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THE COURTS OF CANADA AND THEIR NAMES.

With the multiplicity of jurisdictions in Canada and the consequent multiplicity of Courts, it is obviously a desirable thing that the various Courts of the various jurisdictions should be distinguished by names which will avoid confusion, and at the same time convey to the mind a knowledge of the nature of the Court and the jurisdiction it exercises. With this object in view it is evidently desirable that the names of Provincial Courts should by clearly and readily distinguishable from the Courts of the Dominion, and it is also obviously desirable that the Provincial Courts of similar jurisdiction in each Province should bear the like names; so that in each Province the Court of the like name should be known to have the like jurisdiction to that of every other Provincial Court of the same name.

Owing, however, to each Province having the power to assign names to its Provincial Courts, it has fallen out that each Province has decided to act independently and neither in concert with nor with regard to the views of the other Provinces of which the Dominion is composed, and as a result in almost every Province there is a different nomenclature of Provincial Courts.

In the Province of Ontario the old English system of several Courts of co-ordinate common law jurisdiction and the King's Bench and Common Pleas was originally adopted, supplemented subsequently by the creation of a Court of Chancery. With the adoption of the system of the Judicature Act the Province again followed English precedent, perhaps not sufficiently mindful of the different circumstances of our case. In England there could be no objection to, or conflict of names in, continuing the former Courts of Law and Equity in one "Supreme Court of Judicature;" but in Ontario the adoption of that name involved

the difficulty that it trenched upon a name already possessed by the Federal Court—which is undesirable, and likely to create a false impression as to the jurisdiction of the Provincial Court and confuse it with the Federal Court. In Canada, when we talk of the "Supreme Court," it would be a manifest advantage, if, in every Province of the Dominion, that title was understood to refer to the Dominion Court.

Having, with the adoption of the Judicature Act in 1881, adopted the title of the "Supreme Court of Judicature" for its chief Provincial Court, when the Act came to be revised in 1913 it not unnaturally came to pass that the title of the chief Provincial Court in Ontario was abbreviated to that of the "Supreme Court of Ontario," whereby its liability to confusion with the Supreme Court of Canada was not lessened but rather increased.

There can be little room to doubt that the principle of the Judicature Act that in each Province there shall be but one Court of superior jurisdiction tends to simplicity. The plan of several Courts of co-ordinate jurisdiction seems to be logically indefensible; but it appears apparently to be thought desirable in some Provinces that there should be a distinction between the Court of first instance and the Provincial Court of Appeal and, accordingly, this method prevails in some Provinces; and it has been recently adopted in Saskatchewan—but beyond the multiplication of Courts has this method any advantage which is not just as well attained by the Ontario system of having but one Court having jurisdiction both as a Court of first instance and also as a Court of Appeal? The latter is really the logical reproduction of the ancient Court of King's Bench in England when it was the sole Court of superior jurisdiction and was a Court of first instance and when sitting *in banc* was also a Court of Appeal. The name of King's Bench, however, was inseperably associated with the idea of a Common Law Court and the amalgamation of jurisdiction in law and equity which the Judicature Act accomplished seemed to call for a new name for the Court exercising that jurisdiction. During the Commonwealth, the title of "High Court of Justice" emerged, and when the Judicature Act originally came into force that title was adopted for that Division of the Ontario Court which was in

effect the Court of first instance, and to the appellate branch of the Court was assigned the title of "Court of Appeal." But we think the revisers of the Judicature Act did well to abolish these titles; and to make the chief Court of the province both as a Court of first instance and in its appellate jurisdiction one in name, but whether the title selected was, in the circumstances we have mentioned, the best is we think fairly open to doubt. We are inclined to think the "Superior Court of Ontario" would have been a better selection. Subject to this question of the appropriate name we think that Ontario has set a good example in its judicial system which other Provinces would do well to follow.

UNIFORMITY OF LAWS.

The desirablity of uniformity of law throughout the Dominion is evident, but that it does not in fact exist is constantly making itself apparent. Take for instance the question of mortmain. There ought to be a uniform law on this subject throughout the Dominion. The laws restricting the holding of land in mortmain rest on a principle which ought never to be lost sight of, but which in modern times is apt to be overlooked. It is well known that the possession of property and particularly of landed property gives the possessor a power and an authority which he would not otherwise possess. It is to the manifest advantage and prosperity of the community at large that the possession of the land of the country should be as widely diffused as possible. It is to the manifest disadvantage of any country that the land of the country should get into the hands of the few. In order that the possession of landed property may be widely diffused it is necessary in the interests of the community that it shall be subject to the fluctuations of ownership arising from deaths and marriages, partitions and sales; and it is obviously a manifest detriment to the community if land comes to be vested in hands so that it cannot be sold and in fact becomes inalienable.

The fact that a very considerable part of the land of England had got into ecclesiastical hands and had thus become inalienable was the reason why statutes were passed in England putting re-

strictions on the alienation of lands in mortmain and particularly restrictions on the devising of lands in that way. These statutes were the result of actual experience and ought not to be lightly regarded, for the same evils are likely to befall any Province of this Dominion which neglects to protect itself in due time against the evil which the English law against mortmain was designed to guard. The undue acquisition of land by not only ecclesiastical corporations but by commercial corporations cannot be too jealously guarded against, if the true interests of the community at large are properly to be conserved.

It is for this reason we regret to find that in Saskatchewan it has been recently decided in *Re Miller*, by Elwood, J., that that Province has no mortmain law, and we think the Legislature of that Province would do well without delay to make due statutory provision in that respect. On this subject there ought to be a uniformity of law throughout the Dominion—it is well not to wait until the evil has arisen.

The Ontario Act provides for the compulsory sale of all lands held in mortmain within seven years after their acquisition, but whether any systematic method is adopted by the Provincial Government to enforce that provision of the statute we are unable to say. No provision is made by statute requiring returns to be made to the Government of all lands held by corporations, and the date of their acquisition of the same, but it would seem that some such provision ought to be made in order to enable the Government properly to enforce the Act.

The commercial law of Canada is pretty generally uniform, but there are two English Acts which might be generally adopted, viz., the Sale of Goods Act and the Partnership Act; and as we have often previously remarked, a uniform Companies Act and Bankruptcy Act are also among the *desiderata*.

The subject of divorce is also one that should be dealt with by the Dominion and an end put to the various laws prevailing thereon in different Provinces.

ADMINISTRATION OF ESTATES IN ONTARIO.

[COMMUNICATED.]

The recent decision of Sutherland, J., in *Parkinson* v. *Foy* (1918), 13 Ont. Weekly Notes 451, requires consideration, and comment. The facts of this case are as follows:—

The testator, George J. Foy, died on the 10th October, 1909. By his will he devised and bequeathed the residue of his estate to the Trust and Guarantee Company, Limited, whom he appointed trustees and executors, with power to sell and convert the same into money and set apart a sufficient portion thereof to pay his widow an income of $3,000 per annum, and divide the residue within four months after his decease in six equal shares amongst his six children in equal shares, opening ledger accounts for each and to pay the income to each daughter until she attained the age of 30 yea s at which time the trustees were directed to convey, transfer or hand over, as the case might be, to each daughter her full share of the estate as the same should then stand in her account. The estate for probate was valued at $448,854.99, of which $331,000 represented shares in the George J. Foy Company, Limited.

The trustees distributed the shares in the George J. Foy Company, Limited, amongst the legatees and set apart $60,000 to produce an annuity of $3,000 for the widow but had not distributed the balance of the estate, amounting to approximately $70,000, notwithstanding the fact that the estate had been in their hands since 10th October, 1909, and that the applicant Mary Foy Parkinson and her sisters had all attained 30 years of age and were entitled to have their respective shares of the estate handed over to them as directed by the testator to manage themselves.

It was also disclosed on the application that two of the trustees' officers had acted as directors of the George J. Foy Company, Limited, qualifying on the shares of the estate, and had received upwards of $2,380.00 as remuneration for their services, which the trustees had placed to their own credit and refused to account for as forming part of the estate notwithstanding that they qualified on the board on the estate's shares.

The trustees' answer to the motion was their inability to find purchasers for the property, but the evidence shewed little or no effort in this direction. They also contended that the applicant was the only legatee pressing for her share. They admitted its officers had acted as directors of the George J. Foy Company, Limited, but claimed that this was done with the consent of the beneficiaries. They denied absolutely that the $2,380 which they received from the Foy Company, Limited, for their services belonged to the estate, or was even to be taken into consideration as forming part of the estate, and they claimed the right to withhold the estate from the beneficiaries until they could administer the same.

The learned Judge held that as it appeared that other beneficiaries interested in the estate were not in accord with the applicant in making the application, and the estate was being managed with business capacity in good faith and no benefit could at present accrue to the applicant by making the order asked, dismissed the application with costs, holding that it was not obligatory on him under Rule 612 to make an order for the administration of the estate. The motion was argued on November 2, 1917. Judgment was reserved until the 23rd day of February, 1918. In the meantime the applicant's husband, with the approval of the other beneficiaries and to the knowledge of the learned Judge, had sold the Front Street property for $47,000 cash, which sale the trustees had carried out and had received the money before the learned Judge gave his decision.

If this case is good law, the testator's direction in the will directing the trustees to hand over her property to her on her attaining 30 years of age, is to be disregarded and not given effect to, and the trustees can go on collecting the rents and interest on mortgages of the estate and charge the beneficiaries with commissions for their care and management of an estate which the beneficiaries could manage for themselves, it would seem that the retention of the estate was a breach of trust by the trustees.

If this is good law, Rules 608 to 614, dealing with the right to administration of estate, might well be abrogated. We could

readily understand a motion for an administration order being dismissed where the beneficiaries were not entitled to the estate and were simply asking for an account, and complaining unnecessarily of the trustees' management, but that was not this case. The applicant sought to recover from the trustees her share of the estate in their hands and to compel them to execute the trusts and she was, apparently, under the facts above set forth, entitled to an administration order and to the relief claimed. The fact that the other beneficiaries were not in accord with the applicant, or that the estate was being properly managed by the trustees, was not the issue. The question was: Have these trustees the legal right to retain the property of the beneficiaries in their hands contrary to the expressed direction of the testator in his will?

