, carefully dissected by Lords Westbury and Hatherley, and Lindley, seems to have taken on a new lease of life. It remains to be seen whether a future Lord Chancellor, with his ideas strongly rooted in the common law, will once again establish the conception of domicile upon a clear and definite foundation of fact, and free it from the vague associations of political surmise" (p. 27).

It is submitted that no such deus ex machinâ is needed; the present conception of domicile as established above seems quite satisfactory.

N. W. Hoyles.

THE CROWN AND PARLIAMENT.

Viscount St. Aldwyn, better known as the Right Hon. Sir Michael Hicks-Beach, who has filled great offices in the Cabinet, including that of Chancellor of the Exchequer, and has occupied the position of Leader of the House of Commons, in a recent speech said that he did not believe Ministers would dare to advise their sovereign to give his Royal Assent to the Home Rule and Welsh Disestablishment Bills, and he thought it quite possible that, if they tendered such advice, they might be told it was their duty to consult the country, which had no confidence in them or their measures either. Lord St. Aldwyn has forgotten that, inasmuch as the royal prerogative is concerned in both these bills, so with respect to both of them, to secure their passage through the House of Commons into which they have been introduced, a communication from the Crown, "placing its interest at the disposal of Parliament," signified by a Minister of the Crown, must be made. This form of communication and

several others are recognized as constitutional declarations of the Crown suggested on the advice of its responsible ministers, by whom they are announced to parliament in compliance with established usage. When bills affecting the royal prerogative have been suffered through inadvertence to be read a third time and passed without such communication, the proceedings have been declared null and void. These communications cannot be misconstrued into any interference with the proceedings of parliament, as some of them are rendered necessary by resolutions of the House of Commons, and all are founded upon parliamentary usage which both houses have agreed to observe. "This usage," writes Sir Erskine May, "is not binding upon parliament; but if, without the consent of the Crown previously signified, Parliament should dispose of the interests or affect the prerogative of the Crown, the Crown could still protect itself in a constitutional manner by the refusal of the Royal Assent to the bill. And it is one of the advantages of this usage that it obviates the necessity of resorting to the exercise of that prerogative": (May's Parliamentary Practice, p. 450). The Royal Assent to both the Home Rule and Welsh Disestablishment Bills must be given virtually to both these measures before they leave the House of Commons—that consent to be conditional to their passing through the various parliamentary stages which are necessary preliminaries to their receiving the formal assent of the Crown.

Viscount St. Aldwyn clearly does not accept the statement of Mr. Asquith as Prime Minister in the House of Commons on the 11th April, 1911, that "the Royal veto is as dead as Queen Anne," as a correct enunciation of constitutional doctrine, and it is likewise clear that Sir Erskine May did not regard the veto as obsolete. Professor Hearn is positive in his declaration that the Royal veto is still in existence and capable of being exercised. "Although," he writes, "under the House of Hanover the power of refusal has never been directly exercised, it must not, on that account, be supposed that the power is obsolete or inoperative. Under our present system the intimation of the

royal will regarding any measure of importance is given at its introduction or at some early stage of its progress. The Crown has, indeed, generally possessed sufficient influence to prevent the passage of any measure that was peculiarly distasteful to it, Professor Hearn wrote in 1867. Modern changes, too, in the civil list and in the management of the royal revenue have removed many subjects of disagreement. But the true explanation is to be found in the good sense and forbearance of both the King and the parliament, and the practical arrangements to which a sincere desire for harmonious co-operation has given rise. In matters affecting the personal or proprietary interests of the Crown, parliament will not deal with any proposal until the King has given an official intimation of his desire to receive on the subject its advice. By the rules of both houses a message from the Crown through one of its ministers is now required before any question touching the prerogative or the revenue of the Crown is taken into consideration:" (Hearn's Government of England, pp. 62-63). The intimation that the Royal assent would be withheld by the Crown would be equivalent to a dismissal of the ministry. It would certainly be followed, not by a dissolution of parliament, but by a resignation of the cabinet, whose successors would be bound to accept with office the retroactive responsibility for the position created by the course suggested by Lord St. Aldwyn. Such a position can scarcely be considered within the range of probability.—*Law Times.*

LIABILITY OF MERCHANTS AS TO ARTICLES OF EXPLOSIVE CHARACTER.

The case of *Peaslee-Gaulbert Co.* v. *McMath*, 146 S.W. 770, decided by Kentucky Court of Appeals, contains a very elaborate discussion regarding the liability of dealers in selling in the open market articles of merchandise potentially dangerous in their use by the ultimate purchaser.

The facts shew, that a wholesale company sold to a retailer

a can of paint dryer known as No. 1 T. Japan Dryer. This dryer was highly inflammable, but would not explode unless touched by or in very close proximity to a flame. Decedent, who was in the employ of the retail firm, went to their store at night in company with another employee and while some of the dryer was being poured from the can in which it was shipped into another can, it came in contact with the flame of a candle held too close. An explosion resulted, causing his death. His administrator sued the wholesaler, alleging as negligence its failure to tag or mark the compound as dangerous. There was a verdict for plaintiff and this the Court of Appeal sets aside in a reversal of the lower court.

The court lays down several propositions: (1) A dealer, wholesale or retail, or any person making a sale knowing that an article is imminently dangerous in the use for which it is intended, should label or mark the package so as to indicate this fact; (2) but not so knowing he is under no duty to exercise care to discover such fact, when selling in the usual course of trade; and (3) at all events he is responsible to any person with whom he has no contractual relation unless an article is imminently and inherently dangerous in the ordinary use for which it is intended or to which it is reasonably expected to be applied.

