Canada Law Journal.

VOL. XLIX. TORONTO, OCTOBER 15 No. 20

THE STATUTE OF FRAUDS AND SOME RECENT CHANGES.

It would be well for the profession in Ontario to scan carefully the forthcoming volume of the Revised Statutes, as presumably they have done the statutes for 1913 recently published. There is one change of considerable importance to which it would be well to call special attention.

By the 17th section of the Statute of Frauds (29 Char. II. c. 3) it is enacted that "no contract for the sale of any goods, wares and merchandises for the price of £10 sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same; or give something in earnest to bind the bargain, or in part of payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto authorised."

Doubts long existed as to the application of this section to an executory contract to sell. More than 150 years after the passing of the Statute of Frauds the matter was set at rest by Lord Tenterden's Act, 9 Geo. IV. c. 14, s. 7, which enacted that the provisions of s. 17 "shall extend to all contracts for the sale of goods of the value of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit, or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." The effect of the above statute was held to modify the 17th section of the Statute of Frauds so far as the word "price" was concerned, and made "value" the standard.

The above section of Lord Tenterden's Act was introduced into this Province, and appears in Con. Stat. U.C. (1859) c. 44, s. 11, and from there was carried into the last revision of the Ontario statute in 1897 at s. 9 of c. 146.

Our new Statute of Frauds (3 & 4 Geo. V. c. 27) would seem to change the law as it enacts (s. 12) that "no contract for the sale of any goods, wares or merchandise for the price of $40 or upwards shall be allowed to be good unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized, and notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of the contract be actually made, procured or provided, or fit or ready for delivery or although some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

As this section is composed partly of the words of the 17th section of the original Statute of Frauds and partly of s. 9 of R.S.O. (1897) c. 146, and as this latter section is repealed by 3 & 4 Geo. V. c. 27, s. 13 (the Act last Session) it would seem that on this point the legislature has deliberately eliminated the question of value from the construction of section 17 of the Statute of Frauds.

It is worthy of note that the word "value" is used in the Imperial Sale of Goods Act of 1893, which is still in force. Sec. 4 of that statute saying "a contract for the sale of any goods of the value of £10 or upwards shall not be enforceable by action, unless, etc."

It would be interesting to know why the word "value" was introduced in Lord Tenterden's Act, and still more interesting to know why the change from value to price, resulting from s. 12 of the statute of 1913 above referred to, was made, or indeed whether it was intended by that section to alter the law here as it certainly has done. Any light on this subject would be help-

ful. Possibly the difficulty may disappear when the hoped for revision, so long overdue and which the Commissioners think they may be able to give to the public by the end of the year, is complete. It goes without saying that, unless there is some very strong reason to the contrary legislation in this country should as far as possible go on parallel lines with that of the Mother Country.

JUDICIAL CHANGES IN ENGLAND.

Numerous changes may shortly be expected in the English judiciary. The breakdown in the health of Lord Alverstone, Chief Justice of England, which has deprived the country of his services and the Court of Queen's Bench of its Chief Justice for more than eight months, seems to warrant the belief that he will very soon resign the position which he has so well filled. It is said that his successor is almost sure to be Sir Rufus Isaacs, the Attorney-General.

We felt it our duty recently to criticize the action of the Attorney-General in the *Marconi* case, but there was nothing there to touch his personal honour, and his great learning and brilliant talents will be well employed in the exalted and responsible position of Chief Justice of England. Our exchanges say that his appointment would be most satisfactory to the bar.

The mention of his name calls to mind the prominent position taken by men of the Hebrew race in connection with the administration of affairs in Great Britain. We all remember the great Disraeli, for some time Prime Minister of England. The Law Officers of the Crown of the present time are also of that wonderful and ineffaceable race, the Attorney-General being Sir Rufus Isaacs and the Solicitor-General, Sir John Simon. One of the most prominent and brilliant men of the present Cabinet, the Postmaster-General, Mr. Herbert Samuel, is also a Jew. Should the present Attorney-General take the place of

Lord Alverstone it will be another instance of the undying physical and mental vigor of this ancient people.

Two additional Lords of Appeal in Ordinary are to be appointed. It was thought probable that they might be chosen from the present judiciary, but it is said (by cable) that one of them will be the present Advocate-General of Scotland, Mr. Alexander Ure, K.C.

There may be those who will take exception to this appointment and will question whether Lord Haldane has therein carried out the promise he made to get the very best men available. It is said that the Advocate-General when in Parliament made himself obnoxious in a reference to the claim of the Duke of Buccleuch for compensation for damages to his property on the Thames Embankment. Mr. Ure made a statement known by all lawyers acquainted with the case of *Buccleuch* v. *Metropolitan Board of Works* to be incorrect and was twitted for either forgetting his law or disregarding the facts. It is said that the only occasion on which that courteous gentleman and experienced parliamentarian, Mr. Balfour used harsh language about a political opponent, was when he criticised the veracity of Mr. Ure in forcible and picturesque language, the words being that the statement objected to was a "frigid and calculated lie." —We do not vouch for the accuracy of the statement, but it was so reported at the time.

Since the above was written, Sir Rufus Isaacs has been appointed Lord Chief Justice of England. He is succeeded by Sir John A. Simon, K.C., V.O., K.C.M.P., Solicitor-General. S. O. Buckmaster, K.C., succeeds him as Solicitor-General.

THE "TURNTABLE" DOCTRINE IN UNITED STATES.

The "turntable doctrine" is that principle of law enunciated for the first time in this country by the Supreme Court of the United States and followed by some of the state courts to the effect that an adult who places a dangerous agency, which, from its nature is attractive to children, where it is accessible to them, may be liable for the injuries caused thereby, though the children

are trespassers. This is an exception to the general rule that no right or action lies in favour of one who is injured while trespassing or guilty of contributory negligence. The theory on which these cases proceed is that the temptation of an attractive plaything to a child is a thing which must be expected and guarded against, and that the placing of such objects where they are accessible to children is an implied invitation to them. As said above, it is well settled that one owes no duty to keep his premises in a safe condition for the protection of mere trespassers and owes them no duty except the mere duty not to wilfully or wantonly injure them, but it is said that there is a notable exception to this general rule in the case of children. It is thus put by Judge Thompson in vol. 1, section 1024, of his work on Negligence: "A well-grounded exception to the foregoing principle is that one who artificially brings or creates upon his own premises any dangerous thing, which from its nature has a tendency to attract the childish instincts of children to play with it, is bound as a mere matter of public duty, to take such reasonable precautions as the circumstances admit of, to the end that they may be protected from injury while so playing with it or coming in its vicinity. Things of this kind frequently pass under the designation of attractive nuisances."

The term "turntable" is applied to this doctrine because of the frequency with which it has been applied to action against railroads or injuries sustained by reason of that class of machinery and because the first case in this county wherein the doctrine was upheld was such a case, see 17 Wallace 657.

The first case wherein this doctrine was upheld in this country was the *Railroad Co.* v. *Stout*, 17 Wallace 657. In that case a boy was injured while playing in a railroad turntable left unlocked and was allowed a recovery. This doctrine was later reaffirmed by the Supreme Court of the United States in *Railroad Co.* v. *McDonald*, 152 U.S. 262.

Perhaps the most able opinion sustaining those cases is that of the Minnesota court in *Keffe* v. *Railroad Co.*, 21 Minn. 211, where the court said: "Now, what an express invitation would be to an adult, the temptation of an attractive plaything

is to a child of tender years. If the defendant had left this turntable unfastened for the purpose of attracting young children to play upon it, knowing the danger into which it was thus alluring them, it certainly would be no defence to an action by the plaintiff, who had been attracted upon the turntable and injured, to say that the plaintiff was a trespasser, and that his childish instincts were no excuse for his trespass.