If the beneficiary cannot get an administration order, how is she to recover her share? Once the trustees admit assets, they can be sued in an action of assumpsit, but until an account is taken how can they be sued? If a successful action had been brought in this case for administration, the costs would have fallen on the applicant for not in the first place applying for an administration order. The writer thinks the trustees were at fault, and in any event the costs should have been paid by the trustees in view of the fact that the applicant's husband found a purchaser for the property which the trustees claimed was not possible.

[Was not the real question involved in this case simply whether the learned Judge in refusing the order exercised a judicial or an arbitary discretion, the complaint being that he exercised the latter.—Ed. C.L.J.]

THE ONTARIO STATUTES OF 1918.

The statutes passed at the recent session of the Ontario Legislature have been published with commendable promptitude, and maintain the improved standard of typography and binding, which, since 1916, has been characteristic of our annual output of provincial legislation.

As a rule the arrangement is satisfactory, although there are one or two places where strict chronological order has not been

maintained, probably due to clauses being brought in at the last moment and not inserted in the place in which the careful draughtsman would have placed them.

The amendment of the County Courts Act, c. 21, appears to have suffered from some such cause. The Act provides for the rehearing of County Court actions where a judge has died before giving judgment, or has delayed giving judgment for more than six months. Probably, as originally drawn, the Act provided that in all cases the rehearing should take place before a Judge of the Supreme Court; but in its passage through the House it would look as if some member may have suggested that a Judge of a County Court might also be enabled to rehear such cases, and accordingly s. 44*a* provides that a Judge of a County Court may rehear but the rest of the Act merely provides for a Judge of the Supreme Court rehearing, and no provision is made whereby a case can be carried before a County Court Judge, as the only provision for setting such cases down for rehearing is at the Weekly Court in Toronto.

The amendment made to the Mechanics and Wage Earners Lien Act, by c. 29, is no doubt intended to obviate the defect which the recent case of *Miller Pressed Brick Co.* v. *Whalley*, 14 O.W.N. 27, disclosed: where a materialman failed to obtain a lien even on his own materials furnished because they were not placed on the land for which they were intended to be used, but no land adjacent thereto.

The giving different sections or sub-sections duplicate numbers, such as on p. 333, where two sections are numbered 536—and a like defect occurs elsewhere—is a difficulty perhaps hard to avoid where so many cooks have their hands in the pot.

DAY LABOURERS.

In a country like ours where every man is more or less a "daily labourer" it is interesting to note the construction placed upon these words as used in a statute in England which entitles a traveller to a cheap fare on a tramway service run specially "for artisans, machinists and daily labourers." It appears that the person

claiming this privilege was caretaker of an institute, and, having been an old soldier, was also given a job as a guard in an internment camp, fulfilling his work as caretaker and as guard on alternate days. For one job he was paid on a daily basis and for the other was paid weekly. The justices who first tried the case agreed that he was a "daily labourer" and was therefore entitled to the cheap fare. There was an appeal to a Divisional Court (Justices Darling, Avory & Atkin). The result of their deliberations was to lay down the proposition that to be a "daily labourer" a man must work at one job and must do so day by day and every working day; and that, on the facts stated, in neither of the items of work undertaken by this unfortunate traveller was he engaged as a "daily labourer." All of which strikes one as being a very narrow construction of the statute, and one which we venture to think did not carry out its intention.

NOTES FROM THE ENGLISH INNS OF COURT.

The New Master of the Rolls.

After long delay Lord Justice Swinfen Eady has been appointed Master of the Rolls. This selection meets with the cordial approval of the legal profession. For nearly a year the learned Lord Justice has presided in the Court of Appeal. He has in fact been doing the chief work of a Master of the Rolls—and if evidence is required that he is a competent judge, the pages of our *Law Reports* speak for themselves. The new Master of the Rolls is one of those who understands the power of silence. He seldom interrupts an argument. He seems to have taken to heart the words of Thomas Carlyle, who wrote: "In the learned professions as in the unlearned, and in human things throughout, the true function of intellect is not that of talking, but of understanding and discerning with a view to performing." On the rare occasions when "Swinfen" does intervene the advocate must needs deal with the difficulty without delay.

Lord Justice Duke.

After filling the high office of Chief Secretary for Ireland, Mr. H. A. Duke, K.C., has been appointed a Lord Justice of Appeal. Of his career as a politician it is unnecessary to speak. The profession, in which he occupied a foremost place when he accepted the office which he has just resigned, welcomes him back with open arms. Soon after his call he acquired a large practice on the Western Circuit, and was eventually numbered amongst the first two or three advocates at the English Bar. That he will succeed on the Bench is a foregone conclusion.

Lawyers and Literature.

Many successful advocates have tided over their early and unremunerative professional years by driving the pen. Mr. Duke was one of these. He began life as a journalist and was for some years on the staff of the *Western Morning News*. He must have recognised at an early date that he had other talents. Perhaps he realised, as some realise too late, that while literary work is a good stick for a young man, it is a bad crutch for an old, and he forsook it for the law. But his experience as a journalist stood him in good stead. I have heard him times without number. I have often read the transcript of a shorthand note of one of his forensic speeches; but I never heard him make a mistake in grammar; I never read a sentence of his which was not well rounded off. You will often find that he who can speak correctly (as apart from eloquently) was in his early days a writer; you will seldom find that a man who was a writer fails to speak correct English. It does not follow, however, that absolute correctness in speaking is necessary in an advocate. There was once a man on my own circuit who was never known to finish a sentence or round a period; but he seldom failed to secure the acquittal of the prisoner at the bar.

Of Judgments.

That those who attain the dignity of the Bench should have some literary training is a consummation devoutly to be wished.

The man who made "untidy" speeches when at the Bar is more likely to deliver a slipshod judgment from the Bench—unless, of course, he has taken the trouble to write it out beforehand. A newly-appointed judge once told me that he had made up his mind always to deliver his judgment *ex tempore* whenever possible. But I cannot say that the end has justified the proceedings. I recall an anecdote of the late Archbishop Temple, who was paying a week end visit to a country vicarage. At morning service the rector did very well: he read his sermon. He then heard to his dismay that the Prelate was going to attend church in the afternoon. To disarm criticism the rector announced beforehand that he had made a vow always to preach *ex tempore* in the afternoon. After the service Dr. Temple (so the story runs) made the rector kneel before him in the vestry. Placing both hands upon his head he said: "I dispense your vow!" When listening to the learned judge above referred to I have often wished that he, too, could have a dispensation.

Old Law Books.

With the possible exception of the three volume novel, there is no class of work which so soon gets out of date as legal text books. Even if it is but six months old, a recent decision may have rudely displaced the learning which is to be found in its pages. The result is that some of the volumes in a lawyer's library are seldom taken from the shelves on which they accumulate the dust; and if, in a fit of economy, their proprietor attempts to dispose of them, he will get but a fraction of the price which was paid for them. To the rule that old law text books—as distinct, of course, from reports forming part of a series—undergo a steady depreciation in value there is one very notable exception. There is one text book—nay, one edition of one text book—which has steadily gone up in value, so much so that the lawyer who has it on his bookshelf considers himself a lucky man. I refer to the 3rd edition of Bullen and Leake's Precedents of Pleading, which was published in 1868. I do not know what the published price was; but I considered myself lucky the other day when I picked up a well thumbed copy for £2 2s. 0d. Messrs. Stevens & Sons in their latest catalogue offer a copy at £3 15s. 0d.

"Bullen and Leake."

At first sight the volume may not appear to be of much value. It contains much that is obsolete—founded as it is upon the Common Law Procedure Act which has long been repealed. Here one may read at length of demurrer and other forms which have passed out of use. But the notes to the precedents are a mine of legal wealth. In them one may really find the common law of England—a common law which has scarcely been encroached upon by statute and with which but few of the many judges who have adorned the English Bench since 1868 have ventured to interfere. One could refer to numerous judgments delivered since that date into which whole passages from Bullen and Leake have been transcribed. The book is freely quoted in court at the present day and has earned for itself the sobriquet of "The Circuit Bible."

The Value of Accurate Pleading.

The modern judge is but too apt to treat the pleadings in an action with undeserved contempt. I heard one judge only the other day conclude his judgment by saying to the plaintiff's counsel: "What relief are you asking for? I have not looked at the pleadings." Messrs. Bullen and Leake, in the preface to the first edition of the work above mentioned, thus stated what, in 1860, was the accepted view of the profession upon the subject of pleading: "It must be remembered that the accurate statement of such of the facts and circumstances of each case as are necessary to enable the plaintiff on the one hand to establish his entire cause of action, and the defendant on the other hand to set up his entire defence, is still an essential part of the duty of counsel; and that although a final defeat of justice upon merely formal grounds may leave a blank amendment, no legislative enactment can in all cases prevent the expense and delay which result from the necessity for amending untrue or imperfect narrations of the facts relied upon by the respective parties." A careful and accurate pleader having "Bullen and Leake" at his elbow can still save his client an enormous amount of expense, and by narrowing the issues can secure the speedy administration of justice.

Proceedings in Lieu of Demurrer.

I have said that demurrer, which "is the formal mode in pleading of disputing the sufficiency in law of the pleading of the other side," has been abolished in England, but the Rules of the Supreme Court have put something in its place. When the pleadings are closed either party may take out a summons to have a point of law arising on the pleadings set down for hearing, the facts of the case being sufficiently set forth in the pleadings by the plaintiff and defendant respectively. An example of this occurred the other day. A member of a Military Service Tribunal was sued for slander. It was alleged that during the hearing of the only kind of case which such a tribunal can hear, namely, whether a man shall be called up for service, he slandered the plaintiff. He admitted the words, but pleaded absolute privilege—the privilege which clothes the utterances of all judges. The case was set down for hearing under the above rule, when it was decided that the privilege was absolute and that the defence was good. So the action failed and all the costs of an Expensive trial before judge and jury were saved to the parties.

Imprisonment Without Trial.