The court distinguishes between a manufacturer and a dealer, holding the former to a higher degree of care, in putting on the market a dangerous compound, as he is presumed to know, or should be charged with notice of, danger in its use.

The court dwelt somewhat on the facts in the case at bar, this being an article of well-known consumption and there being in its proper use, with reasonable care, no danger, and the fact that this kind of a dryer, made after a somewhat universal formula, had never been sold with any label or mark indicative of the presence of any dangerous quality.

It, certainly, would be placing a very heavy charge upon merchants to make any stringent rule of liability as to merchandise not inherently dangerous in use. They ought, in the absence at least of statute on the subject, to be allowed to rely on the

labels the manufacturer uses—or at least to some extent—unless to be a merchant one should have to qualify as another would to be a druggist or a physician. The fact that the police power of the state does not require this is a presumption that a seller, in open market, of merchandise and his buyer are presumed to have equal knowledge in matters of this kind. We refer in this connection to 74 Cent. L.J. 277, where was discussed editorially, "Liability of Wholesaler of Toy Pistols for Death of Child Purchasing from Retailer."—*Central Law Journal.*

STORIES OF ENGLISH LAW AND LAWYERS.

The prolixity of counsel has provoked much good-and-bad-humored interruption from the Bench.

In Mr. Justice Darling's court a few years ago, counsel, in cross-examining a witness, was very diffuse, and wasted much time. He had begun by asking the witness how many children she had, and concluded by asking the same question. Before the witness could reply, Justice Darling interposed with the suave remark: "When you began she had three."

Of the same genial order was the retort of Justice Wightman to Mr. Ribton, when that counsel, in addressing the jury, had spoken at some length, repeating himself constantly and never giving the slightest sign of winding up. He had been pounding away for several hours, when the good old judge interposed, and said, "Mr. Ribton, you've said that before." "Have I, my Lord," said Ribton, "I am very sorry; I quite forgot it." "Don't apologize, Mr. Ribton," was the answer. "I forgive you, for it was a very long time ago."

With these two creditable specimens of kindly, spontaneous humor, compare the remark of a United States judge, which was much praised in the press at the time it was made, but which in our opinion is far inferior to Justice Darling's impromptu. The American visited the Court of Appeal, and was invited by the late Lord Esher to take a seat on the bench. A certain Queen's Counsel was addressing the court. "Who is he?" asked the

Yankee. "One of Her Majesty's Counsel," replied Lord Esher. "Ah,' said the American, "I guess now I understand the words I have heard very often since I have been in your country, 'God Save the Queen.'"

Bethell, afterwards Lord Westbury, confessedly adopted as a ruling principle the maxim: "Never give in to a judge," and his overwhelming egotism enabled him to successfully carry off situtions that would have brought a less fearless man to grief. All his sayings have a touch of bitterness and cynicism, and in reading those accounted most brilliant, one somehow feels that they savor of what might be termed colossal check rather than legitimate repartee. "Take a note of that," he once said in a stage aside to his junior. "His Lordship says he will turn it over in what he is pleased to call his mind." The discursive habits of Lord Justice Knight Bruce he detested. "Your Lordship," he once pointedly cut short an observation of that judge by declaring, "Your Lordship will hear my client's case first, and if your Lordship thinks it right, your Lordship can express surprise afterwards." And all the gratitude that fell to the successful suggestion of one of his juniors was the sotto voce remark, "I do believe this silly old man has taken your absurd point."—*Central Law Journal.*

The resignation of Lord Robson of his office of Lord of Appeal in Ordinary has been announced. This was not altogether unexpected, as the state of his health which necessitated his taking this step has been known and regretted for some time by most members of the Profession. Lord Robson is a familiar figure to all except the most junior of its members, as he was in active practice at the Bar both before and after his appointment as a law officer up to the year 1910, when he was created a life peer under the Appellate Jurisdiction Act 1876. His retirement from that post will be a matter of regret to both sides of the Profession, with whom, by his invariable courtesy and sound common-sense, he was popular in his capacity both of counsel and of Judge.—*Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

BUILDING SOCIETY—RULES—ULTRA VIRES ACTS—PRIORITIES—LIABILITIES—WINDING-UP—APPLICATION OF SURPLUS ASSETS.

In re Birkbeck Permanent Building Society (1912) 2 Ch. 183, is a case bearing principally on English Building Society Acts; but it deals also with principles of general application. In this case a building society which was being wound up, had carried on, as the Court found, *ultra vires*, a banking business and received deposits, and one of the questions involved was: what were the rights of persons who had thus dealt with the society, in respect of its assets, and it was held by Neville, J., and he was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Buckley, L.JJ.), that the depositors with whom the society had purported to incur liabilities as bankers, were not either legal or equitable creditors of the society, and were not entitled to rank as such in competition with the regular creditors or shareholders of the society; but that, after all such claims had been paid in full, they were entitled, rateably, to any surplus that might remain, so far as necessary to satisfy their demands; and Buckley, L.J., points out that where a company borrows money *ultra vires*, the lender, if he can establish that his money has been applied to the payment of any legitimate debt or liability of the company, may be entitled to be subrogated to the rights of the creditor whose claim has been thus discharged; but unless he is in a position to do that, he cannot, either in a Court of law or equity, affirm that he is a creditor.

PRACTICE—FORECLOSURE ACTION—PLAINTIFF TRUSTEES—CHANGE OF TRUSTEES AFTER FINAL ORDER—OPENING FORECLOSURE—ORDER TO CONTINUE PROCEEDINGS.