The high character of the United States Supreme Court in which *Railroad Co.* v. *Stout* was decided, constrained many of the state courts to accept its decision as being well founded in legal principle, and for some years the doctrine seemed likely to be approved throughout the country; but the tide is setting strongly in the opposite direction, and it has not been generally accepted by the state courts. On the contrary it has been emphatically repudiated by the courts of last resort in Massachusetts, New York, New Jersey, New Hampshire, Texas, Pennsylvania, Ohio, Virginia and West Virginia.

The opinion in the *Stout* case is not clear and the case is most unsatisfactory. The doctrine there enunciated has been recognized by most of the courts as being a dangerous one if pushed to its logical conclusion and even the courts following the case have applied the rule with extreme caution and sought to hedge it in with limitations by refusing to extend its application beyond that particular class of cases. The Georgia court, in *Ferguson* v. *Railway Co.*, 75 Ga. 637, held that "where a railway company leaves a dangerous machine, such as a turntable, unfastened in a city, on a lot which is not securely inclosed, and where people and children are wont to visit it and pass through it, this is negligence on the part of such company; and where an infant of ten or twelve years of age resorted to the turntable and in riding upon it was dangerously and seriously injured the railroad company is liable for damages for such injury to the infant," but absolutely refused to extend the doctrine to a case in which an infant was drowned by falling into an excavation filled with water on defendant's land, *Savannah, F. & W. Ry. Co.* v. *Beavers*, 39 S.E. 82, 113 Ga. 398. And the courts of

Minnesota, Kansas and California also refuse to extend the doctrine beyond the particular class of cases to which the *Stout* case belongs. The Supreme Court of North Carolina, in the case of *Briscoe* v. *Henderson Lighting and Power Co.*, 148 N.C. 396, 62 S.E. 600, in a lengthy and able opinion by Justice Conner, after reviewing the authorities refused to extend the doctrine to a case where a boy thirteen years of age went upon the lands of the defendant company where the company maintained machinery which the complaint alleges was calculated to attract children and while there fell into a hot water well which the defendant negligently failed to keep properly covered and was injured. Justice Conner, while saying that the court did not absolutely repudiate the "turntable" cases in North Carolina so far as they applied to railroad turntables, as they were not involved in this case, at the same time repudiated the theory of implied invitation on which the "turntable" cases proceed, saying: "The inducement to one to enter on the premises of another which will render the latter liable for injuries from pitfalls thereon must be equivalent to an invitation, and mere permission is neither inducement, allurement, or enticement."

So that we find a great many of the courts utterly repudiating the doctrine and making injuries to infants stand on the same ground as those to adults, while those upholding the doctrine recognize its dangerous character by refusing to extend it beyond a certain class of cases. But if it be a good rule of law and properly applicable to one class of cases, why shouldn't it be a good rule of law in other cases involving the same basic principles whether the particular instrument of injury be a railroad turntable or a farmer's threshing machine? Or, if it is bad law in one case why shouldn't it be bad law in another case? Both involve the same fundamental principles. Isn't the threshing machine as peculiarly attractive to a child as the turntable and equally dangerous? Isn't a cherry tree full of ripe red fruit as capable of destruction to a child as a railway turntable? Neither can injure the infant without some

force set in motion by himself, in the one case the act of climbing, in the other, the act of getting upon the turntable. Is he any the less dead if he fall from the cherry tree and break his neck than if he have his life crushed out by the revolutions of the turntable? Yet the same courts that mulct a railroad company in damages for injury to a trespassing infant when he is injured by the company's necessary machinery lawfully used in lawful business refuse to extend the rule to the tree or the threshing machine and like cases. It may be answered that the cherry tree, though attractive, is neither inherently dangerous nor machinery.

Perhaps so, if we seek to find nice distinctions, but a threshing machine is both and the tree is certainly capable of dangerous use and it is equally true that a turntable is not dangerous to those who let it alone. What is good law in one case ought to be good law in another case, if both involve the same character of parties and the same basic principles. As said by the Supreme Court of Virginia in *Walker's Adm'r. v. The Potomac, F. & P. Ry. Co.*, 53 S.E. 113, 105 Va. 226. "For if it be a common law rule that a land owner, who is in the reasonable and lawful use of his property, makes changes thereon which have the double effect of inviting young children to the land, and at the same time exposing them to serious danger, is guilty of negligence, unless he exercises reasonable care for their safety, either in keeping them off the land, or in protecting them after their entry thereon, the rule would apply not only to railroad companies and their turntables, but to all landowners, who, in the use of their land, maintain upon it dangerous machinery, or conditions which present a like attractiveness to children. The common law applies alike to all landowners under like conditions, and it would be an anomaly to hold that a doctrine or rule of the common law which had its origin before there were either railroads or turntables, applies only to railroads in the use of their land upon which they have dangerous machinery."

But the common law does not make it the duty of a landowner to have his premises in safe condition for the uninvited

entry of trespassers, be they adults or infants, nor to take precautions to keep them off his premises or protect them after entry and in restricting the doctrine to turntables alone as so many of the courts upholding it do, they refuse to follow it to its natural and logical consequences. Inasmuch as there is no common law doctrine then permitting such a discrimination against railroads the courts in upholding such a doctrine are, in the absence of express statutory authority, exceeding their powers and are directly incroaching upon the peculiar province of their legislatures in violation of their constitutions. If such discrimination be necessary, the legislature can change the common law as far as may be necessary to regulate the use of turntables and other dangerous appliances and leave untouched the common law rights of the ordinary landed proprietor. The New Jersey Court in *Delaware, etc., Ry. Co.* v. *Reich*, 40 Atl. 682, says that the doctrine, if followed to its logical conclusion would require a similar rule to be applied to all landowners in respect to all structures, machinery or implements maintained by them, which presented a like attractiveness and furnished a like temptation to children. He who leaves his mowing machine, or dangerous agricultural implement in his fields would seem to be amenable to this duty.

There is no controversy that the legal principle is correct which requires a person to owe some duty to another before his negligence shall be the basis of a cause of action against him. The "turntable" cases all acknowledge that. The weakness of the *Stout* case lies in the fact that it sought to impress on railroad companies, and did so, liability for negligence in leaving the turntable unlocked before it had established any duty on the part of the company toward the plaintiff. In order for a plaintiff to recover in negligence cases, it must appear that the defendant owed him some duty which it failed to discharge; for where there is no duty there can be no negligence giving rise to a legal action, *Walker's Admr.* v. *Potomac, F. & P. Ry. Co.*, supra. If, then, the railroad owed Stout no duty what difference could it make whether the turntable was locked or not?

But the advocates of this doctrine say th..t the infantile mind is immature and incapable of weighing danger like an adult and that, therefore, an adult owes a greater degree of care to an infant than to another adult. The principle of law is true enough, but it is only applicable when the adult owes the child some duty already and the child is in a place where he has a lawful right to be and his danger is known, or ought to be known; then the law requires the adult to have greater regard for the immaturity of the infant and exercise greater care in dealing with him than he would be required to take in the case of another adult whom he would have a right to presume was in full possession of all his faculties and able to look out for himself. The apparent assumption is that all children are outcasts and that the law imposes upon landowners the duty to look out for them because there is no one else to do so. As a matter of fact most children have some one, either parents or legal guardians, who must look after them, and whose moral duty it is to keep them off of dangerous premises and away from dangerous places, and this moral duty is equal to the moral duty of landowners to fence them out. As was said by the Pennsylvania Court in *Gillespie* v. *McGowan*, 100 Pa. St. 144, this rule "would charge the duty of protection of children upon every member of the community except their parents." Who can say what is or is not attractive to the juvenile mind? "A child's will is the wind's will." Almost anything will attract some child. The pretty house, or the bright, red mowing machine, or the pond in the farmer's field. Must all these things be guarded for fear some child whose parents either negligently or wilfully permit him to roam at will, will be injured?