The recent imprisonment or "internment" of a large number of adherents of Sinn Fein on a charge of what practically amounts to high treason draws attention to the extraordinary power which the Defence of the Realm Act has conferred upon the Executive. "To none," says Magna Charta, "shall we sell, delay or deny justice"; but here, on a large scale, is what appears at first sight to be a denial of justice, for there is no talk of putting any of the interned revolutionaries on his trial. But we must interpret the word "justice" in the wider sense. *Inter arma silent leges* is a maxim of universal application. A public trial of Mr. De Valera were a thing impossible at the present moment. We cannot afford to throw open the closed portals of our secret service—a service which has undoubtedly been the principal agency in collecting sufficient evidence for the Government to act upon. Nor would a trial in which half the evidence was taken *in camera* serve the purpose of convincing those who sympathise with Sinn Fein that the charge was well laid and properly proved.

A PLEA TO THE JURISDICTION.

I would even go further, and say that no Sinn Feiner would be in the smallest degree influenced by a verdict of guilty, even after an open trial at Bar conducted in accordance with all the great traditions which attend the administration of justice in England. It is part of the Sinn Fein creed that *quoad* Ireland, England is a foreign country. Roger Casement, when on his trial for high treason two years ago, refused to recognize the jurisdiction of the court which tried him. His successors would undoubtedly do the same. In all the circumstances the Executive are undoubtedly adopting the wisest course.

We have at various times had occasion in these columns to call attention to the employment of judges on work outside their proper sphere. The objections we have expressed have naturally had less weight during the war, when judges have been doing outside work of a *quasi*-judicial character; such, for instance, as the work of Lord Justice Pickford on the Dardanelles Commission, and the work of Younger and Atkin, JJ., on the Internment Commission; and notably, too, the work of Mr. Justice Younger in connection with the exchange and treatment of prisoners of war. But these are tasks which, speaking generally, have had no direct political effect; though the Mesopotamia Commission, which was appointed at the same time as the Dardanelles Commission, led to the retirement of Mr. Austen Chamberlain, and it is impossible to foretell what result such inquiries may have; and, of course, political effects may follow on an ordinary judicial investigation, such as the retirement of Mr. Mundella from the Presidency of the Board of Trade in 1894 in consequence of the remarks of Vaughan Williams, J., in the *New Zealand Trust and Loan Co.'s case*. But it would have been a very different matter had the proposal to submit to a secret tribunal of two judges the issue as to the veracity of the Prime Minister and the Chancellor of the Exchequer raised by Major-General Maurice's letter to the press been accepted. That raised a political issue of the first importance, and we are glad that the proposal was withdrawn almost as soon as made.—*Solicitor's Journal.*

REVIEW OF CURRENT ENGLISH CASES

HUSBAND AND WIFE—WEARING APPAREL OF WIFE—AGREEMENT THAT APPAREL FURNISHED BY HUSBAND TO WIFE IS TO BE HIS PROPERTY—VALIDITY OF AGREEMENT.

Rondeau v. *Marks* (1918) 1 K.B. 75. In a late case an action was brought by a disappointed swain to recover an engagement ring, in which the plaintiff swore, that when the ring was given it was on the express understanding that it was to be returned if the contemplated marriage did not take place, which indicated a degree of forethought not usual on such occasions. In the present case, which was an interpleader issue between the execution creditor of a married woman, who had taken in execution some of the defendant's wearing apparel, which was claimed by her husband (who was the defendant in the issue), under an agreement that all apparel furnished by him for the use of his wife was to remain his property. Bailhache, J., who tried the issue, upheld the validity of the agreement (1917) 2 K.B. 636 (noted *ante* p. 62), and the Court of Appeal (Pickford and Bankes, L.JJ., and Sargant, J.) have now affirmed his decision.

STATUTORY REGULATION FOR DETERMINATION OF DISPUTE—STAYING ACTION—PARTIES COMPELLED TO FOLLOW STATUTORY REMEDY —ARBITRATION ACT, 1889 (52-53 Vict. c. 49) ss. 4, 27—(R.S.O. c. 65, ss. 4, 8).

Clements v. *Devon* (1918) 1 K.B. 94. In this case a dispute had arisen between a medical man and an Insurance Committee, appointed under the English Insurance Act, which empowers the Commissioners of Insurance to make regulations; and by a regulation so made disputes arising between medical men appointed under the Act and the Insurance Commissioners are to be subject to appeal to the Insurance Commissioners. In the present case the plaintiff, a medical man, had brought an action in respect of matters in dispute between himself and the Insurance Committee and the defendants applied to stay the proceedings under the Arbitration Act, on the ground that there was by virtue of the regulation above referred to a submission to arbitration within the meaning of the Arbitration Act. Rowlatt, J., refused to stay the action on the ground that the regulation in question was not a submission within the Act, but the Court of Appeal

(Pickford, and Bankes, L.JJ., and Sargant, J.) reversed his decision, Pickford, L.J., and Sargant, J., on the ground that the regulation to which the plaintiff had agreed amounted to a submission within the Arbitration Act, and Bankes, L.J. (doubting that there was any submission within that Act), on the ground that it was a special tribunal set up by Parliament to deal with the question in dispute to which the plaintiff was bound to resort.

STATUTORY ORDER—DATE WHEN IT COMES INTO OPERATION—ORDER OF FOOD CONTROLLER.

Johnson v. *Sargant* (1918) 1 K.B. 101, is deserving of notice in that Bailhache, J., holds that where a Food Controller is empowered by statute to make rules and regulations, such rules and regulations do not take effect until after publication or notification to parties affected thereby.

DISTRESS—EXEMPTIONS—VALUE OF EXEMPTIONS LEFT AFTER DISTRAINT—ONUS OF PROOF—LAW OF DISTRESS AMENDMENT ACT, 1888 (51-52 VICT. C. 21) S. 4—COUNTY COURTS ACT, 1888 (51-52 VICT. C. 43) S. 147—(R.S.O. C. 80, S. 3 (*f*); C. 155, S. 30 (1).

Gonsky v. *Durrell* (1918) 1 K.B. 104. This was an action for wrongfully distraining a tool of the tenant in contravention of the Law of Distress Amendment Act, s. 4 (see R.S.O. c. 155, s. 30 (1).) The privilege attaching to tools of trade is to the value of £5 (in Ontario it is to the value of $100), and it consequently became necessary to shew that the tenant was not left in possession of exempted tools of trade to the extent of £5. The action was tried in a County Court and the judge gave judgment for the defendant on the ground that the onus was on the plaintiff to shew that the defendant did not leave on the demised premises goods to the amount exempted, which onus he had failed to satisfy; and a Divisional Court (Darling, Avory, and Sankey, JJ.) affirmed this decision.

CRIMINAL LAW—FORTUNE TELLING—EVIDENCE OF BONA FIDES—INTENT TO DECEIVE—VAGRANCY ACT, 1824 (5 GEO. 4, C. 83) S. 4—(CR. CODE S. 443).

Davis v. *Curry* (1918) 1 K.B. 109. The defendant was convicted of pretending to tell fortunes. Evidence was offered at the trial that the defendant had an honest belief that she possessed some power which enabled her by holding an object to tell the thoughts of the person to whom it belonged, but the magistrate

was of the opinion that the pretending to tell fortunes imported an intention to deceive, and that a belief in the possession of the powers claimed was irrelevant: a Divisional Court (Darling, Avory and Sankey, JJ.), however, considered the evidence material and remitted the case to the magistrate to enable him to hear and consider the evidence offered.

INSURANCE—AGREEMENT BY WAREHOUSEMAN TO INSURE—VALUE OF GOODS—AMOUNT OF INSURANCE—INCREASE IN VALUE.

Carreras v. *Cunard S.S. Co.* (1918) 1 K.B. 118. The defendants were warehousemen and agreed with the plaintiffs to warehouse goods of the plaintiffs from time to time as they arrived by ship, at a weekly rental which was to cover fire insurance. The agreement did not specify any sum for which the goods were to be insured. As the goods arrived the plaintiffs delivered to the defendants the customs entries which shewed the cost price of the goods in London. While plaintiffs' goods were in the defendants' custody a fire occurred and they were destroyed. Between the date of the delivery of the goods to the defendants they had increased in value, of which fact the defendants had no knowledge. The plaintiffs claimed to recover the difference between the amount actually insured and what the goods should have been insured for having regard to the increase in their value; but Bailhache, J., who tried the action, held that it was the duty of the plaintiffs under the agreement to inform the defendants of the value of the goods for the purpose of insurance, and as the only information they had in fact given was that contained in the customs entries the defendants' liability was limited to that amount.

PAYMENT—REMITTANCE BY POST—IMPLIED REQUEST.

Mitchell-Henry v. *Norwich Union F. I. Co.* (1918) 1 K.B. 123. In this case the question at issue was whether the plaintiff or the defendants must bear the loss occasioned by the theft of a letter sent by post by the plaintiff enclosing a sum of money to the defendants. The defendants sent a written notice to the plaintiff stating that a sum of £48. 5s. 8d. which was shortly coming due to them from the plaintiff should be paid at their office, and asking the plaintiff when "remitting" the same to return the notice. The plaintiff sent to the defendant by registered post a packet containing £48 in treasury notes and a postal order and stamps for 5s. 8d. The packet was stolen. The plaintiff claimed a declaration that he had duly paid the £48. 5s. 8d. to the defendants.

Bailhache, J., who tried the action, considered that by the use of the word "remitting" the defendants had impliedly authorised the plaintiff to send the money by post in the ordinary way in which money is remitted by post, but that it is not the ordinary way to send so large a sum as £48 in treasury notes by post and that therefore the plaintiff would have to bear the loss.

COUNTY COURT—PROHIBITION—CAUSE OF ACTION—JURISDICTION.