Pennington v. *Cayley* (1912), 2 Ch. 236. One result of the Judicature Act has been, that it has led to the making of curious and novel applications in suits for equitable relief quite unknown to the former equity practice, and having a strange disregard of the principles by which that practice was governed, and which are supposed to be perpetuated in our present procedure. The present case is an apt illustration. The action was brought by trustees for foreclosure and after the final order had

been made, two of the plaintiff trustees died, and new ones were appointed. One of the defendants, desiring to apply to open the foreclosure, presented a petition of course for an order of revivor, and an order was issued reviving the suit in the name of the defendant as plaintiff against the surviving plaintiff and the new trustees as defendants. It is almost needless to say that the order was set aside by Eady, J., who points out that the proper procedure was to ask the surviving plaintiff to add the co-trustees as plaintiffs and if he refused, or they refused to be co-plaintiffs, then to get an order to continue the proceedings in the name of the surviving plaintiff as plaintiff against the original defendants and his co-trustees, as defendants.

WILL—CONSTRUCTION — CHARITABLE LEGACIES—WILL MADE AFTER MORTMAIN ACT 1891—(9 EDW. VII. c. 58, ONT.)—USUAL DIRECTION FOR PAYMENT, IN USE PRIOR TO ACT OF 1891—EFFECT OF DIRECTION TO PAY CERTAIN LEGACIES "AFTER PAYMENT" OF OTHERS—PRIORITY.

In re Harris, Harris v. Harris (1912) 2 Ch. 241, is a case involving the construction of a will made after the passing of the Mortmain and Charitable Uses Act, 1891 (see 9 Edw. VII. c. 58, Ont.), whereby the testator devised and bequeathed his estate, real and personal, to trustees for payment of debts, funeral and testamentary expenses, and "in the next place" to pay £500 to each of seven nephews, and "after payment thereof" to pay £1,000 each to nine nieces. He then bequeathed certain other legacies including eleven charitable legacies, and directed these charitable legacies "to be paid exclusively out of such part of my personal estate as may lawfully be appropriated to such purposes, and in preference to any other payments thereout." Two questions were raised; first, out of what fund were the charitable legacies payable, having regard to the Act of 1891 (see 9 Edw. VII. c. 58, Ont.), and Warrington, J., decided that they were payable out of the whole personal estate not specifically bequeathed, and not merely out of what was formerly termed "pure personalty"; and that such legacies were payable in priority, so far as the personal estate went, to all other payments thereout. The second question was, whether the legacies to the nephews were entitled to any priority over those to the nieces, and Warrington, J., held that they were not, following, on this point, *Thwaites* v. *Foreman* (1844) 1 Coll., 409.

MORTGAGE—OVERDRAFT OF BANK ACCOUNT GUARANTEED BY TESTATOR—TRANSFER OF ACCOUNT TO ANOTHER NAME—MORTGAGED PROPERTY SPECIFICALLY DEVISED—(LOCKE, KING'S ACT, 17-18 VICT. C. 113), S. 1—(10 EDW. VII. C. 57, S. 38, ONT.).

In re Hawkes, Reeve v. *Hawkes* (1912) 2 Ch. 251. In this case the facts were that a testator, in 1899, to secure all moneys then or which might thereafter be owing from him to a bank, charged certain freehold property which he afterwards, by will, made in 1902, devised to his son. The testator in that year becoming incapacitated for business, his bank account was transferred first to the name of his son and one of his daughters, and then to the name of his son and another daughter. In 1907 the account was overdrawn and the testator gave the bank a document whereby he requested the bank to permit its overdraft and guaranteed payment of all moneys then or thereafter due on the account for advances or otherwise. At the testator's death the account was overdrawn, and the debit balance was subsequently discharged out of his personal estate. In these circumstances the question arose whether, under Locke King's Act (see 10 Edw. VII. c. 57, s. 38, Ont.), the freehold property devised to the son was primarily liable for the debt due to the bank, and therefore bound to make good to the personal estate the amount thereof, and Parker, J., held that it was.

PARTITION ACTION—ORDER FOR SALE EFFECTS CONVERSION OF ESTATES OF PERSONS, SUI JURIS, AT DATE OF ORDER—MARRIED WOMAN.

In *Herbert* v. *Herbert* (1912) 2 Ch. 268, Eady, J., decided that an order for sale in a partition action, though not acted on, effected a conversion into personalty of the estates of all parties, who were *sui juris* at the date of the order, but not the estates of parties who were not *sui juris*, *e.g.*, a married woman, who had not requested a sale, notwithstanding she subsequently became discovert; nor does it operate the conversion of such a share *i.e.*, of a person not *sui juris*, subsequently descending to one of the parties as to whose own share the order did work a conversion.

ANCIENT LIGHTS—OBSTRUCTION — MEASURE OF DAMAGES.

Griffith v. *Clay* (1912) 2 Ch. 291. In this case the simple question was, what is the proper measure of damages for ob-

struction of ancient lights in the following circumstances. The plaintiff was the owner of two houses fronting on a street and the windows facing the street were ancient lights. The defendant erected a building on the opposite side of the street which obstructed the plaintiff's ancient lights. The plaintiff's houses were old and dilapidated and would soon have to be demolished; the neighbourhood had ceased to be residential, but was adapted for factories and workshops, and the site of the houses, together with a piece of land in the rear thereof, also owned by the plaintiff would form a building site suitable for a warehouse or factory and the value of this building site as a whole would be diminished by the obstruction of the light in front. Neville, J., held that the damages recoverable by the plaintiff were not limited to the depreciation in the value of the two houses, but extended to the loss in value of the whole of the plaintiff's premises considered as one building site, and this conclusion was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Buckley, and Kennedy, L.JJ.).