But they go further, and say that the placing of such articles where they are accessible to children is an implied invitation to them. In *Powers* v. *Harlow*, 53 Mich. 507, the court said: "If they leave exposed to the observation of children anything which would be tempting to them, and which they in their immature judgment might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken." On the same principle an owner has been held liable

for injury to a child, for leaving dangerous explosives accessible to children, as a single torpedo unguarded on a railroad track, *Harriman* v. *Railroad Co.*, 45 Ohio St. 11. This is known as the doctrine of constructive invitation, and the courts thus holding declare that if the person is allured or tempted by some act of a railroad company to enter upon its lands, he is not a trespasser, but is there by the invitation of the company, and therefore the rule as to trespassers does not apply, and the company owes him the same duty that it would owe any other invited guest." "The viciousness of the reasoning," said the Court of Appeals of New Jersey, in the case of *Delaware, etc., Ry. Co.* *Reich,* supra, in discussing this question "which fixes liability upon a landowner because the child is attracted, lies in the assumption that what operate as a temptation to a person of immature mind is, in effect, an invitation. Such an assumption is unwarranted." As said by Mr. Justice Holmes, "Temptation is not always invitation. As the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it or hold parties bound to contemplate infractions of property rights, because the temptation to unformed minds to infringe them might have been foreseen."

The Virginia court in repudiating this artificial reasoning, says in *Walker's Adm'r.* v. *Railway,* supra.: "No one believes that a landowner as a matter of fact, whether a railroad company or a private individual, who makes changes on his own land in the course of a beneficial user, which changes are reasonable and lawful, but which are attractive to children, and may expose them to danger if they should yield to the attraction, is by that act alone inviting them upon his premises." This doctrine of constructive invitation has been utterly rejected by the highest courts of New Hampshire, Massachusetts, New York, New Jersey, Rhode Island, Michigan, Virginia and West Virginia.

So that in the final analysis we find the tendency to be against the doctrine of the turntable cases, though respectable

courts still maintain it to some extent, and the tide of authority drifting away from the artificial reasoning resorted to by some courts in their endeavour to sustain a doctrine, which though undoubtedly humane in its results, frequently works greater hardships in its operation and application.—*Central Law Journal.*

WILL DISCOVERED AFTER SALE BY ADMINISTRATOR

The case of *Hewson* v. *Shelley*, which for three and a half days occupied the attention of Mr. Justice Astbury, is one of extraordinary interest for conveyancers. The owner of certain freehold property named Barley Wood was supposed to have died intestate, and his widow took out letters of administration to him. The debts, duties, and funeral and testamentary expenses having been all paid, the administratrix, under the Land Transfer Act 1897, sold Barley Wood. Part of the proceeds was invested so as to form a fund to answer the widow's dower, and the remainder was divided between three co-heiresses. On the death of the widow, a will of the supposed intestate was found, more than twelve years after his death, but less than twelve years after the sale. This will gave all the testator's property to his widow for life, and after her death gave Barley Wood to G. The executors named in the will were the widow, G., and another. It is elementary law that executors derive their title from the will and not from the probate. Consequently Barley Wood vested in the executors at the death of the supposed intestate, and they, after the letters had been revoked and probate granted, took proceedings against the purchaser on the ground that he had bought the property from a person who had no right to sell it to him. One of the most recent authorities on the subject is the case of *Ellis* v. *Ellis* (92 L. T. Rep. 727; (1905) 1 Ch. 613), where Mr. Justice Warrington expressed himself thus: "Unfortunately for the plaintiffs there was in existence a will by which an executor was appointed; that will was duly proved, and the administration was revoked. Under those circumstances, I think it is clear law that the grant of administration is wholly void, and that, speaking generally, dispositions of the assets by the supposed

administrator are void also, the ground of this being that the assets are vested in the executor from the death, and the supposed administrator has no property in them and no power of dealing with them." There is a curious distinction between such a case and a case where there is a will but no executors of it were appointed. In *Boxall* v. *Boxall* (51 L. T. Rep. 771; 27 Ch. Div. 220) Mr. Justice Kay upheld a sale of leaseholds by an administratrix, though a will was afterwards discovered which did not appoint executors. That learned judge referred to the old case of *Abram* v. *Cunningham* (2 Lev. 182), decided in the reign of Charles II., and said: "The report, like many reports of that time, has a short note of the judgment not containing any reasons. But the argument is given at some length, and in it reliance was placed chiefly on the fact that the concealed will had appointed executors, who therefore had a right of property vested in them before probate, and this, I gather, was the ground of the decision. No stress seems to have been laid upon the fraud committed in concealing the will; and, indeed, where the question was whether a third person should suffer who had acquired the property in good faith from an administrator apparently duly constituted, it would not be reasonable to visit him with the consequences of a concealment to which he was no party."

Although, where the will appoints executors, the grant of administration is spoken of as wholly void, certain acts of the administrator are protected. "It would seem, however, that, as between the rightful representative and a person to whom the executor or administrator, under a void probate or grant of letters, has aliened the effects of the deceased, the act of alienation, *if done in the due course of administration*, shall not be void." Thus in the case of *Graysbrook* v. *Fox* (Plowd. 275, Temp. Eliz.) "it was laid down by the court, that if the sale had been made to discharge funeral expenses or debts, which the executor or administrator was compellable to pay, the sale would have been indefeasible for ever" (Williams on Executors, 10th ed., p. 462). This is reasonable, as since the executor would have been obliged to pay the funeral and testamentary expenses and debts of the deceased, he must be taken to have adopted the acts of the administrator in paying them. There are also certain provisions of the Probate Act 1857 to be considered. Sec. 77 pro-

vides for all payments *bona fide* made to any executor or administrator under a revoked probate or administration, before revocation, being lawful discharges, and for all payments made by such executor or administrator "which the person to whom probate or administration shall be afterwards granted might have lawfully made" being good. Sec. 78 enacts that "all persons and corporations making or permitting to be made any payment or transfer *bona fide* upon any probate or letters of administration granted in respect of the estate of any deceased person under the authority of this Act shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or letters of administration." If it were not for some such provisions, no one could safely pay a debt due to the testator's estate to an administrator or executor, as the testator's will or a later one might at any time be discovered and proved, and the debt might have been paid to the wrong person.

In *The Goods of J. Wright* (68 L.T. Rep. 25; (1893) P. 21) an application was made to the Probate Division for a grant of administration until a will was found. The widow of the deceased had stated that he had made a will, but that it had been accidentally destroyed. It was believed that the widow was not in England. Mr. Justice Gorell Barnes (as he then was) said that a grant *ad colligenda* would not be sufficient, as there did not seem to be much chance of the will turning up, and a grant of administration was made until the original will or an authentic copy thereof should be brought into the registry, limited to dealing with and completing the sale of certain leasehold houses and giving a discharge for the purchase money thereof. Probably the alleged will in that case was never discovered. Otherwise, there might have been a question whether the purchasers got a good title from the limited administrator. If the proceeds of sale were employed in due course of administration, they presumably would, and the order of the court expressly referring to the sale might in any case have protected them.