Clarke v. *Knowles* (1918) 1 K.B. 128. This was an application for prohibition to a County Court, on the ground of want of jurisdiction to hear the plaint. By the County Courts Act, "an action may be commenced . . . in the Court in the district of which the cause of action or claim wholly or in part arose." The claim in question was a contract made by offer and acceptance sent through the post office. The action was brought in the district from which the offer was sent. A Judge in Chambers dismissed the application, but a Divisional Court (Lawrence and Lush, JJ.) reversed his decision, holding that the sending of the offer was no part of the cause of action—and that the cause of action really arose at the place where the offer was accepted.

DISCOVERY—PARTICULARS—TRAVERSE OF NEGATIVE ALLEGATION IN STATEMENT OF CLAIM—ONUS ON PLAINTIFF—PARTICULARS OF TRAVERSE—RULE 203—(ONT. RULE 138).

Weinberger v. *Inglis* (1918) 1 K.B. 133. In this case the plaintiff was complaining of the action of a committee of the Stock Exchange for refusing to re-elect him a member of that body. In his statement of claim he alleged that nothing had occurred since his election in 1895, or now existed, to render him ineligible for re-election. The statement of defence traversed this allegation. The plaintiff applied for particulars of any facts or circumstances which had occurred since 1895 to render him ineligible. Astbury, J., before whom the application was made, refused it on the ground that the traverse was not a matter stated in a pleading within the meaning of *Rule* 203 (Ont. Rule 138), and because in order to succeed the plaintiff would have to prove the negative statement, and the object of the Rules is not to force a defendant on a traverse to undertake the burden of proving anything himself, and still less to relieve a plaintiff from the onus of proof resting solely on him.

INSURANCE (LIFE)—CONCEALMENT OF MATERIAL FACT—KNOWLEDGE OF DISTRICT MANAGER—SUBSEQUENT RECEIPT OF PREMIUMS—WAIVER—PRINCIPAL AND AGENT—KNOWLEDGE OF AGENT IMPUTED TO PRINCIPAL.

Ayrey v. *British Legal & U. P. Ass. Co.* (1918) 1 K.B. 136. This was an action on a policy of life insurance. The policy contained a provision that it should be void in case of the concealment of any material fact by the assured. The assured was described in the proposal for insurance as a fisherman, which was his ordinary occupation. The fact that he was also a member of the Royal Naval Reserve and was therefore exposed to additional risk was not stated in the proposal form, but was communicated verbally to the defendants' district manager, and the premiums due under the policy were subsequently paid to and received by the district manager. For these circumstances the County Court Judge who tried the action held that the policy was void and that the plaintiff could not recover, but a Divisional Court (Lawrence and Atkin, JJ.) reversed his decision, holding that the knowledge of the district manager must be imputed to the defendants and that the subsequent receipt of premiums was, in effect, a waiver of the proviso, and judgment was accordingly given for the plaintiff.

NUISANCE—LANDLORD AND TENANT—TREES ON LESSOR'S PREMISES OVERHANGING DEMISED PREMISES—LESSEE'S HORSE POISONED BY EATING OF YEW TREE ON LANDLORD'S LAND—DUTY OF LESSOR TO LESSEE.

Cheater v. *Cater* (1918) 1 K.B. 247. This was an appeal from the decision of a Divisional Court (1917) 2 K.B. 576 (noted *ante* vol. 53, p. 388). The plaintiff had leased certain premises from the defendant; on the land of the defendant adjoining the demised premises a yew tree was growing near the boundary, the branches of which overhung the demised premises, and a horse of the plaintiff ate thereof and was poisoned and died. It was not shewn that the tree had grown over the demised premises subsequent to the lease. In these circumstances the Court of Appeal (Pickford and Bankes, L.JJ., and Sargant, J.) held that a lessee takes the property as he finds it, and as, for aught that appeared to the contrary, the tenant took the land with the branches overhanging it, so as to be within reach of horses, the defendant was not liable.

SHIP—ABANDONMENT AT SEA IN CONSEQUENCE OF TORPEDOING—SHIP AND CARGO SUBSEQUENTLY SALVED—RIGHT OF SHIPOWNER TO FREIGHT.

Newsum v. *Bradley* (1918) 1 K.B. 271. This was an appeal from the judgment of Sankey, J. (1917) 2 K.B. 112 (noted *ante*

vol. 53, p. 332). The plaintiffs were indorsees of a bill of lading of goods shipped on defendants' vessel. In the course of the voyage the vessel was attacked and torpedoed and the master and crew thereupon abandoned the vessel and gave notice of abandonment to the plaintiffs. The vessel and cargo were subsequently salved and brought into port. The plaintiffs claimed to recover the goods free from any claim thereon by defendants for freight. Sankey, J., held that they were so entitled, and his decision is now affirmed by the Court of Appeal (Pickford and Bankes, L.JJ., and Sargant, J.). Sargant, J., however, dissented, holding that the abandonment was not voluntary but compulsory, owing to threats of the enemy to shoot them, and he thought the subsequent notice ought not to be construed as an abandonment, but merely as a communication of a matter of common interest.

LANDLORD AND TENANT—COVENANT BY TENANT TO PAY EXPENSES OF WORKS REQUIRED BY ANY FUTURE STATUTE—SUBSEQUENT STATUTORY REQUIREMENT OF FIRE ESCAPE—APPORTIONMENT—"JUST AND EQUITABLE IN THE CIRCUMSTANCES OF THE CASE."

Monro v. *Burghclere* (1918) 1 K.B. 291. This was an appeal from a County Court. The plaintiff had leased certain premises from the defendant and had covenanted in the lease to pay the expenses of any works which might by any future statute be required to be done on the premises. After the lease a statute was passed requiring a fire escape to be provided for the building on the demised premises, and the statute provided that on application to the Judge of the County Court the expenses should be apportioned between the lessor and lessee as the judge might think "just and equitable in the circumstances of the case." The judge held that the tenant was bound to pay the whole cost, and a Divisional Court (Lawrence and Shearman, JJ.) affirmed his decision, holding that here the tenant having expressly contracted to pay the expense it would not be just or equitable to relieve him of his obligation.

COPYRIGHT—PARTIAL ASSIGNMENT—LICENSE—DRAMATIC AND MUSICAL WORK—CINEMATOGRAPH DISPLAY WITH MUSIC—COPYRIGHT ACT (1911) (1-2 GEO. V., c. 46) s. 1 (2), s. 5 (2, 3).

British Actors Film Co. v. *Glover* (1918) 1 K.B. 299. The question in this case was the right to produce by cinematograph with musical accompaniment a copyrighted opera. The owners of the copyright were Joseph Williams Ltd., who had granted to the

defendant an exclusive license to perform the work in the provinces of the United Kingdom. Subsequently Joseph Williams granted to the plaintiffs permission to produce the opera by cinematograph with instrumental musical accompaniment. The defendant having notified the plaintiffs and published notices that such production by them was an infringement of his interest under his prior agreement, the action was brought to recover damages and restrain him from publishing such notices. The action was tried by Lush, J., who held that the defendants' license was tantamount to a partial assignment of the copyright, and that the subsequent agreement with the plaintiffs gave them no right to do anything which would amount to an infringement of the defendants' rights; and that it was clear that the plaintiffs' performance would constitute an infringement, as apart from the representation of the opera by moving pictures, they also claimed to perform the music, the exclusive right to perform which in the provinces the defendants had purchased. The action therefore failed. The learned judge found it unnecessary to determine whether the representation by moving pictures alone would have constituted an infringement.

MASTER AND SERVANT—WRONGFUL DISMISSAL—REPUDIATION OF CONTRACT—DAMAGES.

Re Rubel Bronze & Metal Co. v. Vos (1918) 1 K.B. 315. The defendant, in November, 1915, engaged the plaintiff as manager of their business for three years at a fixed salary and a commission upon the net profits in each year. On 2nd January, 1917, the defendants purported to "suspend" the plaintiff pending an investigation as to his efficiency; and compelled him to deliver up his keys, and a badge he held as a person engaged in munition work at a controlled establishment, as being no longer indispensable, and they appointed another person to take charge of their works in place of the plaintiff and required him to deliver up all cash belonging to them. About a week later they required the plaintiff to appear before the board, which he declined to do, claiming that the defendants had repudiated the contract, and he claimed damages for wrongful dismissal. The defendants refused to recognize such claim, and subsequently, on 29th January, formally dismissed him. The question stated by an arbitrator was whether the acts of the defendants on 2nd January, 1918, amounted to a dismissal of the plaintiff, or a repudiation by them of their contract with him, so as to entitle the plaintiff to damages as for a wrongful dismissal on that date, and McCardie, J., held that they

did, and that the plaintiff was entitled to damages as for a wrongful dismissal on the 2nd January, 1918, the acts of the defendants amounting to a repudiation of the contract inasmuch as they forbade the plaintiff to fulfil any of his duties and prevented him from earning his commission on net profits.

PRACTICE—DEFAULT IN DELIVERING STATEMENT OF CLAIM—APPLICATION TO DISMISS ACTION—DELIVERY OF STATEMENT OF CLAIM BEFORE HEARING OF MOTION—RULE 294—(ONT. RULE 323).

Lyon v. *Sturges* (1918) 1 K.B. 326. In this case an order was made requiring the plaintiffs to deliver a statement of claim on or before 22nd November. No statement of claim having been delivered, the defendants issued a summons to dismiss for want of prosecution. Later on the same day the plaintiffs delivered a statement of claim. The Master made an order notwithstanding, dismissing the action, which was affirmed by Coleridge, J., but the Court of Appeal (Eady and Warrington, L.JJ.) reversed the order, on the ground that Rule 294 only authorizes a dismissal where no statement of claim has been delivered, a limitation, we may observe, not contained in Ont. Rule 323.

CONTRACT—ILLEGALITY—ALIEN ENEMY—SUSPENSION CLAUSE—ABROGATION OF CONTRACT—PUBLIC POLICY.