PRACTICE—COMPANY — RECEIVER — DEBENTURE HOLDERS' ACTION—PROCEEDINGS BY RECEIVER—COSTS OF PROCEEDINGS BY RECEIVER—PROCEEDING BY RECEIVER AGAINST MORTGAGEE HAVING A CHARGE ON WHOLE OF THE ASSETS—DISCRETION.

Viola v. *Anglo-American Cold Storage Co.* (1912) 2 Ch. 305. The circumstances of this case are involved and somewhat peculiar. Another action was commenced in 1911 by a person named Tzowko, the holder of a debenture of the Anglo-American Cold Storage Co., in which the company was joined as plaintiff, against one Hickman, a mortgagee of the company's assets, to set aside a sale thereof purported to have been made by Hickman under his mortgage at a gross undervalue, to the Vesteys who were also defendants, and who were interested in a a rival cold storage company. Pending the action, the Vesteys bought up Tzowko's debenture which was vested in one Viola, the plaintiff in the present action as trustee for the Vesteys, and in his name the present action was instituted on behalf of himself and other debenture holders of the company, and a receiver was appointed. The receiver thus appointed appears to have applied to the Court for, and obtained leave to proceed with the action against Hickman in the name of, and at the expense of the company. This order was appealed from on the part of the plaintiff, who contended that the order in effect authorized the re-

ceiver to use the assets of the company of which as debenture holder the plaintiff was mortgagee, for the purpose of carrying on proceedings adverse to the interests of the Vesteys for whom he was a bare trustee. The order was supported by the second mortgagees, who contended that the purchase by the Vesteys of the debenture of Tzowko, was merely a scheme to protect themselves as purchasers at the alleged fraudulent sale of the company's assets. Eady, J., held that the question was one entirely for the discretion of the Court and in the circumstances the order in question was properly made.

GAMING—LOTTERY—PURCHASE OF CHANCE FOR PRIZE—GIFT OF PRIZE—MONEY PAID FOR CHANCE NOT APPLIED TO PURCHASE OF PRIZE—GAMING ACT, 1802 (42 GEO. 3, C. 119), S. 2—LOTTERIES ACT, 1823 (4 GEO. 4, C. 60), S. 41—(CR. CODE, S. 236).

Bartlett v. *Parker* (1912) 2 K.B. 497, was a case stated by justices. Tickets bearing different numbers were sold to any one who would purchase them at 6d. a piece upon the terms that the purchaser of a ticket bearing a number to be subsequently drawn by an independent person should be entitled to a bicycle. The bicycle was presented as a gift by a firm of bicycle makers as an advertisement of their goods, and no part of the purchase money of the tickets was applied to purchase or provide the prize. The question was whether this sale of tickets constituted a lottery within the meaning of the Lottery Act, 1823, s. 41. (see Cr. Code, s. 236). A Divisional Court (Ridley, and Lawrance, JJ.), held that it did, because each purchaser of a ticket bought a chance, and the holder of the winning ticket was determined by chance, and therefore the scheme constituted a lottery within the meaning of the Act.

MOTOR CAR—USER AT NIGHT WITHOUT LIGHT TO ILLUMINATE IDENTIFICATION PLATE—MOTOR CAR ACT, 1903 (3 EDW. VII. C. 36), S. 2 (4)—(MOTOR VEHICLES ACT, ONT. (2 GEO. V. C. 48), S. 8 (3)).

Printz v. *Sewell* (1912) 2 K.B. 511, was also a case stated by justices. The appellant was charged under the English Motor Car Act, with using a motor cycle at night on a public highway without having a lamp burning on the cycle so contrived as to illuminate every letter or figure on the cycle as required by the regulations made under the Act, and it was held by a Divisional Court (Lord Alverstone, C.J., and Pickford, J.), that it was

open to the accused to shew that he had taken all reasonable precautions to prevent the letters and figures on the motor cycle which ought to have been illuminated by the lamp affixed thereto from being obscured or rendered not easily distinguishable. It may be noted that the similar provision relating to lights in the Ontario Act (2 Geo. V., c. 48), s. 8 (3), seems to be confined to motor vehicles other than motor cycles.

ARBITRATION—UMPIRE—APPOINTMENT BY COURT—ORIGINATING SUMMONS—ARBITRATOR MADE PARTY TO APPLICATION TO APPOINT UMPIRE—ARBITRATION ACT, 1889 (52-53 VICT., C. 49), S. 5—AT EDW. C. 35, S. 9, ONT.).

Denny v. *Standard Export Lumber Co.* (1912) 2 K.B. 542. In this case a dispute between buyers and sellers had been referred to two arbitrators who were empowered to appoint an umpire. The arbitrators having failed to make an award, or appoint an umpire after notice from the buyers so to do, the buyers applied, on originating summons served on the sellers' arbitrator, but not on the sellers themselves, they being resident out of the jurisdiction, for the appointment of an umpire by the Court. The sellers arbitrator objected that he ought not to have been made a party to the application, and that no order could be made against him, and any order made would not bind the sellers who were not parties to the application, and it was further contended that a trade expert and not a legal umpire should be appointed, if any. The Master made an order appointing a legal umpire, Lush, J., refused to reverse the order; and the Court of Appeal (Williams, Buckley, and Kennedy, L.JJ.), also affirmed the order, their Lordships thinking, however, although as a general rule, the summons for the appointment of an umpire should be served on the opposite party to the arbitration and not on his arbitrator, yet (Williams, L.J., hesitating), that upon the facts of this case, the sellers' arbitrator had so acted in the interest of the sellers throughout the proceedings that he ought not to be dismissed as a respondent. Buckley, and Kennedy, L.JJ., were of the opinion that the application might properly have been made *ex parte*.