In *Hewson* v. *Shelley* it was argued that as under the Land Transfer Act 1897 an administrator can sell realty for the payment of debts, etc., and it is now the practice for purchasers to

inquire if there are debts, etc., in existence, the purchaser was protected, seeing that the proceeds might have been employed in the due course of administration. The learned judge, however, brushed these arguments aside, as well as those which dealt with the possible sale for the purpose of raising money owing to the widow for estate duty or an improvement charge paid by her, on the ground that as a matter of fact the land was not sold for any such purposes.

The sale in question, though in form by the administratrix, was in reality by the widow and co-heiresses, who had consented to the sale of the land which they supposed was theirs. His Lordship, though fully sensible of the hardship on the purchaser, had no alternative but to give judgment for recovery of the premises by the executors and for an account of rents and profits since the widow's death. The fund set apart to meet the dower was with the consent of the plaintiffs ordered to be paid to the purchaser in exchange for the title deeds.

It is difficult to see how, at any rate, a judge of first instance, in the present state of the authorities, could come to any other conclusion, but the question which will now trouble conveyancers is: Can they safely accept titles from legal personal representatives or from persons who claim through recent purchasers from them? A will, or a later will, or even a codicil may afterwards turn up, and if it appoints executors or fresh executors the title may be bad. Yet, if they refuse to complete, the court may, and presumably would, decree specific performance. Possibly a practice may grow up of purchasers requiring personal representatives to show that they are selling for payment of debts, etc., or of purchasers insuring at Lloyd's against the risk of such sales being set aside. Possibly, the Legislature, in its wisdom, may intervene and, in effect, guarantee the sale by executors or administrators if made before the probate is or letters are revoked. It is, of course, hard on the devisee if the property to which he is entitled under the will or codicil does not come to him, as it has been sold by the administrator or wrong executor, but then he is merely a volunter, an object of the testator's bounty, while the purchaser has actually paid good money for it and is so much the poorer. Both are innocent parties, but the purchaser is the more entitled to our sympathy.—*Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

ADMIRALTY—SALVAGE — TOWAGE — ABANDONED VESSEL—DERELICT — CONDITIONS SUBSTITUTING SALVAGE FOR TOWAGE — QUANTUM MERUIT.

The Glenmorven (1913), P. 141. This was an admiralty case. The plaintiffs had contracted to tow the defendants' rudderless ship from Vigo to the Tyne, for £400 "no cure no pay, no claim to be made for salvage." Whilst the voyage was proceeding the master and crew abandoned the ship, and the tug, with other assistance, took her first to Falmouth and then on to the Tyne. In these circumstances, Evans, P.P.D., held that the abandonment of the ship by the master and crew put an end to the towage contract, which was to tow the vessel with the master and crew on board, and that thereafter the services were not performed under contract, but were in the nature of salvage for which the plaintiffs were entitled, plus a *quantum meruit* for their previous services.

COMPANY—WINDING-UP — DIRECTOR — SERVANTS — PREFERENTIAL CLAIMS FOR WAGES—ARTICLES OF ASSOCIATION — COMPANIES CONSOLIDATION ACT, 1908 (8 EDW. VII. c. 69), s. 209, SUB-S. 1 (*b*)—DOMINION COMPANIES ACT (R.S.C. c. 144), s. 70—ONTARIO COMPANIES ACT (2 GEO. V. c. 31), s. 172 (*b*).

In re Beeton Co. (1913), 2 Ch. 279. This was a winding-up matter in which certain parties claimed to be entitled to preferential claims for salary. Mrs. Roberts was a director of the company which was formed to carry on a weekly periodical, and by the articles of association it was provided that a director might hold any other office or place under the company in conjunction with the office of a director. Mrs. Roberts was appointed dress editor at a fixed salary per annum, and her duties occupied the whole of her time. Miss Hotchell was employed by the company at a fixed salary per annum to supply "fashion drawings" for the periodical, and the company had the first call on her services and her work occupied most of her time, but she occasionally did work for other publishers. Mrs. Peel

was employed at a fixed salary per annum to supply weekly articles and other information, but she also wrote for other publishers. Neville, J., in these circumstances, held that, having regard to the articles of association, Mrs. Roberts' office as director did not preclude her employment in any other capacity, and that she was a "clerk or servant" of the company and as such entitled to preferential payment under the Companies Act, 1908 s. 209, sub-s. 1 (*b*), (R.S.C. c. 144, s. 70, 2 Geo. V. c. 31, s. 172 (*b*) Ont.), but that Miss Hotchell and Mrs Peel were merely contributors to the periodical and were not "clerks or servants" within the meaning of the section, and were therefore not entitled to preferential payment.

PRACTICE—DISCOVERY — PLAINTIFF OF UNSOUND MIND — NEXT FRIEND—AFFIDAVIT OF DOCUMENTS—DISCOVERY.

In *Pink* v. *Sharwood* (1913), 2 Ch. 286, Eve, J., held that where an action is brought by a person of unsound mind by his next friend, there is no jurisdiction to order the next friend to file an affidavit of documents for the purpose of discovery, *Dyke* v. *Stephens* (1885), 30 Ch.D. 189, being followed, in preference to *Higginson* v. *Hall* (1879), 10 Ch.D. 235. A contrary conclusion was arrived at in Ontario: see *Travis* v. *Bell*, 8 P.R. 550.

TRADE MARK—APPLICATION FOR REGISTRATION—MARK NOT PRESENTLY INTENDED TO BE USED.

In re Neuchatel Asphalte Co. (1913), 2 Ch. 291. In this case an application to register a trade mark was successfully opposed in the following circumstances The applicants were owners of an asphalte deposit in Switzerland, they had contracted with the Val de Travers Co. to supply it with all the asphalte it required, and not to supply asphalte to any other person in the United Kingdom. They applied to be allowed to register a trade mark in England in connection with the asphalte sold by them. The Val de Travers Co. opposed the application on the ground that a trade mark can only be registered for the purpose of the designation of goods sold in the United Kingdom, and that the applicants had no right to sell asphalte until the year 1926 which was too remote a period to warrant the present registration of a trade mark, and Sargant, J., so held.

COMPANY—RECEIVER AND MANAGER—APPOINTMENT BY DEBENTURE HOLDERS — NOTICE OF PREFERENTIAL CLAIM — SUBSEQUENT PAYMENT OF UNPREFERRED CLAIMS—LIABILITY OF RECEIVER.

Woods v. *Winskill* (1913), 2 Ch. 303. In this case Astbury, J., decided that where a receiver and manager, appointed by debenture holders of a limited company, has notice of preferential claims, and thereafter pays claims of ordinary creditors in carrying on the business, he is liable to the preferred creditors for damages in tort in respect of the moneys so paid away. The same rule would apply to a receiver or manager appointed by the Court.

LANDLORD AND TENANT—DEMISE OF FIRST FLOOR OFFICE—RIGHT TO PLACE FLOWER BOXES ON WALL OUTSIDE OF OFFICE WINDOWS—TRESPASS—DEMISE OF OUTER WALL.