Naylor v. *Krainische Co.* (1918) 1 K.B. 331. This was an action brought for a declaration that a contract entered into by the plaintiffs with the defendant before the war had by reason of the war been dissolved, the defendant being an alien enemy. The contract was for the sale to the defendant of iron ore, and contained a clause suspending deliveries in case of stoppage of mines, wars, civil commotions, etc. McCardie, J., who tried the action, held that apart from the suspension clause the contract was dissolved from the date of the declaration of war, and that the suspension clause made no difference in that respect, because the war now waged was not such a war as was provided for by that clause, and because, even if it were, the clause only provided for a suspension of deliveries until the end of the war, but left the other terms of the contract in force during the war. And he also held that even if the suspension clause postponed all contractual rights and duties during the war, the contract was none the less dissolved through the alteration caused by the war in the circumstances contemplated by the parties as the basis of the contract; and also on the grounds of public policy because pending a war all commercial intercourse with an enemy is prohibited.

NEGLIGENCE—MASTER AND SERVANT—DEFECTIVE PREMISES—CONCEALED DANGER—INJURY TO SERVANT.

Cole v. *De Trafford* (No. 2) (1918) 1 K.B. 352. This was an action by a servant against his mistress to recover damages for alleged negligence. The plaintiff was a chauffeur, and the garage of the defendant had a folding door in the upper part of which was a glass window 8 feet from the ground. The glass was originally secured by a wooden beading and putty. Some of the beading had got displaced and a nail had been used to keep the glass in place. The plaintiff was opening the door to take out the plaintiff's motor when the glass fell out on his hand and severely injured it. The plaintiff, who had been employed 13 days, had not noticed the defect though he had cleaned the window with a hose; but from the evidence of a surveyor it appeared that, judging from the state of the putty, the defect must have existed for some months. The jury found that the plaintiff was guilty of negligence in not having the defect remedied, but the County Court Judge who tried the action held that there was no evidence to warrant that finding. On an appeal to a Divisional Court (Lawrence and Shearman, JJ.) the court, although agreeing that the owner of a garage owes a duty to his chauffeur to take reasonable care to maintain the premises in a condition free from any concealed danger, were divided in opinion as to the effect of the evidence in the case, Lawrence, J., agreeing with the County Court Judge that there was no evidence to support a finding of negligence, and Shearman, J., thinking that there was.

PRACTICE—AGREEMENT TO REFER—STAY OF PROCEEDINGS—STEP IN PROCEEDINGS—ORDER FOR MUTUAL DISCOVERY—KNOWLEDGE OF AGREEMENT TO REFER—ARBITRATION ACT 1889 (52-53 VICT. C. 49) S. 4—(R.S.O. C. 65, S. 8).

Parker v. *Turpin* (1918) 1 K.B. 358. This was an application to stay proceedings in an action on the ground that the parties had agreed to refer the matter in dispute to arbitration, and the question was whether or not the defendant had taken a step in the action. The plaintiffs took out a summons for discovery and the defendant also asked for discovery, and an order was thereupon made for mutual discovery. The defendant was previously unaware that the agreement sued on contained an agreement to refer, and on becoming aware of it, he moved to stay proceedings. The County Court Judge who heard the motion thought that the case was governed by *Ives* v. *Willans* (1894) 2 Ch. 478, where a demand for a statement of claim was held not to be a step in the

cause. The Divisional Court (Lawrence and Shearman, JJ.), however, considered that that case was not in point, and that the defendants' application for discovery was a step in the cause and disentitled him to a stay, even though made in ignorance of his right.

ADMIRALTY—COLLISION DUE TO NAVIGATING WITHOUT LIGHTS—ADMIRALTY DIRECTIONS—SPECIAL CIRCUMSTANCES RENDERING NECESSARY DEPARTURE FROM REGULATIONS FOR PREVENTING COLLISIONS AT SEA—STATE OF WAR—ENEMY VIOLATION OF INTERNATIONAL LAW—GERMAN LAWLESSNESS.

The Algol (1918) P. 7. This was an Admiralty case in which damages were claimed for collision which was admittedly due to the fact that both vessels were, pursuant to Admiralty directions, navigating without lights. The owners of the cargo in the ship which was sunk by the collision claimed that the other ship though acting under the Admiralty directions was nevertheless guilty of a breach of the rules for preventing collisions at sea. Hill, J., however, held that the complete disregard of all rules of international law, and of the practice of civilized nations by the scientific savages with whom we are at present at war, brought into existence a new danger to navigation in an area of the sea in which the vessels in question were navigating, and that in navigating without lights both vessels were doing what was justified and required by art. 27 of the rules for preventing collisions at sea under which they were bound to have "due regard to all dangers of navigation and collision."

SETTLEMENT—TRUST FOR CONVERSION WITH CONSENT OF TENANT FOR LIFE—ELECTION—RE-CONVERSION.

In re Ffennell, Wright v. *Holton* (1918) 1 Ch. 91. By the marriage settlement in question in this case lands were vested in trustees upon trust with the consent in writing of the husband and wife or the survivor to sell, and invest the proceeds and pay income of rents and profits until sale to the wife during their joint lives, and after the death of either of them to the survivor, and after the death of the survivor upon the usual trusts for the children (if any) of the marriage, and in default of children, in trust for such persons as the wife should when discovert by deed, or whether covert or discovert by will appoint; and in default of appointment if the wife should survive (which event happened) for the wife. There were no children, and the wife survived her husband; and the land remained unsold at her death. By her

will, made prior to her husband's death, the wife appointed the trust estate to him, consequently the property devolved on the wife absolutely for default of appointment; and the question was, whether it passed to her representatives as realty or personalty. Neville, J., determined that the trust for sale (even though subject to the consent in writing of the wife) worked a conversion of the property,—and that the wife's will was no evidence of an election on her part to take the property as unconverted, and consequently it devolved as part of her personal estate.

COMPANY—DECLARATORY JUDGMENT—CONSTRUCTION OF MEMORANDUM AND ARTICLES OF ASSOCIATION—RIGHT TO DIVIDENDS.

Evling v. *Israel* (1918) 1 Ch. 101. This was an action to obtain a declaratory judgment construing the memorandum and articles of association of a limited company and declaring the rights of different classes of shareholders in respect to the division of the profits, and Eve, J., made the required declaration and directed an account on the footing of the declaration.

WILL—BEQUEST TO DEBTOR OF TESTATOR IN TRUST—HOTCHPOT CLAUSE—NO IMPLIED RELEASE OF DEBT.

In re Barker Gilbey v. *Barker* (1918) 1 Ch. 128. In this case a summary application by originating summons was made by the trustee of the will to determine the effect of a hotchpot clause. By the will the testator bequeathed certain shares of his estate to his brothers, who were respectively indebted to him in various sums of money. The testator directed that the indebtedness of the legatees should be brought into hotchpot for the purpose of the division of his estate. The shares bequeathed to the brothers were in trust for them respectively for life with remainder to their issue. On behalf of the brothers it was contended that the effect of the hotchpot clause was to extinguish the personal liability of the debtors to the testator. On behalf of the issue of the legatees it was claimed that it had no such effect and Astbury, J., so held.

APPORTIONMENT—EXCLUSION OF APPORTIONMENT ACT BY EXPRESS STIPULATION—TRUST FOR SALE—POWER OF POSTPONING SALE—WHOLE INCOME TO BE APPLIED AS INCOME PENDING SALE—APPORTIONMENT ACT, 1870 (33-34 VICT. c. 35) s. 7 —(R.S.O. c. 156, s. 4).

In re Edwards Newbery v. *Edwards* (1918) 1 Ch. 142. In this case the simple question was whether or not the Apportionmnte

Act 1870, (see R.S.O. 156, s. 4) was excluded by the terms of the will in question. The testator bequeathed his residuary estate to trustees on trust for sale, and to hold the net proceeds on trust to pay the income to his wife during her life. He gave the trustees power to postpone the sale and directed that until sale the whole income was to be applied as from his death as income. Dividends on stocks and shares were received after his death, but which were declared in respect of periods wholly or partially anterior to his death and the question was whether these dividends were apportionable under the Apportionment Act. The wife claimed that they were not, by reason of the clause directing the whole of the income as from his death to be applied as income. Astbury, J., however, held that the Act applied and that there was nothing in the will to exclude its operation. *In re Lysaght* (1898) 1 Ch. 115; and *In re Meredith* (1898) W.N. 48, he held not to be applicable.

SALE OF GOODS—CONTRACT REQUIRED TO BE EVIDENCED BY WRITING—IMPLIED RESCISSION BY SUBSEQUENT PAROL AGREEMENT.

Morris v. *Baron* (1918) A.C. 1. The problem the House of Lords had to solve in this case was whether or not a contract for the sale of goods of more than £10 in value which was evidenced in writing as required by the *Sale of Goods Act*, s. 4 (see R.S.O. c. 102, s. 12), could be validly rescinded by a subsequent parol agreement between the parties. Their Lordships (Lord Finlay, L.C., Lords Haldane, Dunedin, Atkinson and Parmoor) answer this question in the affirmative, overruling the decision of the Court of Appeal (Eady and Bankes, L.JJ., and Lawrence, J.) who had overruled Bailhache, J. The question is very elaborately discussed in all its bearings. From the observations of Lord Finlay, L.C., and others of their Lordships, however, it is doubtful whether this decision would be law in Ontario owing to the difference in the wording of the English Sale of Goods Act, s. 41, and the 17th section of the Statute of Frauds (R.S.O. c. 102, s. 12) which would govern the case in Ontario. The 17th section declares that no contract not in accordance with that section "shall be allowed to be good"—whereas the Sale of Goods Act s. 4, is like s. 4 of the Statute of Frauds, and merely says that no action can be brought on a contract not complying with its terms, consequently it held that a parol contract though not enforceable under the *Sale of Goods Act*, s. 4, is not a nullity and may validly rescind a prior written contract, though it could not vary it. On the other hand, some of their Lordships express the opinion that there

is no difference in effect between the 4th and 17th sections of the Statute of Frauds and if that be the correct view then this decision would be good law in Ontario.

MAINTENANCE OF ACTION BY CROWN.