EXTRADITION—REQUISITION FOR SURRENDER—ARREST OF ACCUSED—BRITISH SUBJECT—REQUISITION BY "THE DIPLOMATIC AGENT OF HIS COUNTRY"—EXTRADITION TREATY OF 1876 WITH FRANCE.

The King v. *Governor of Brixton Prison* (1912) 2 K.B. 578.

This was an application to discharge a person, a British subject, who had been arrested for the purpose of extradition for crimes committed in France. By the extradition treaty of 1876 with France, a fugitive criminal may be apprehended under the warrant of a magistrate on such information or complaint, and such evidence or other such proceedings as would, in the opinion of the magistrate, justify the issue of a warrant if the alleged crime had been committed where the magistrate exercises jurisdiction; and it further provides that the accused shall be discharged as well in the United Kingdom as in France if within fourteen days a requisition shall not have been made for his surrender "by the diplomatic agent of his country." Under the Treaty each nation may allow the extradition of its own nationals. The accused, in the present case, was a British subject, and it was contended that he was entitled to be discharged because no requisition for his surrender had been made by the diplomatic agent of the United Kingdom; but a Divisional Court (Lord Alverstone, C.J., and Pickford, and Avory, JJ.), held that "the diplomatic agent" referred to in the Treaty meant the diplomatic agent of the country within whose jurisdiction the accused was when the crime charged against him was committed, and which demanded his requisition. The application for discharge therefore failed.

TRADE UNION—RESTRAINT OF TRADE—LEGALITY OF ASSOCIATION AT COMMON LAW—LEGAL AND ILLEGAL PURPOSES—SEVERABILITY OF PURPOSES OF ASSOCIATION—ACTION TO ENFORCE BENEFITS TO MEMBER—JURISDICTION—TRADE'S UNION ACT, 1871 (34-35 VICT. C. 31), S. 4—(R.S.C. C. 125, S. 4).

Russell v. *Amalgamated Society of Carpenters* (1912) A.C. 421. This was an appeal from the decision of the Court of Appeal (1910), 1 K.B. 506 (noted ante, vol. 46, p. 327). The action was brought by the widow and personal representative of a deceased carpenter who was a member of a Trade Union, against the Union to recover moneys representing a superannuation benefit to which the deceased was entitled at the time of his death. It was contended by the defendants that under the Trade Union Act, 1871 (34-35 Vict. c. 31), s. 4 (see R.S.C. c. 125, s. 4), the Court had no jurisdiction to entertain the action and the Court of Appeal so held, and the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, Atkinson, Shaw, Mersey, and Robson), have affirmed the decision though not for the

same reasons. Lords Loreburn and Atkinson were of the opinion that the action would not lie because the association was not a corporation but a mere voluntary association which could not be sued in its own name; and Lords Macnaghten, Shaw, Mersey, and Robson, held that the action would not lie because the society was an illegal association at common law, inasmuch as its main purposes were in restraint of trade, and the rules relating to those purposes were not severable from the rules relating to its provident purposes.

MARRIAGE WITH DECEASED WIFE'S SISTER—REJECTION FROM COMMUNION—LAWFUL COURSE.

In *Thompson* v. *Dibdin* (1912) A.C. 533, the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, Atkinson, Shaw, and Robson), have determined that members of the Church of England who marry their deceased wife's sisters, can not properly be regarded by clergymen of the Church of England as "notorious evil livers." In the opinion of their Lordships, it is an immaterial circumstance that the ecclesiastical authorities regard such marriages as a breach of the Divine law, so that according to this decision a person may be a wilful violator of what the Church regards as the Divine law without being "a notorious evil liver." Such cases indicate the difficulty of enforcing discipline in the Church of England. It is hardly necessary to say that the decision has not met with the approval of the leaders of the Church.

COMPANY—LEASE BY COMPANY OF ALL ITS PROPERTY—POWER OF MAJORITY OF SHAREHOLDERS TO BIND MINORITY—63-64 VICT. c. 98, s. 1 (D.).

Dominion Cotton Mills v. *Amyot* (1912), A.C. 546. This was an appeal from the Superior Court of Quebec. The question at issue was whether a lease by a joint-stock company of all its property which had been approved of by a majority of the shareholders was binding on a dissentient minority. The Judicial Committee of the Privy Council (Lord Loreburn, L.C., and Lords Macnaghten, Atkinson, Shaw, and Robson), held that the lease in question was within the letter of the Dominion Statute, 63-64 Vict. c. 98, s. 1 (*a*), which expressly authorised the company to dispose of its mills, and that the evidence established that the terms of the lease were fair, both in fact and in intention to the shareholders and therefore, that the minority were bound. The appeal was therefore dismissed.

TELEGRAPH WIRE—RESTRICTED USE OF SPECIAL TELEGRAPH WIRE—USER OF WIRE FOR UNAUTHORISED PURPOSES—ACCOUNT—LIMITATION.

Reid-Newfoundland Co. v. *Anglo-American Telegraph Co.* (1912), A.C. 555. This was an appeal from the Supreme Court of Newfoundland. The Reid-Newfoundland Co. were in possession of a railway under a lease which was subject to a subsisting contract with the Anglo-American Telegraph Co. under which the lessees of the railway were entitled to the use of a special telegraph wire erected and maintained by the Telegraph Co. in, and about the railway, for certain purposes defined by the contract, and were bound "not to pass or transmit any commercial messages over the said special wire, except for the benefit or account of" the Telegraph Co. The Reid Co. having used it for other purposes the Telegraph Co. brought the present action for an account. The defendants pleaded the Statute of Limitations (21 Jac. 1, c. 16). The Newfoundland Court held that this Act did not apply because the plaintiffs' action was founded on a specialty, as to which the period of limitation was twenty years. The judicial committee of the Privy Council (Lords Macnaghten, Shaw, Mersey, and Robson), without passing on that point, held that in regard to the unauthorised user of the wire, the defendants were trustees of the profits for the Telegraph Co., and as such liable to account therefor, and that, having regard to the Newfoundland Trustee Act, 1898, on that ground the plea of limitation must be overruled.