Hope v. *Cowan* (1913), 2 Ch. 312, is an instance of the trivial matters which sometimes give rise to law-suits. This was an action by landlords against their tenants for trespass in affixing flower boxes on the outside of the windows of the demised premises. The demised premises were an office on the first floor of a building. The tenants covenanted to keep the inside of the premises in good repair, and the plaintiffs, the lessors, covenanted to keep the external part of the premises in repair, and to permit the tenants to affix their trade signs, to be approved by the plaintiffs, on the outside of that portion of the building in their occupation, and subject to this latter covenant, the defendants covenanted, not without first obtaining the written consent of the plaintiffs, to attach or affix any sign, nameplate, or letters to the premises, and to remove all outside names and trade signs at the end of the tenancy and make good all damage caused to the outside walls of the building thereby. By the lease under which the plaintiffs held, they were bound to repair and maintain the walls of the buildings. The defendants, without the plaintiffs' consent affixed flower boxes on brackets to the outside windows of their office. Joyce, J., who tried the action, held that the general rule of law is that under a demise of one floor of a building, or of a part of a building bounded on any side by an outside wall, unless there be some reservation to the contrary, both sides of the outside wall pass by the demise, and that being so, he held (the alleged nuisance caused by the boxes, being refuted), that the defendants had not exceeded their rights, and the action was dismissed.

LIEN—GENERAL LIEN—GOODS IN COLD STORAGE—PLEDGE OF BILLS OF LADING—ENFORCEMENT OF LIEN AGAINST HOLDER OF BILLS OF LADING.

Jowitt v. *Union Cold Storage Co.* (1913), 3 K.B. 1. In this case, a company imported from Australia frozen meat, and for the purpose of financing the company the plaintiffs paid the price owing by the company to the persons from whom the meat was purchased, and reimbursed themselves out of the proceeds of bills of exchange accepted by the company and discounted by a bank. Bills of lading were deposited with the bank as security for the bills of exchange. On the arrival of the meat in England, the company, with the assent of the bank, placed the meat in the defendants' cold store, to be delivered to the bank's order against the bill of lading. The defendants' terms of storage (which were those usual in the trade) provided that the defendants should have a general lien on the meat for all charges accrued and accruing against the storer, or for any other money due from the owners of the goods. The company having failed to meet the bills of exchange, the plaintiffs paid the bank and received the bills of lading and demanded delivery of the meat from the defendants who claimed to hold the meat for charges due to them from the company for the storage of other goods. Scrutton, J., who tried the action decided that the goods having been lodged with the defendants with the assent of the bank on the terms of the defendants having a general lien, the defendants were entitled to enforce the general lien against the plaintiffs who had succeeded to the bank's rights.

PRINCIPAL AND SURETY—CO-JUDGMENT DEBTORS—TIME GIVEN TO ONE JUDGMENT DEBTOR—DISCHARGE OF SURETY—MERCANTILE LAW AMENDMENT ACT 1856 (19 & 20 VICT. C. 97) S. 5—(10 EDW. VII. C. 63, S. 3, ONT.).

In re A Debtor (1913), 3 K.B. 11. In this case an attempt was made to apply the rule of law that time given to a principal debtor without the consent of a surety, discharges the surety, to the case where time is so given after judgment against the principal and surety, but Phillimore and Horridge, JJ., on an appeal from a Registrar in Bankruptcy, held that after judgment, the rule did not apply, following *Jenkins* v. *Robertson*, 2 Drew. 351.

FOREIGN JUDGMENT—JUDGMENT OF COURT IN BRITISH INDIA—DECREE FOR DIVORCE AND DAMAGES AGAINST CO-RESPONDENT—CO-RESPONDENT DOMICILED IN ENGLAND—ACTION TO RECOVER UPON DECREE OF FOREIGN COURT FOR DAMAGES.

Phillips v. *Batho* (1913), 3 K.B. 25. The plaintiff in this case was a British subject domiciled in British India where he had obtained a decree for divorce and as ancillary thereto a judgment for damages against the defendant as co-respondent, who had been a resident in India where the alleged adultery took place, but who had left India and come to live in England. He was served with process by registered post in England, and he did not appear. The defendant contended that the decree had been made against him without jurisdiction, and could not be enforced against him in England; but Scrutton, J., who tried the action held that, under the Indian Divorce Act 1869, the Indian Court had jurisdiction, and that the defendant had been properly made a party and served with process and was bound by the judgment, and he held that the case constituted an additional case to those enumerated by the Court in *Emanuel* v. *Symon*, 1908, 1 K.B. 302, in which an English Court will enforce a foreign judgment; because this was a judgment affecting status concerning which English Courts were not competent to deal, because the Sovereign and His Legislatures have entrusted marriages made in India between Christians domiciled there and the consequences of interference with such marriages to the Courts of that country, which constituted a sufficient reason for enforcing the judgment against the defendant in England, although the learned Judge admits that the mere fact that no remedy can be given against a defendant in England, is not conclusive in favour of enforcing a foreign judgment.

PRACTICE—CERTIFICATE FOR SPECIAL JURY—"IMMEDIATELY AFTER VERDICT"—JURIES ACT, 1825 (6 GEO. IV. C. 50); S. 34—(9 EDW. VII. C. 34, S. 84, ONT.).

In *Barker* v. *Lewis* (1913), 3 K.B. 34, a simple point of practice is involved. The action was tried by a special jury and the Juries Act, 1825 (6 Geo. IV. c. 50), s. 34 (see 9 Edw. VII. c. 34, s. 84, Ont.), provides that the party who applies for a special jury shall only be entitled to costs as if the action were tried by a common jury "unless the Judge before whom the cause is tried, immediately after the verdict, certify under his hand, upon the

back of the record that the same was a cause proper to be tried by a special jury." The action was tried on the 27th January, 1913, but the certificate of the Judge was not given until 24th April following. The Court of Appeal (Cozens-Hardy, M.R., and Kennedy L.J.) held that this was not a sufficient compliance with the Act.

MOTOR CAR—OFFENCE—OWNER—REFUSAL TO GIVE INFORMATION AS TO DRIVER OF MOTOR CAR—OMISSION TO SPECIFY OFFENCE COMMITTED BY DRIVER—MOTOR CAR ACT, 1903 (3 EDW. VII. c. 36), s. 1 (3).

Ex p. Beecham (1913), 3 K.B. 45. The applicant in this case was the owner of a motor car who had been convicted under the Motor Car Act, 1903 (3 Edw. VII. c. 36), s. 1 (3), for refusing to give information as to the driver of the car by whom an offence had been committed. An objection was taken before the magistrate that the information did not specify what particular offence had been committed nor where it had been committed; but the objection was, as the Divisional Court (Bankes, and Lush, JJ.) held, properly overruled. There appears to be no such provision in the Ontario Act, 2 Geo. V. c. 48.

CRIMINAL LAW—SENTENCE—WHIPPING AUTHORISED OF OFFENDER WHOSE AGE DOES NOT EXCEED SIXTEEN YEARS — OFFENDER OVER SIXTEEN AT TIME OF CONVICTION.

The King v. *Cawthron* (1913), 3 K.B. 168. This was a curious case. The defendant had been convicted of an offence against a female child and had been sentenced to a year's imprisonment at hard labour. The statute under which the conviction was had provided "that in the case of an offender whose age does not exceed sixteen, the Court may instead of sentencing him to any term of imprisonment, order him to be whipped." The prisoner was under sixteen when the offence was committed but over sixteen when convicted. He applied to have the sentence changed to whipping; but the Court of Criminal Appeal (Darling, Rowlatt, and Atkin, JJ.) held that it could not be done, that the statute only authorized whipping of offenders who were under sixteen at the time of conviction.