Mackey v. *Monks* (1918) A.C. 59. In this appeal a preliminary objection was taken that the Crown was supplying the appellant with means to prosecute his appeal and that this was an illegal act, and that the appeal ought not to be heard. The question at issue in this case was the validity of certain regulations made by the Home Secretary under a statute, in reference to the loading and unloading of ships, and the Crown assisted the appellant with means to prosecute his appeal in order to get the question of the validity of the regulations settled. Lords Atkinson and Parker, who dealt with this objection, doubt whether it could be regarded as maintenance, but, even if it were, they hold it could not debar the appellant of his right to have his appeal heard.

INSURANCE (MARINE)—GOODS—CONSTRUCTIVE TOTAL LOSS—RESTRAINT OF PRINCES—PERIL OF CAPTURE—PUTTING INTO NEUTRAL PORT TO AVOID CAPTURE—BRITISH GOODS ON GERMAN SHIP—LOSS OF ADVENTURE—PROXIMATE CAUSE OF LOSS.

Becker v. *London Assurance Co.* (1918) A.C. 101. This was an appeal from the Court of Appeal (1916) 2 K.B. 156 (noted *ante* vol. 52, p. 353). The plaintiffs sued on a policy of marine insurance for a total loss of the goods insured. The policy insured against the usual perils, including men of war, enemies and restraint of princes. The goods in question were British goods shipped on a German vessel and were in transit when war broke out between England and Germany and the master on being informed of the fact put into a neutral port to avoid the risk of capture by hostile cruisers, and the voyage was abandoned. The plaintiff gave notice of abandonment and claimed as for a total loss. There was no evidence that the vessel had been chased by any hostile cruiser, but in the opinion of the Lords of the Admiralty she would have been in peril of capture if she had proceeded on her voyage. The House of Lords (Lords Loreburn, Dunedin, Atkinson, Sumner and Wrenbury), agreed with the Court of Appeal that the frustration of the adventure was caused, not by a peril insured against, but by the voluntary act of the captain in putting

into a port of refuge to avoid risk of capture and that the plaintiffs, therefore, were not entitled to recover.

CONTRACT—PERFORMANCE RENDERED IMPOSSIBLE BY VIS MAJOR—STOPPAGE OF WORK BY MINISTER OF MUNITIONS.

Metropolitan Water Board v. *Dick* (1918) A.C. 119. The House of Lords (Lord Finlay, L.C., and Lords Dunedin, Atkinson and Parmoor) has affirmed the judgment of the Court of Appeal (1917) 2 K.B. 1 (noted *ante* vol. 53, p. 330). The action was brought for a declaration that a contract entered into by the defendant with the plaintiffs to construct a reservoir . . . was still subsisting. The contract was subject to a proviso, that if, by reason of (*inter alia*) any difficulties, impediments, or obstructions, whatsoever, and howsoever, occasioned, the contractors should, in the opinion of the plaintiff's engineers, have been unduly delayed, or impeded in the completion of the contract, it should be lawful for the engineer to grant an extension of time for completion. By a notice given by the Minister of Munitions in February, 1916, the contractors were required to cease work on their contract, and they ceased work accordingly, and claimed that by reason of such notification they were entitled to treat the contract as at an end. Their Lordships agreed with the Court of Appeal that the interruption created by the prohibition was of such a character and duration as to make the contract, if resumed, a different contract from the contract when broken off, and therefore, it had ceased to be operative; and that the proviso for extending the time for performance did not apply to the prohibition by the Minister.

PRIZE COURT—NEUTRAL SHIP—CONDITIONAL CONTRABAND—KNOWLEDGE BY SHIP-OWNERS OF CHARACTER OF CARGO.

The Hakan (1918) A.C. 148. This was an appeal from the judgment of the Prize Court condemning a ship and cargo as lawful prize. The ship was Swedish and her owners chartered her to German fish merchants for voyages from Scandinavian to German ports. The ship was captured while carrying herrings which were previously declared conditional contraband. The consignees of the herrings were bound to hand over the fish to a German company appointed by the German Government for purposes connected with the Government control of food in Germany. The Judicial Committee of the Privy Council (Lords Parker and Wrenbury, and Sir Arthur Channell), held that in these circumstances both ship and cargo had been properly condemned.

TRADE MARK—REGISTRATION—INFRINGEMENT BY USING SIMILAR TRADE MARK REGISTERED IN FOREIGN COUNTRY—INJUNCTION —NEWFOUNDLAND TRADE MARK ACT (N. Con. S. c. 112.) ss. 2, 31.

Imperial Tobacco Co. v. *Duffy* (1918) A.C. 181. This was an appeal from the Supreme Court of Newfoundland. The action was brought to restrain the infringement of the plaintiff's trade mark registered in that colony. The infringement consisted in using in the colony a similar trade mark to one which the defendants had used in the United States since 1896, but which was not registered in Newfoundland. The Court below had dismissed the action, but the Judicial Committee of the Privy Council (Lords Parker, Sumner and Wrenbury), held that the plaintiffs were entitled to the injunction as prayed.

Bench and Bar.

CANADIAN BAR ASSOCIATION.

The next annual meeting of the Association will be held at the Ritz Carlton Hotel, Montreal, on the 3rd, 4th and 5th of September next. The President, Sir James Aikins, in the notice calling the meeting, makes an urgent appeal to the profession for the support of the Association so as to make it as useful as possible. The membership roll as it stands at present is 870 lawyers and 37 judges, out of the 5000 lawyers in Canada and 270 judges and 48 retired judges. Although so many of our brethren are at the front it is hoped that notwithstanding there will be a good attendance. A number of distinguished guests have been invited.

The objects of the Association as stated in the notice are as follows:—(1) To advance the science of jurisprudence; (2) To promote the administration of justice: (3) To promote uniformity of legislation: (4) To uphold the honour of the profession; and (5) To encourage cordial intercourse among the members of the Bar.

Correspondence.

The Courts of Canada and Their Names.

The Editor, Canada Law Journal:

Sir,—The change made by the Province of Saskatchewan in the constitution, or rather the nomenclature, of its Courts leads one's thoughts to the same subject in connection with other Provinces.

To begin with, all the Provinces should have the same system and the same names to the system. Every step in the direction of uniformity is most desirable. Again, as to nomenclature, Saskatchewan very properly and with some regard to the fitness of things drops the title of "Supreme Court," which expression is inappropriate to provincial Courts, and one wonders how it ever came to be used. The word "Supreme" is only appropriate to the Court of last resort for Canada. A lot of little Supreme Courts has a comical aspect and is related to the injurious advocacy of those who clamour for an undue measure of jurisdiction to the Provinces under the B.N.A. Act; and who, as a political battlecry, use the phrase "provincial rights."

A more appropriate title for our provincial Courts would, I think, be "Superior Courts." This name is given to one of the Courts in Quebec, but there they have put the cart before the horse, for the Court of King's Bench is the highest Court and their "Superior Court" is the inferior Court.

For a suggestion as to the distinction between Courts of first instance and Courts of appeal therefrom, how would it do to have the former styled "Court of King's Bench" and the latter "Court of Appeal," as they now exist in Saskatchewan, or perhaps better have a "Superior Court" of the Province with an Appellate Division and a Division for the adjudication of matters of the first instance under some appropriate title, such as "Trial Courts"? Some might prefer the title "Superior Court" alone, without any Divisions, the judges from time to time making such arrangements as to the trial of cases as would be most convenient under varying circumstances. The various Superior Courts and Divisions in the Province of Ontario with four Chief Justices is almost grotesque; but this has grown up under peculiar circumstances, and as to the plethora of Chiefs, most of these titles will expire automatically by degrees. We are all agreed that one Chief Justice for each Province is quite enough. Yours, etc.,

Nomen.

[This subject is referred to in our Editorial Column at p. 201. —Ed. C.L.J.]

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Ex. Court.] THE KING *v.* LARIVEE. [May 7, 1918.

Expropriation—Fair market value—Generosity—Compulsory taking —10% allowance.

The Judge of the Exchequer Court, after reviewing the evidence, concluded: "Under all the circumstances of the case . . . a fair and generous market price for the area expropriated would be about eight to ten cents a foot, and to make it very generous compensation, I will make it ten cents a foot."

Held, that the element of "generosity" is not one which should enter into the arbitrator's or Judge's consideration, when fixing the compensation to be allowed for compulsory purchase.

An allowance of ten per cent. of the award for compulsory taking cannot be claimed as of right for all kinds of property and under all circumstances.

Appeal allowed with costs.

Amyot, for appellant; *Belleau*, K.C., and *St. Laurent*, K.C., for respondent.

Ex. Court.] POWER *v.* THE KING. [May 7, 1918.

Expropriation—Common grant—Cla[illegible]demption—Extinction of right—Prescription.

In a grant from the Crown of a water-lot to the appellants' predecessor in title, it was provided for the resumption of it by the Crown at any time for purposes of public improvement upon giving twelve months' notice in writing of its intention to exercise that right.

Per Anglin, Brodeur and Lavergne, JJ.:—The Crown, by instituting expropriation proceedings in respect of this water-lot, elected not to exercise its right of resumption.

Such right, having been vested in the Quebec Harbour Commissioners under 22 Vict., c. 32, does not form part of the Crown

domain, notwithstanding their public character and the nature of their trust.

Per Brodeur and Lavergne, JJ.:—This right, not having been exercised for a period of over thirty years, was extinguished by prescription under art. 2242 C.C. Anglin, J., *contra*.

Per Davies and Idington, JJ., dissenting:—The appeal should be dismissed as the appellants have no reason to complain of the amount of compensation allowed.

Appeal allowed with costs.

Lafleur, K.C., and *St. Laurent*, K.C., for appellants; *Gibsone*, K.C., for respondent, The King; *Dobell*, for respondents, Quebec Harbour Commissioners.

B.C.] [May 14, 1918.

KOMNICK BRICK MACHINERY CO. *v.* B.C. PRESSED BRICK CO.

Statute—Construction—Legislation declared ultra vires—Amendment granting right to "maintain anew" an action—Jurisdiction—Supreme Court Act, s. 2, par. (e).