INSURANCE (MARINE)—CONSTRUCTION—PERILS OF THE SEA — CARGO DAMAGED OWING TO LEAK IN HULK WHILE AT MOORINGS.

Sassoon v. *Western Assurance Co.* (1912), A.C. 561. In this case, which was an appeal from the Supreme Court at Shanghai, the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Shaw, and Mersey), dismissed the appeal holding that where goods stored on a wooden hulk, moored in a river, were damaged by water percolating through a leak caused by the rotten condition of the hulk unknown to the plaintiffs, the loss was not caused by perils of the sea within the meaning of a time policy of insurance against marine risks; following *Re Xautho* (1887), 12 App. Cas. 509.

MORTGAGE—MORTGAGE OF LEASE OF TIED HOUSE—ATTEMPT TO MAKE MORTGAGE IRREDEEMABLE—INVALIDITY — MORTGAGOR'S RIGHT TO REDEEM NOTWITHSTANDING RESTRICTION.

Fairclough v. *Swan Brewery Co.* (1912), A.C. 565. This was an action by mortgagees to enforce a covenant in a mortgage. The mortgage was of a lease for twenty years of a tied house, and expressly provided that without the mortgagee's consent the mortgage debt should not be wholly paid off till a date within six weeks of the expiration of the lease. This period had not arrived, and the mortgagees brought action against the mortgagor for breach of covenant to buy beer exclusively from them, and for an injunction to restrain further breaches of the covenant, whereupon the mortgagor claimed the right to redeem, contending that the clause postponing his right of redemption was unreasonable and void. The Judge who tried the action gave effect to the mortgagor's contention; but the Supreme Court of Australia held that the restriction on redemption was not unreasonable, and reversed his decision. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, Shaw, and Mersey), agreed with the Judge at the trial, that the restriction was an undue clog on redemption and invalid, and that therefore the mortgagor, notwithstanding it, was entitled to redeem.

BRITISH NORTH AMERICA ACT, 1867—POLICY OF B.N.A. ACT—LEGISLATION AUTHORISING PUTTING QUESTIONS TO THE COURTS OF LAW INTRA VIRES OF BOTH DOMINION AND PROVINCES.

In *Attorney-General of Ontario* v. *Attorney-General of Canada* (1912), A.C. 571, the Judicial Committee of the Privy Council (Lord Loreburn, L.C., and Lords Macnaghten, Atkinson, Shaw, and Robson), have affirmed the power, both of the Dominion Parliament and Provincial Legislatures, to pass statutes authorising the Governments of the Dominion or Provinces respectively to refer questions to Courts of law subject to their respective jurisdictions for their opinion. Their Lordships point out that the Imperial Parliament had passed a similar Act empowering the Imperial Government to refer questions to the Judicial Committee of the Privy Council.

BRITISH COLUMBIA WORKMEN'S COMPENSATION ACT, 1902—CONSTRUCTION—NON-RESIDENT DEPENDENT OF ALIEN WORKMAN—RIGHT TO COMPENSATION.

In *Krzuz* v. *Crow's Nest Pass Coal Co.* (1912), A.C. 590, the

question was, whether the British Columbia Workmen's Compensation Act, 1902, which is in terms identical with the English Workmen's Compensation Act, 1897, entitles the alien dependents of an alien workman, who was killed within the jurisdiction, to claim compensation under the Act for his death. The Court of Appeal of British Columbia held that it did not, but the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, and Shaw), have reversed that decision. The Court below relied on *Tomalin* v. *Pearson* (1909) 2 K.B. 61, but their Lordships, while admitting that that case was well decided, consider it did not apply.

POSSESSION OF LAND BY MORTGAGEE—PAYMENT OF TAXES OF WILD LANDS—STATUTE OF LIMITATIONS — MORTGAGOR AND MORTGAGEE.

Kirby v. *Cowderoy* (1912), A.C. 599, appears to be a very important decision, and to upset some previous ideas as to the nature of possession required in order to acquire a title by possession. The facts were simple. By a mortgage made, July 1, 1889, certain wild land was mortgaged by the plaintiff to the defendant, neither party were in actual occupation but the defendant paid all the taxes as they fell due from 1889 until January, 1911, when the plaintiff commenced the present action for redemption. The defendant claimed to have acquired an absolute title under the Statute of Limitations. The Court of Appeal of British Columbia held that the plaintiff was not barred, and decreed redemption; but the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, and Shaw), reversed the decision holding that the defendant by paying the taxes for over twenty years had had possession in the only way which was practicable in the circumstances. In Ontario it has been held (see *Re Jarvis and Cook*, 29 Gr. 303), that an actual visible occupation is necessary for the acquisition of a title by possession and that payment of taxes for 10 years by a person not in possession is not sufficient to bar a title under the Statute of Limitations.

REPORTS AND NOTES OF CASES.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

SASSOOM *v.* WESTERN ASSURANCE COMPANY.

Lords Macnaghten, Atkinson, Shaw, and Mersey.] [May 17.

Marine insurance—Perils of seas—Goods stored—Damage by leaking.

This was an appeal from the Supreme Court of China.