ASSIGNMENT OF CHOSE IN ACTION — NOTICE OF ASSIGNMENT — SUFFICIENCY OF NOTICE TO DEBTOR—JUDICATURE ACT, 1873 (36-37 VICT. C. 66), S. 25 (6)—(1 GEO. V. C. 25, S. 45, ONT.).

Denney v. *Conklin* (1913), 3 K.B. 177. This was an action by assignees to recover a chose in action, and the question was whether a sufficient notice of the assignment had been given to the debtor under the Jud. Act, s. 25 (6)—(see 1 Geo. V. c. 25, s. 45, Ont.). The facts were that on 5th December, 1907, one Derham, who was entitled to the debt in question, made a deed of arrangement whereby he absolutely assigned to Denny and Gasquet, the trustees, all his personal property. On 8th April, 1908, the solicitors of the trustees wrote to the defendant saying that, "the trustees of the deed of arrangement dated the 5th December, 1907, and executed by Mr. Walter Derham, have instructed us to apply to you for an account shewing all dealings between yourself and Mr. Walter Derham. The reason of this application is that there appears from Mr. Derham's books to be a considerable debt due from you to him for money advanced." On 24th June, 1910, one Metcalfe was by deed appointed a new trustee of the deed of 5th December, 1907, in substitution for Gasquet, but no notice of this deed was given to the defendant. This action was brought by Denny, Gasquet and Metcalfe to recover a debt of £808 from the defendant, who contended that no sufficient notice had been given under the Jud. Act, s. 25 (6). But Atkin, J., who tried the action held that the above notice was a sufficient notice under the Act to entitle the plaintiffs to sue in their own names and he gave judgment in their favour.

REPORTS AND NOTES OF CASES.

Province of Ontario.

SUPREME COURT—APPELLATE DIVISION.

Mulock, C.J.Ex., Clute, Riddell, Sutherland, Leitch, JJ.] [13 D.L.R. 134.

BERNSTEIN *v.* LYNCH.

Automobiles—Responsibility of owner when car used by servant for his own business or pleasure.

The owner of an automobile is answerable at common law for its negligent operation by his chauffeur, where, instead of returning the car to the garage where it was kept, as it was his duty to do after having used the vehicle in the business of his employer, the chauffeur while using the car for purposes of his own and driving it in a reckless manner, caused the plaintiff to be knocked off a bicycle and injured as a result of the chauffeur's negligent conduct.

Campbell v. *Pugsley*, 7 D.L.R. 177, specially referred to; *Burns* v. *Poulsom*, L.R. 8 C.P. 563, 567, followed; and see 1 Beven on Negligence, 3rd ed., 583.

Under sec 19 of the Motor Vehicles Act, 2 Geo. V. (Ont.) ch. 48, R.S.O. 1914, ch. 207, the owner of an automobile is liable for any violation of the provisions of the Act by his chauffeur while using the car for purposes of his own without the knowledge or consent of his employer.

Campbell v. *Pugsley*, 7 D.L.R. 177, specially referred to; *Mattei* v. *Gillies*, 16 O.L.R. 558; *Verral* v. *Dominion Automobile Co.*, 24 O.L.R. 501, followed.

W. E. Raney, K.C., for defendant. *John MacGregor*, for plaintiff.

Province of Quebec.

COURT OF REVIEW.

Sir Charles P. Davidson, C.J., Tellier, and DeLorimier, JJ.] [13 D.L.R. 49.

BRIDGER *v.* ROBB ENGINEERING CO.

Negligence—Dangerous premises—Building in course of construction—Duty to licensee.

A person seeking employment on the construction work of a new building and entering on the works under the permission to be implied from a notice reading "labourers wanted" is a licensee while waiting for the arrival of the foreman in charge of the hiring of labourers; and is entitled as against the various contractors to such reasonable protection from unseen dangerous conditions in the premises as is incident to a building in course of construction.

Valiquette v. *Fraser*, 39 Can. S.C.R. 1, referred to.

W. F. Ritchie, K.C., for plaintiff. *W. L. Bond*, K.C., for Meldrum Bros. *A. H. Duff*, for Robb Engineering Co. *G. A. Mann*, K.C., for McGuire & Co. *F. Callaghan*, for Gelin.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] HIRTLE *v.* KNOX. [13 D.L.R. 21.

Malicious prosecution—Probable cause—Criminal prosecution.

Probable cause exists for laying information for theft against one who forcibly took a crop from a purchaser which was planted by the former after the extinguishment of his rights in the land by a sale by the sheriff under an execution, where the taking was by force and accompanied by trespass to lands, although under a pretended claim of right.

Paton, K.C., for appellant. *McLean*, K.C., for respondent.

Province of New Brunswick.

SUPREME COURT.

Full Court.] KEYES *v.* HANINGTON. [13 D.L.R. 139.

Corporations and companies—Preferences—Loan to liquidator—Order of Court—Priority over costs of winding-up.

A claim for money lent the liquidator of a company under an order of a Court declaring that the loan should be a first charge on all the assets of the company, subject only to existing liens, charges or encumbrances, is entitled to priority over the costs and charges of the winding-up proceeding, including liquidator's and solicitor's fees; and such rule is not affected by sec. 92 of the Winding-up Act, R.S.C. 1906, ch. 144, providing that the costs, charges and expenses properly incurred in a winding-up proceeding, including remuneration of the liquidator, shall be payable from the assets in priority to all other claims; since such section applies only to confer priority over claims against the company in existence at the time of going into liquidation.

M. G. Teed, K.C., for appellant. *A. J. Gregory*, K.C., for respondents.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] WALLACE *v.* LINDSAY (No. 2). [13 D.L.R. 8.

Judgment—Modification—Presumption—New judgment.

Where an action was dismissed as to all but one defendant, against whom judgment was rendered, it will be presumed that a subsequent ex parte entry on the records of a County Court of a "trial and judgment for the plaintiff" for a larger sum was merely a correction of the first judgment as to the one defendant only, and that it was not intended as a judgment on a new trial against all of the defendants.

Wallace v. *Lindsay*, 9 D.L.R. 625, reversed.

A. C. Campbell, for plaintiff. *J. E. Adamson*, and *C. A. Adamson*, for defendant.

KING'S BENCH.

Galt, J.] COMPLIN *v.* BEGGS. [13 D.L.R. 27.

Brokers—Real estate—Duty to obtain highest price—Principal and agent — Compensation — Breach of duty — Fraud of principal.

Where the prices of large acreages of farm lands are fixed approximately on well-understood standards, the owner who in the usual course employs a selling agent and names the selling price, either adding the agent's commission to that price or allowing the agent to retain whatever amount he can secure from a purchaser over and above the price named, cannot invoke the ordinary rule which imposes upon an agent the duty of obtaining the highest possible price for his principal.

Morgan v. *Elford*, 4 Ch. D. 352, applied.

Upon a contract by a real estate agent to sell lands for his principal, the obligation of the latter to treat the agent honestly and to do nothing calculated to deprive him unfairly of his commission is as strict as that of the agent to act honestly and to refrain from accepting (under ordinary circumstances) any commission or other benefit from the purchaser.

Upon an agency contract to sell lands a breach of duty by the agent which is not tainted by dishonesty but is merely the result of a mistaken notion of his rights will not disentitle him to commission, although he is liable to his principal for any profits illegally received.

Hippisley v. *Knee Bros.*, [1905] 1 K.B. 1, applied; *Andrews* v. *Ramsay*, [1903] 2 K.B. 635, distinguished; *Manitoba and N.W. Land Corporation* v. *Davidson* 34 S.C.R. 255, considered.