An action brought by the appellant was dismissed by the trial court upon the merits and by the Court of British Columbia on the ground that the appellant, being an unlicensed extra-provincial company, had been prohibited by the Companies Act of 1897 from making the contract sued upon. Later on, this legislation was held by the Judicial Committee of the Privy Council to be *ultra vires* of the legislature. The Companies Act was subsequently amended by enacting the following provision:

"Where an action, suit, or other proceeding has been dismissed or otherwise decided against an extra-provincial company on the ground that any act or transaction of such company not having been licensed or registered pursuant to this or some former Act, the company may, if it is licensed or registered as required by this Act and upon such terms as to costs as the Court may order, maintain anew such action, suit, or other proceeding as if no judgment had therein been rendered or entered."

Held, that the appellant was not obliged to bring an action *de novo*, but had the right to ask for a re-instatement or revival of the dismissed action at the stage at which it was when the judgment based upon the statute subsequently held *ultra vires* was pronounced.

The judgment appealed from holding that the action must be begun *de novo* is a final judgment within the meaning of paragraph (e) of s. 2 of the Supreme Court Act.

Appeal allowed with costs.

H. J. Scott, K.C., for appellant; *Chrysler*, K.C., for respondent.

Que.] [March 11, 1918.

MONTREAL TRUST COMPANY *v.* ROBERT.

Company — Subscription of stock — Misrepresentations—Acquiescence—Delay—Estoppel—Stock "to be issued"—Proof.

This was an appeal from the Superior Court of the Province of Quebec, sitting at Montreal.

Held, Fitzpatrick, C.J., dissenting, that in case of misrepresentations made by the promoter of an incorporated company, a subscriber of stock must clearly prove that he has in fact been induced by such misrepresentations to buy shares, especially if he has kept silent after receiving numerous demands of payment and has failed to repudiate his contract for a considerable period of time after he had knowledge of the falsity of the representations.

Per Idington, J.:—A mere statement, at the head of an underwriting agreement, as to the capital to be issued, does not imply that the subscriber will be under no liability to pay for his shares, unless and until the amount so stated has been issued.

Per Fitzpatrick, C.J., dissenting:—In the case of an agreement to take shares in an incorporated company, the capital issued, if not equal to that proposed, must not at least be so reduced as to render the company incapable of accomplishing the avowed object of its existence.

Appeal dismissed with costs.

J. E. Martin, K.C., and *Rinfret*, K.C., for appellant; *G. H. Montgomery*, K.C., and *W. Chipman*, K.C., for respondent.

Que.] C.P.R. *v.* S.S. STORSTAD. [March 11, 1918.

Admiralty law—Collision—Sale of vessel liable for damages—Distribution of insufficient fund—Priority between life and property claimants—S. 503, Imperial Merchants Shipping Act, 1894.

The S.S. "Storstad," arrested and held liable at the suit of the appellant owner of th "S.S. Empress of Ireland," with whom she collided, was sold under an order of the Court, and the proceeds of the sale were deposited in court for distribution between the claimants for loss of life and property according to their respective rights.

Held, Idington, J., dissenting, that the distribution of the fund must be made in accordance with the provisions of s. 503 of the Imperial Merchants Shipping Act; the claimants for loss of life or personal injury being entitled to 7/15 of the fund and then ranking

for the balance of their claims *pari passu* with the claimants for loss of property.

Per Idington, J., dissenting:—Section 503 of the Act is effective only upon the application of the owner of the ship to a competent Court, invoking limitation of his liability.

Appeal allowed with costs.

Aimé Geoffrion, K.C., and *A. R. Holden*, K.C., for appellants; *G. F. Gibsone*, K.C., *E. Languedoc*, K.C., and *Eug. Angers*, for respondents.

Alta.] SIMSON v. YOUNG. [March 25, 1918.

Sale of land—Foreign vendor—Agreement for sale—Place of completion—Time essence of agreement—Extension of time—Waiver.

Y., residing in Ireland, through an agent in Calgary, listed land there for sale with a real estate broker. An agreement by S. to purchase this land, signed by the broker for Y., provided for a part payment in cash to be forfeited to the vendor, and the contract to be null and void if the balance was not paid in one year, time to be the essence of the contract. When the balance became due, March, 1914, S. went to the broker to complete the purchase, but was told that the conveyance had to be sent to Ireland for execution and to return in six weeks, which he did, and found the situation the same. Subsequent inquiries succeeded no better, and in December, 1914, he formally tendered the money to the broker and shortly after wrote to Y. repudiating the agreement and demanding the return of the money paid under it. Receiving no reply in January, 1915, he took an action for rescission and repayment of the money in which Y. by counterclaim asked for specific performance. In February Y. tendered a conveyance of the land to S.

Held, that while no place was named in the agreement for completion of the purchase, it was to take place at Calgary, and as Y. was to prepare the conveyance it was her duty to have it there for delivery to S. at the appointed time.

Held, also, that the assent by S. to the request of the broker to wait after the time of completion for the conveyance could not be considered an agreement for extension nor evidence of an intention not to rescind.

In the agreement the address of the vendor was given as Belfast, Ireland, instead of Dublin, where she lived, and the vendee's letter of repudiation was not delivered.

Held, Fitzpatrick, C.J., dissenting, that this and other circumstances absolved the vendee from the duty of giving notice fixing a reasonable time within which the purchase must be completed or the contract be at an end.

Held, per Anglin, J.:—The stipulation in the agreement that "time shall be the essence of this agreement" was binding on both parties though the vendee alone was to be penalized for its non-observance.

Geo. H. Ross, K.C., and *Barron*, for appellants; *J. A. Ritchie* and *McKay*, for respondent.

B.C.] ARNOLD v. DOMINION TRUST CO. [April 15, 1918.

Life insurance—Benefit of wife—Declaration in writing—Will—Identifying policy—R.S.B.C. c. 115, s. 7—Winding-up Act—Leave to appeal.

By s. 7 of the Life Insurance Policies Act of British Columbia a man may "by any writing identifying the policy by its number or otherwise," cause a policy of insurance on his life to be deemed a trust for the benefit of his wife for her separate use.

Held, per Davies and Anglin, JJ., Fitzpatrick, C.J., *dubitante*, Idington, J., *contra*, that such declaration in writing may be made by will, as the Legislature of British Columbia, when enacting this provision, must be presumed to have adopted the judicial construction of similar legislation in the Province of Ontario.

A. by his will devised to his wife "the first seventy-five thousand dollars collected on account of policies of life insurance."

Held, Davies, J., *contra*, that said devise was not a writing "identifying the policy by its number or otherwise," as required by s. 7 of the Act, and said sum of $75,000 did not enure to the benefit of A.'s wife.

After the death of A., his wife brought action against the Trust Company, executor of his will, and said company's liquidator under a winding-up order to recover $75,000 out of the proceeds of life policies collected by the executor. On appeal from the judgment of the Court of Appeal in said action:—

Held, Idington and Brodeur, JJ., dissenting, that the case was not one subject to the provisions of s. 106 of The Winding-up Act, and leave to appeal was not necessary.

Appeal dismissed with costs.

S. S. Taylor, K.C., for appellant; *Lafleur*, K.C., for respondent.

Province of British Columbia.

COURT OF APPEAL.

Macdonald, C.J.A., Martin, Galliher, McPhillips, and Eberts, JJ.A.] [April 2, 1918.

ALBERNI LAND CO. v. REGISTRAR-GENERAL OF TITLES.

Deed—Reservations and exceptions—Easements—Registration.

Reservations in a conveyance of land of "all coal, coal oil, petroleum, etc., within, upon or under the same" are exceptions and reservations from the grant and not easements, and should not be registered as charges. A certificate of indefeasible title may issue subject to these reservations, a memorandum of which should be endorsed on the certificate.

The incorporeal rights, such as rights of entry and rights of way, are easements, and not subject to reservation, but if they are easements of necessity incidental to the getting of the minerals there is no need to register them as a charge.

H. A. Maclean, K.C., for appellant; *C. J. Gwynne*, for respondent.

ANNOTATION ON ABOVE FROM 40 D.L.R. 144.

PROFITS À PRENDRE.

A *profit à prendre* is a right to enter upon the land of another and take some profit of the soil, such as minerals, oil, stones, trees, turf, fish or game. The right to take water is not a *profit à prendre*, but an easement, *Race* v. *Ward*, 4 E. & B. 702, 119 E.R. 259.

A *profit à prendre* differs from an easement in this, that an easement entitles the dominant owner to enter his neighbour's land and make some use of it, while a *profit à prendre* entitles the owner of it to take some profit from the soil. It differs also in this, that an easement must be appurtenant to some land other than that over which the easement exists. In other words, there must be a dominant tenement to which the easement is appurtenant, whereas a *profit à prendre* may exist in gross, that is, as a separate inheritance enjoyed independently of the ownership of any land, *Shuttleworth* v. *Le Fleming*, 19 C.B.N.S. 687; *Welcome* v. *Upton*, 6 M. & W. 536; *Barrington's Case*, 8 Rep. 136.

It differs also from the ownership of the soil. Thus, a grant of all the coal or other mineral in or upon certain land, is a grant of part of the land itself, and passes complete ownership in the mineral to the grantee. But a grant of the right to enter, search for and dig coal, and carry away as much as may be dug, is a grant of an incorporeal right to enter and dig, and passes

the property in such coal only as shall be dug, *Wilkinson* v. *Proud*, 1 M. & W. 33; *Chetham* v. *Williamson*, 4 East 469; and see *McIntosh* v. *Leckie*, 13 O.L.R. 54. The grant of such a right does not prevent the owner from exercising his right, as owner, of taking the same sort of thing from off his own land. The right granted may limit, but does not exclude, the owner's right. Clear and explicit language must be used in order to give the grantee the right to the exclusion of the land-owner, *Duke of Sutherland* v. *Heathcote*, [1892] 1 Ch. at p. 484.