Goods belonging to the appellants were stored in a hulk moored in a tidal river, in smooth water, and were insured (inter alia) against perils of the seas. In consequence of natural decay, which could not be detected by ordinary examination, the hulk became leaky, and the goods were injured by water which found its way through the decayed woodwork of the bottom of the hulk.

Held, not to be a loss by the perils insured against.

Judgment of the court below affirmed.

Atkin, K.C., *Bailhache,* K.C., and *Raeburn,* for appellants. *Sir R. Finlay,* K.C., and *Mackinnon,* for respondents.

DOMINION COTTON MILLS COMPANY *v.* AMYOT.

Lords Loreburn, Macnaghten, Atkinson, Shaw, and Robson.] [May 17.

Company—Action by dissentient shareholders.

This was an appeal from the Superior Court of the Province of Quebec.

Held, that a dissentient minority of shareholders in a company can only succeed in an action seeking redress against the majority if they can shew either (1) that the action of the majority is ultra vires; or (2) that the majority have abused their powers, and are seeking to deprive the minority of their rights; or (3) that the transaction impeached is fraudulent. *Burland* v. *Earle,* 85 L.T. Rep. 553 (1902), A.C. 83, approved.

Judgment of the court below reversed.

Sir R. Finlay, K.C., *Geoffrion*, K.C., and *Geoffrey Lawrence*, for appellants. *Rowlatt*, for respondents. *Brosseau*, K.C., for intervenant.

ATTORNEY-GENERAL FOR ONTARIO *v.* ATTORNEY-GENERAL FOR CANADA.

Lords Loreburn, Macnaghten, Atkinson, Shaw, and Robson.] [May 17.

B.N.A. Act, 1867—*Supreme Court Act, R.S.C.* 1906, *c.* 139—*Right of reference to Supreme Court.*

Held, that an Act of the Dominion Parliament of Canada authorising the putting of questions either of law or fact to the Supreme Court, and requiring the judges of that court to answer them, on the request of the Governor in Council is not ultra vires.

Judgment of the court below affirmed.

Sir R. Finlay, K.C., *Nesbitt*, K.C., *Geoffrion*, K.C., and *Geoffrey Lawrence*, for appellants. *Newcombe*, K.C., and *Atwater*, K.C., for respondents.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [July 29.

BOEHNER *v.* HIRTLE.

Trespass—Crown grants—Conflicting claims—Evidence—Allotment proceedings—Admission derogating from grant—Insufficient area—Possession with title—Boundaries—Plan—Overlapping.

In an action of trespass plaintiff relied upon allotment proceedings preliminary to a township grant and the registry of the allotment in 1765 and possession thereunder; and also upon a grant of that year, although LOT taken out of the government office, and upon a grant of the township in 1784 to a large number of persons, including plaintiff's earliest predecessor in title,

reciting the previous grant and the completion of the allotment and laying out in 1765.

Held, following *Boutillier* v. *Knock*, 2 Old. 77, that the land to which plaintiff asserted title was inferentially included in the grant of 1765.

2. Following *DesBarres* v. *Shey*, 2 G. & O. 377, on appeal, 29 L.T.N.S. 592, that a grant is valid in which reliance is placed upon previous allotment proceedings, location and registry, and the location of the area for each grantee is not specified.

3. Following *DesBarres* v. *Shey*, 29 L.T.N.S. 592, that the proceedings of the commissioners by whom the allotments were made called for by the grant of 1784, were evidence in the case.

4. A recital in a private grant will not be read as giving a retrospective effect to the grant itself or as making it senior to a previous grant. The same rule of construction does not apply to recitals in public grants relating to matters of public interest.

5. The Crown cannot, any more than any private individual, when it has parted with its interest in land, make an admission or statement affecting that interest, which will have the effect of derogating from its grant.

6. Where there is not sufficient land in a certain locality for two sets of lots granted, and one set must give way, the first party to take possession with a title takes the compliment of his grant.

7. Where the grant refers to allotment and location as having previously taken place, the general plan is admissible as part of the allotment proceedings and is useful as shewing the divisions, the numbers and the monuments, but will not be allowed to prevail over the true distances as shewn by measurement from such monuments and if the description is found to be false it will be rejected provided there is a sufficient description of the lot to identify it.

8. The fact that a plan shews too large or too small a quantity or a wrong location by scaling, so that it is not to be depended upon in that respect, will not be allowed to prevent the correct quantity and dimensions called for and evidenced in other ways from controlling.

9. In proving the position of adjoining lines referred to as boundaries in a given instrument it is not required to prove title back to the Crown. Occupation with colour of title even in the case of woodland would be sufficient.

10. The law is clear that in case of an overlapping and a mixed occupation or cutting, the constructive possession of the area is in the person who has the senior or better title. See *McInnes* v. *Stewart*, 45 N.S.R. 345.

Paton, K.C., for appellant. *D. F. Matheson*, for respondent.

Ritchie, J.] THE KING v. GRAVES. [Aug. 7.

Criminal law—Change of venue—Publication of the names of jurors in violation of statutory prohibition—Code s. 884—Newspaper comments—Possibility of prejudice not a sufficient ground.

Where a statute directed officials engaged in drawing any panel of grand or petit jurors to keep secret the names appearing on such panel (except as otherwise directed) until four days before the opening of the term of the court at which the jurors named in such panel are summoned to attend and in a criminal case the prothonotary, in violation of such provision, permitted a newspaper reporter to copy for publication the names of the jurors.

Held, a sufficient reason for directing a change of venue: Code s. 884.