The land owner who listed his property for sale with a real estate agent is under a legal obligation to do nothing calculated to deprive the agent unfairly of his commission. (Dictum *per* Galt, J.)

P. J. Montague, for plaintiffs. *O. H. Clark*, K.C., for defendants.

Province of British Columbia

COURT OF APPEAL.

Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A.] [12 D.L.R. 683.

PICARD *v.* REVELSTOKE SAW MILL CO.

Company—Powers of managing director—Sale of business.

The managing director of a company who has authority to manage and conduct its business, does not have implied authority to sell the entire assets of the company as a going concern, since such a sale does not relate to the carrying on of its business.

Picard v. *Revelstoke Saw Mill Co.*, 9 D.L.R. 580, varied.

The managing director of a company is answerable in damages to an optionee, where, without authority, he gave an option for the sale of the assets of the company, leading the optionee to believe that he was empowered to do so.

Bodwell, K.C., and *J. M. Macdonald*, for plaintiff, appellant. *S. S. Taylor*, K.C., and *Carter, for* defendants, respondents.

Full Court.] SLATER *v.* VANCOUVER POWER CO. [13 D.L.R. 143.

Master and servant—Liability for injury to servant—Safe place —Pole set in hole made by contractor other than defendant —Common employment.

One who contracts to string wires on poles to be set by him in holes dug by another contractor, which were accepted as being sufficiently deep, is answerable for the death of a servant as the result of the fall of a pole on which he was working that was set in a hole not deep enough to hold it securely, since there was a failure to furnish a safe place in which to work.

The defence of common employment is not applicable where a servant's injury is due to the breach of the master's duty to provide a safe place in which to work.

Ainslie Mining, etc., Co. v. *McDougall*, 42 Can. S.C.R. 420, followed.

D. G. Macdonell, for plaintiff, respondent. *W. B. A. Ritchie*, K.C., and *Mather*, for defendants, appellants.

Full Court.] [13 D.L.R. 152.

LEWIS *v.* GRAND TRUNK PACIFIC RY. CO.

Master and servant—Workmen's Compensation Act—Arbitrator —Submitting questions to judge.

After an award of an arbitrator appointed under the Workmen's Compensation Act, R.S.B.C. 1911, ch. 244, has been reduced to writing and published, he cannot submit questions under sec. 4 of the Act, to a judge of the Supreme Court.

A. Alexander, for plaintiff, respondent. *D. E. McTaggart,* for defendant, appellant.

Macdonald, C.J.A., Irving, and Galliher, JJ.A.] [13 D.L.R. 176.

WINTER *v.* GAULT BROS., LTD.

Chattel mortgage—Validity—Consideration—Bill of sale as security—Affidavit of bona fides—Priorities—After-acquired goods.

Notwithstanding the bona fides of the transaction, a bill of sale given as security to one creditor for an advance made in paying off another creditor will be void as against the creditors generally of the grantor unless the affidavit of bona fides contains a clause that the grantor is justly and truly indebted to the grantee in the sum secured.

A chattel mortgagee who sets up against the mortgagor's assignee for creditors a claim to part of teh mortgagor's stock-in-trade as after-acquired goods, which by the terms of the mortgage were covered thereby, and who pleads that the registration statute does not apply to after-acquired property has the onus cast upon him of proving what part, if any, of the goods which he had seized under the mortgage of which the registration was defective, were in fact after-acquired goods and of segregating them from others not of that character.

Sir C. H. Tupper, for appellant, defendant. *M. A. Macdonald,* for respondent, plaintiff.

ANNOTATION ON THE ABOVE CASE.

At common law an assignment was not good, so far as it professed to convey after-acquired property; it could only operate upon such property as was in existence, and which was the grantor's at the time of the assignment, or in which he had some interest, unless, however, the grantor ratify

the sale of the "after-acquired property" by some act done by him after the property is acquired by him; and an assignee acquired no valid title by such instrument to such property when there was no *novus actus: Lunn* v. *Thornton*, 1 C.B. 379, 14 L.J.C.P. 161.

But if a seller or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, a Court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of equity would decree specific performance. If it be so, then, immediately on the acquisition of the property described, the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract: Lord Westbury in *Holroyd* v. *Marshall*, 10 H.L.C. 191; *Coyne* v. *Lee*, 14 O.A.R. 503, 23 C.L.J. 413; *Tailby* v. *Official Receiver* (1888), 13 A.C. 523; *Lazarus* v. *Andrade*, 5 C.P.D. 319; *Leatham* v. *Amor*, 47 L.J.Q.B. 581; *Re Panama, etc., Mail Co.*, L.R. 5 Ch. 318.

On a contract or bill of sale purporting to assign goods to be acquired in the future, if the goods be sufficiently described to be identified on acquisition by the seller, the equitable interest in them passes to the buyer as soon as they are acquired (*Tailby* v. *Official Receiver* (1888), 13 A.C. 523; *Holroyd* v. *Marshall*, 10 H.L.C. 191; *McAllister* v. *Forsyth*, 12 Can. S.C.R. 1; *A. E. Thomas, Limited* v. *Standard Bank of Canada*, 1 O.W.N. 379; *Fraser* v. *Macpherson*, 34 N.B.R. 417 (affirmed by Supreme Court of Canada)), and if not so described the property will not pass until the seller does some act appropriating them to the contract (*Langton* v. *Higgins* (1859), 28 L.J. Ex. 252), or unless the buyer takes possession of them under an authority to seize: *Hope* v. *Hayley* (1856), 25 L.J.Q.B. 155.

If the mortgage covers future acquired stock, and there is, under the terms of the mortgage, an implied license to the mortgagor to carry on his business and sell the stock, the *bonâ fide* purchasers from the mortgagor will get a good title, notwithstanding that the mortgage was duly registered, and especially when the mortgage provides that until default the mortgagor shall be entitled to make use of the stock without hindrance or disturbance by the mortgagee; but if the mortgagor fraudulently sells the goods to *bonâ fide* purchasers not in the ordinary course of business, the mortgagee will be entitled thereto, because the right of the mortgagor to deal with the goods is subject to the implied condition that the dealing shall be in the ordinary course of business (*National Mercantile Bank* v. *Hampson*, 5 Q.B.D. 177; *Walker* v. *Clay*, 49 L.J.C.P. 560; *Dedrick* v. *Ashdown*, 15 Can. S.C.R. 227, 242); but the goods to be afterwards acquired must be in some way specifically described, for goods which are wholly undetermined, as, for instance, "all my future personalty," will not pass as future-acquired property: *Tadman* v. *D'Epineuil*, 20 Ch. D. 758; *Lazarus* v. *Andrade*, 5 C.P.D. 318; *Belding* v. *Read*, 3 H. & C. 955.

A clause in a bill of sale which purports to include after-acquired property confers as to the latter a mere equitable title which must give way to a legal title obtained *bonâ fide* and without notice: *Whynot* v. *McGinty*, 7 D.L.R. 618, referring to *Holroyd* v. *Marshall*, 10 H.L.C. 191; *Reeves* v. *Barlow*, 12 Q.B.D. 436; see *Imperial Brewers* v. *Gelin*, 18 Man. L.R. 283.

And, where a mortgage is made upon the whole property, assets, etc., of a company, present and future, except logs on the way to the mill, such exception applies to such logs as may be on the way to the mill, not only at the date of the mortgage, but also at any future time: *Imperial Paper Mills* v. *Quebec Bank*, 6 D.L.R. 475, 26 O.L.R. 637.