It differs also from a mere license of pleasure or personal license, which must be exercised by the licensee only and is not assignable. Thus, if a land-owner grants merely the right to shoot, fish or hunt, without the liberty to carry away what is killed, it is a mere personal license, or license of pleasure, and is not assignable, or exercisable with or by servants, *Wickman* v. *Hawker*, 7 M. & W. at pp. 73, 77, 79; *Webber* v. *Lee*, 9 Q.B.D. at p. 317, *per* Bowen, J. But if, with the right to kill, there is given also the right to carry away what is killed, or part of what is killed, then the grant is of an incorporeal hereditament, a *profit à prendre*, *Wickham* v. *Hawker*, 7 M. & W. 63; *Webber* v. *Lee*, 9 Q.B.D. 315; *Rex* v. *Surrey Co. Ct. Judge*, [1910] 2 K.B. at p. 417. And so, being for profit, this right may be exercised with or by servants, and *a fortiorii* is that so when the right is granted to one, his heirs and assigns *Wickham* v. *Hawker*, 7 M. & W. 63. Each grant must be interpreted by itself; but a grant of the "exclusive right of fishing" has been held to imply the right to take away such fish as may be caught, and so to be a *profit à prendre*, *Fitzgerald* v. *Firbank*, [1897] 2 Ch. 96.

A *profit à prendre* is an interest in land, and an agreement to grant one is therefore within the Statute of Frauds, *Webber* v. *Lee*, 9 Q.B.D. 315; *Rex* v. *Surrey Co. Ct. Judge*, [1910] 2 K.B. at p. 417; *Smart* v. *Jones*, 15 C.B.N.S. 724. And it cannot be sold under an execution against goods, *Canadian Railway Acc. Co.* v. *Williams*, 21 O.L.R. 472. But it has been held that such a right, resting in agreement not under seal, is not such an interest in land as entitles the possessor of it to compensation under the wording of the English Lands Clauses Consolidation Act, 1848, from a railway company which expropriates part of the land which is subject to the right, *Bird* v. *G.E.R. Co.*, 19 C.B.N.S. 267.

Being an incorporeal hereditament, a *profit à prendre* must be created or transferred by deed, *Bird* v. *Higginson*, 2 A. & E. 696; 6 A. & E. 824; *Bird* v. *G.E.R. Co.*, 19 C.B.N.S. 268. But a writing, void as a grant, may operate as an agreement for one, and specific performance of it will be enforced in a proper case. And so, where a land-owner asked an injunction to restrain one who had such an agreement from shooting over his land, the injunction was refused, and specific performance of the agreement by the execution of a proper deed was ordered, *Frogley* v. *Lovelace*, John. 333. And where the circumstances are such that specific performance would be granted, the rights of the parties would now be adjusted as if the formality of a deed had been observed, *Walsh* v. *Lonsdale*, 21 Ch.D. 9.

Where a lease of sporting rights has been made not under seal, and the tenant has actually enjoyed the rights thereunder, he will be liable to perform any agreement made therein on his part, *Adams* v. *Clutterbuck*, 10 Q.B.D. 403.

Where land is granted or leased, and the right of sporting over it is reserved by the instrument to the grantor, this is not properly a reservation or exception, but is a re-grant of a new right exercisable over the lands of the grantee or lessee; and therefore the deed should be executed by the grantee or lessee; and where a right was so expressed to be reserved to the grantor and another, it was held to operate as a re-grant to the persons to whom the so-called reservation was made, *Wickham* v. *Hawker*, 7 M. & W. 63.

Where a grant to shoot or sport over lands is made, and no restriction as to user of the land is imposed upon the land-owner, the grantee takes merely the right to shoot or sport over the lands as he finds them from time to time. And so, a lessor of the right to shoot over his lands is not prevented from cutting timber in due course, although the result may be to interfere with the shooting, *Gearns* v. *Baker*, 10 Ch. App. 355. And the owner may also sell in lots for building purposes, or make the necessary roads through his property, but the purchaser would necessarily take subject to the shooting rights if he had notice of them, *Pattison* v. *Gilford*, L.R. 8 Eq. 259. And, on the other hand, where a lease is made of lands reserving to the lessor all the shooting and sporting rights, the tenant may use the land in the ordinary way under his lease, *Jeffrys* v. *Evans*, 19 C.B.N.S. 246. Where there is a grant of the right to sport for a term of years, and the grantee covenants with the owner of the land to leave it well stocked game, the benefit of this covenant runs with the reversion, and on breach it may be sued on by the assignee of the reversion, *Hooper* v. *Clark*, L.R. 2 Q.B. 200.

Where a right to shoot was enjoyed from year to year on payment of an annual sum, and the landlord gave less than half a year's notice to determine the right, after a shooting season had closed, it was held to be a reasonable notice, under the circumstances, and sufficient to determine the right, and the court refused to hold that half a year's notice was necessary, *Lowe* v. *Adams*, [1901] 2 Ch. 598.

At common law the property in game, when alive and free, is temporary, and consequent upon possession of the soil, *Graham* v. *Ewart*, 11 Ex. at p. 346; *Lonsdale* v. *Rigg*, 11 Ex. at p. 672. There is no right to game as chattels, *Blades* v. *Higgs*, 12 C.B.N.S. at p. 513. But when game is killed or otherwise reduced into possession, the property becomes absolute. So, at common law, if a man keeps game on his land he has a possessory property in it as long as it remains there, but if it escapes into the land of his neighbour, the latter may kill it, for then he has the possessory property. If a trespasser starts game on the grounds of another and hunts and kills it there, the property continues in the owner of the land. But if one, having no license to do so, starts game on the land of one and hunts it into, and kills it on, the lands of another, it belongs to the hunter; but he is liable in trespass to both land-owners, *Sutton* v. *Moody*, 1 Ld. Raym. 250, explained in *Blades* v. *Higgs*, 11 H.L.C. at p. 632; *Churchward* v. *Studdy*, 14 East 249; *Lonsdale* v. *Rigg*, 11 Ex. at p. 672.

Where the public have a right of navigation on water covering land of a private owner, there is no right to shoot wild fowl from a boat under guise of the exercise of the right of navigation, *Fitzhardinge* v. *Purcell*, [1908] 2 Ch. 139; *Micklethwaite* v. *Vincent*, 8 T.L.R. 268. And that is so, also, where the waters have been made navigable by artificial means, *Beatty* v. *Davis*, 20

O.R. 373. Nor can one of the public use a highway for the purpose of shooting game which strays or flies [illegible] the highway from the lands of the adjoining proprietor who owns the fee in the soil of the highway, *Harrison* v. *Rutland (Duke of)*, [1893] 1 Q.B. 142; and see *Hickman* v. *Maisey*, [1900] 1 Q.B. 752; *Reg.* v. *Pratt*, 4 E. & B. 860, 119 E.R. 319.

The right to kill game is somewhat affected by statute in Ontario. By R.S.O. (1887) c. 221, s. 10, it was provided that "in order to encourage persons who have heretofore imported or hereafter import different kinds of game, with the desire to breed and preserve the same on their own lands, it is enacted that it shall not be lawful to hunt, shoot, kill or destroy any such game without the consent of the owner of the property wherever the same may be bred." And a penalty was provided for breach of the Act. In an action by the owner of preserves for the value of deer which had strayed from the preserves upon the defendant's land and had there been killed by the defendant, the opinion was expressed that the Act was not intended to affect the common law right of the owner of any other land to kill and take any such game as might from time to time be found upon his land, and that the preserver of the deer had no right of action against the defendant, *Re Long Point Co.* v. *Anderson*, 19 O.R. 487; reversed on the ground that prohibition would not lie: 18 A.R. 401. In other words, the defendant acquired a temporary possessory property in the game as soon as it came upon his land. The result would seem to be, if this opinion is correct, that the penalty provided by the Act could not be enforced in a similar case, because to do so would be to exact a penalty from the defendant for killing his own deer. This would restrict the operation of the Act to hunting or killing game either on the preserved property or elsewhere than on the land of the person who kills it.

This enactment, somewhat modified, was continued in R.S.O. (1897) c. 287; and by R.S.O. (1914) c. 262, s. 22, it is now provided that (1) "where a person has put or bred any kind of game upon his own land for the purpose of breeding and preserving the same, no person, knowing it to be such game, shall hunt, shoot, kill or destroy it without the consent in writing of the owner of the land." (2) "This section shall not prevent any person from shooting, hunting, taking or killing upon his own land, or upon any land over which he has a right to shoot or hunt, any game which he does not know or has not reason to believe has been so put or bred by some other person upon his own land." And penalties are provided for infringement of the Act. By the express wording of this enactment, the common law right of the owner of land to kill game which he finds thereon is preserved, provided that he does not know or has not reason to believe that it is preserved game, and the expression of this right seems to predicate that if the landowner does know or has reason to believe that the game is preserved, he must not kill it on his own land.

There is nothing in this enactment to change or affect the character of the right to shoot or kill game. In other words, it still remains an incorporeal right, and should be created or assigned by deed, although the "consent in writing" of the owner of the land is all that is required by the Act. But a proper consent, if not under seal, would no doubt be treated as an agreement for a deed as before mentioned.

War Notes.

Mr. Root showed his customary keen perception of the historic significance of events when, at Toronto recently, he said: "We bow to this warrior country." Our own half million of soldiers in France certainly must stand at their proudest salute when the half million of Canadians who preceded them there pass by. The response of Canada to the call of this war was not merely the response of obedience to the British Empire. It was a brave, an instant, a most spirited answer to the call of civilization, liberty and that enduring peace of the world which can be based only on the triumph of right over wrong. Canada did not falter, nor bargain, nor question. She responded with her noblest manhood, and the blows which she has struck against a power which has proved to be our enemy quite as much as hers have had their full force in holding back the German invader from the free lands. On Vimy Ridge, that advanced point to which the Canadians carried the standard, they still stand like a rock. If the United States had answered the great call with the promptness and with the proportion of its man power with which Canada responded, the German armies would have been hurled back beyond the Rhine long ago. Yes—we take off our hats to Canada.—*Boston Transcript.*

It is almost invidious to note any special act of gallantry on the part of any one of our Canadian boys at the front, as they have all done such splendid service; but we must make an exception in favour of the son of the Secretary of our Law Society, Flight Commander H. Brooke Bell, Law Student of the Second Year, who has just been awarded the British Military Cross and the Italian Medal, Valore Militare, for conspicuous gallantry.