A change of venue will not be ordered in a criminal case on the ground that comments upon the crime made in the local press are likely to prejudice the accused persons in their trial, notwithstanding that such comments, in the opinion of the court, are such as ought not to have been made, unless something more than the possibility of prejudice is disclosed, the rights of peremptory challenge and challenge for cause being regarded as sufficient protection in such case.

Roscoe, K.C., for prisoners, in support of application. *Wickmire*, K.C., for Crown, contra.

Full Court.] [August 31.

STARRATT *v.* DOMINION ATLANTIC RY. CO.

Jury notice—Striking out—Judge's discretion wrongly exercised—Venue—Change of in civil action—Difficulty in obtaining unprejudiced jury—Conditional order.

A party who has given a jury notice has a primâ facie right to a jury trial subject to liability to be deprived of such right

if a judge so orders, but this order will not be made except upon good cause shewn by the party attacking the notice, as, for instance, that only questions of law are involved.

Where issues of fact are raised upon the pleadings which must be settled before the question of liability or non-liability can be ascertained it is a wrong exercise of his discretion on the part of the Chambers judge to strike out the jury notice and such exercise of discretion is a proper subject for review. *Hunt* v. *Chambers,* 20 Ch.D. 365.

Where is appears from the affidavits read that a strong feeling exists in the county in which the venue is laid which will make it difficult to obtain a jury with no interest in the matters involved, the court will order the venue to be changed to a county in respect to which no such difficulty exists.

Where the defendant seeking a change of venue was a railway company the order granting the change was made conditional upon the defendant affording free transport for the plaintiff and his witnesses to and from the place to which the venue was changed.

J. L. Ralston, for plaintiff. *Henry,* K.C., for defendant.

Book Reviews.

Current English decisions appertaining to Indian law. Edited by S. Srinivasa Aiyar, B.A., B.L.

This is a new venture from Madras, intended to supply a desideratum to Indian lawyers, giving them current English decisions of questions analogous to those arising for decision in India. It saves the time of ordinary practitioners in India, and obviates the necessity for the complete reports of English cases, most of which would be of no value to such practitioners. The journal published in connection with this series contains interesting extracts, notes and reviews about the law and the profession, and has other interesting and useful information.

Flotsam and Jetsam.

FIFTEEN MINUTES.—The arguments in the matter of the Commonwealth *v.* "Pug" Kennedy for murder were concluded and the case submitted to the jury at 11.45 p.m. "Pug" offered the rather plausible defence that it would be impossible for him to have shot Mine Superintendent O'Donnel at Camp 44 at 6 p.m., and fifteen minutes later be over in Jack Cardigan's "Hole-in-the-Wall," drinking ten-cent red eye. Cardigan's oasis was in the heart of Tiffton, a mile from Camp 44. Witness after witness swore so positively that they had seen "Pug" drinking there at 6.15, that finally the Commonwealth admitted it. Its own evidence had proved the killing occurred at six. So that fifteen minutes had become a controlling features of the case. The defence had shewn that on the mile between the town and camp were numerous high hills to climb, barbed wire fences to cross and that there was always more or less difficulty in getting over the tracks in the yards, because of the constant switching of coal cars.

While the jury was out the lawyers seated about the tables fell to discussing the general misapprehension as to what might be done in a limited time. Captain William Greer said he was convoying a flock of recruits to the Union army upon one occasion when he was attacked by guerillas, who rode through and all around his men. The regular soldiers held together and by their coolness and precision of aim finally beat the enemy off. The fight was so fierce, and so many things were happening that the Captain said his guess was that the engagement had lasted an hour. On consulting with the men who had looked at their watches, however, the affair was over inside of fifteen minutes.

The judge told of a lawyer who had won a big case by stopping in the middle of his argument and letting a juryman hold his watch. This was to shew how long a time fifteen minutes was under suspension. It easily convinced the jury that the railroad engine had ample time for its sparks to set fire to the destroyed building, and they brought in a verdict for the plaintiff for all he claimed.

A man who had come near being drowned said that were he to have written what he saw and felt while unconscious, it would have taken an hour to read it. From the time he had tumbled out of the boat until resuscitated the hands on the dial had travelled just a quarter way round.—*Green Bag.*

In a certain case tried in Missouri, where the charge was theft of a watch, the evidence was most conflicting, and, as the jury retired, the judge observed that he would be glad to assist in the adjustment of any difficulties that might present themselves to the mind of the jury. All but one of the jurors had filed out of the box. There was on the expression of the one who remained an expression betokening the extremest perplexity. Observing this hesitancy, his Honour said: "Is there any question you'd like to ask me?" At this the twelfth juror's face brightened. "Yes, your Honour," was his eager response. "I'd be awful glad if you'd tell me whether the prisoner really stole the watch."

The *Living Age* (Boston, U.S.A.), of Sept. 14, amongst other excellent selections from the leading magazines, publishes an article called "The Folly of International Sport" from *Blackwood's Magazine*. In these days many have lost the true idea of what sport really is, and what is understood by the word in England and Canada. Without discussing the writer's assertion that true sport has nationally ceased to exist in the United States, it claims that the exhibitions at the Olympic games shewed "the triumph of professionalism and of professionalism alone. It is precisely this spirit of professionalism, this lust to win, which we hope will never be introduced in Great Britain. Wherever professionalism has flourished there has been an end to sport." This is what happened in Athens where the athletes of that day were described by Euripides as "the worst citizens, for they knew neither how to fight or how to give counsel. They would not work because they thought that he who won a prize should live forever at the public expense." And so the Olympic games fell into disrepute. This is what is happening to-day, and we agree that the revival of these games is from an international point of view objectionable and harmful as they are the reverse of promoting good feeling between nations and promote professionalism instead of true amateur sport and had better be discontinued.