Where a chattel mortgage conveys the stock-in-trade, shop, contents, including shop and office fixtures, scales and appurtenances, which had been purchased by the mortgagor from a specified seller with a further provision purporting to include "not only all and singular the present stock of goods and all other the contents of the mortgagor's shop, but also any other goods that may be put in said shop in substitution for, or in addition to those already there, as fully and to all intents and purposes as if the said added or substituted stock were already in said shop and particularly mentioned"; such provision to cover other or after-acquired property is aimed at the "stock-in-trade" and requires clear words in order to cover other property sought to be held, the legal principle of construction being that general words following specific words are ordinarily construed as limited to things *ejusdem generis* with those before enumerated: *Dominion Register Co.* v. *Hall & Fairweather*, 8 D.L.R. 577; *Moore* v. *Magrath*, 1 Cowper 9.

Where a mortgage not specifically mentioning present or future book debts covers the "undertaking . . . together with . . . incomes and sources of money, rights, privileges . . . held or enjoyed by (the mortgagor) now or at any time prior to the full payment of the mortgage," such language is sufficiently comprehensive to create an equitable charge on present and future book debts of the trading corporation by which the mortgage was made: *National Trust Co.* v. *Trusts and Guarantee Co.*, 5 D.L.R. 459, 26 O.L.R. 279.

An assignment of a man's stock-in-trade and effects on the farm, together with all the growing crops, and other crops, "which at any time thereafter should be in or about the same," will be a sufficiently specific description of the future crops in the farm to make the assignment a valid one in equity: *Clements* v. *Matthews*, 11 Q.B.D. 808.

A mere power to seize future chattels does not operate in equity as an assignment of such future chattels, nor give the assignee a present interest in them: *Reeve* v. *Whitmore*, 4 DeG. J. & S. 1; *Cole* v. *Kernot; Thompson* v. *Cohen*, L.R. 7 Q.B. 527; *Holroyd* v. *Marshall*, 10 H.L. Cas. 191.

Substituted, or added stock-in-trade should be specifically mentioned if it is to be covered and the premises whereon the goods were or were to be brought should be specifically described: *Kitching* v. *Hicks*, 6 O.R. 739, 20 C.L.J. 112; *Thomas* v. *Standard Bank*, 1 O.W.N. 379, 548; *Thomas* v. *Kelly*, 13 A.C. 506.

Although a contract which purports to transfer property which is not in existence, does not, in equity, operate as an immediate alienation; still if a vendor or mortgagor agrees to sell or mortgage specific property of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, a Court of equity will, in this case, compel him to perform his contract; and the contract will, in equity, transfer the beneficial interest to the mortgagee or purchaser, immediately on the property being acquired: *Re Thirkell, Perrin* v. *Wood* (1874), 21 Gr. 492 at 509.

If the instrument contains so far as all the goods referred to are concerned, such a description as that a person desiring to deal with these goods and chattels, or the sheriff seeking to enforce an execution against the mortgagor, could, without any doubt or difficulty, satisfy himself on the point whether there were any, and if so, what, goods not covered by the instrument in question; and this should be the test of the sufficiency or insufficiency of a description which covers a stock-in-trade with after-acquired goods replenishing the stock: *Re Thirkell, Perrin* v. *Wood* (1874), 21 Gr. 492.

An attempt has been made to draw a distinction between substituted property and after-acquired property, as to the completeness of description, but it is doubtful if such a contention is tenable: *Chidell* v. *Galsworthy*, 6 C.B.N.S. 471.

An instrument describing after-acquired personalty in the words "all his present and future personalty," will only suffice to charge in favour of the vendee, as between the parties, all the personal property at the date of the instrument, but will not operate so as to charge after-acquired property; such a description does not confine the assignment to specific goods, but to undetermined property: *Tadman* v. *D'Epineuil*, 20 Ch. D. 758. And though after-acquired property is properly and specifically described, yet inasmuch as the assignment thereof, though absolute in form, amounts to a contract to assign, for the breach of which the assignor incurs a liability provable in bankruptcy, and from which he is released by his discharge, such description will not cover goods brought on the premises after the discharge in bankruptcy has been granted: *Collyer* v. *Isaacs*, 19 Ch. D. 342.

In *Springer* v. *Graveley*, 34 C.L.J. 135, it was held, that although there is a sufficient interest in the increase of mortgaged cattle in favour of the mortgagor to give title to them free from the mortgage to a *bonâ fide* purchaser, an execution creditor is not in the same position, and can only take the legal title charged with the mortgage. The case was affirmed *sub nomine Graveley* v. *Springer*, 3 Terr. L.R. 120, 2 N.W.T. 306.

Where a chattel mortgage conveyed the stock-in-trade of the mortgagor, and "all goods which at any time may be owned by the mortgagor and kept in the said store for sale, and whether now in stock or hereafter to be purchased and placed in stock," it was held that after-acquired stock

brought into the business in the ordinary course thereof became subject to the chattel mortgage as against execution creditors of the mortgagor, notwithstanding that their writs were in the hands of the sheriff at the time such stock was brought into the business; the equitable right of the mortgagee attaching immediately on the goods reaching the premises: *Coyne* v. *Lee*, 14 A.R. (Ont.) 503.

A provision in a chattel mortgage that it should cover all after-acquired goods and chattels brought upon the premises owned or occupied by the mortgagors or used in connection with their business during the currency of the mortgage operates as a valid lien and charge upon all the after-acquired goods brought upon the premises: *Imperial Brewers* v. *Gelin*, 18 Man. L.R. 283.

A description of after-acquired goods as "all other ready-made clothing, tweeds, trimmings, gents' furnishing, furniture and fixtures and personal property, which shall at any time during the currency of this mortgage be brought in or upon the said premises or in or upon any other premises in which the said mortgagor may be carrying on business," is sufficient, and binds goods of the kinds mentioned in premises to which the mortgagor moves after making the mortgage: *Horsfall* v. *Boisseau*, 21 O.A.R. 663.

A provision covering after-acquired property of the business of manufacturing cannot be extended to the goods in a mercantile business, and *vice versa*: *Milligan* v. *Sutherland*, 27 O.R. 235, 238.

A mortgage of an electro-plating factory "together with all the plant and machinery at present in use in the factory" does not cover patterns used in the business, sent from time to time from the factory to foundries to have mouldings made, and not in the factory at the time of the making of the mortgage: *McCosh* v. *Barton*, 2 O.L.R. 77, reversing 1 O.L.R. 229.

In a chattel mortgage the goods were described as follows: "All of which said goods and chattels are now the property of the said mortgagor and are situated in and upon the premises of the London Machine Tool Co. (describing the premises) on the north side of King street, in the city of London," and in an attached schedule was this description: "And all machines in course of construction, or which shall hereafter be in course of construction, or completed, while any of the moneys hereby secured are unpaid, being in or upon the premises now occupied by the mortgagor, or which are now or shall be in any other premises in the city of London." It was held that the description in the schedule could not extend to goods wholly manufactured on premises other than those described in the mortgage, and, if it could, the description was not sufficient within the meaning of Bills of Sale Act (R.S.O. 1887, ch. 25) to cover machines so manufactured: *Williams* v. *Leonard*, 26 Can. S.C.R. 406.

Province of Alberta.

SUPREME COURT.

Harvey, C.J.] REX *v.* PELKEY. [12 D.L.R. 780.

Prize fighting—What constitutes—Prize or reward—Homicide.

An encounter of the nature of a fight, with fists or hands, between two persons who have met for such purpose by previous arrangement is a "prize fight" under Cr. Code, 1906, s. 105, within the statutory definition of the phrase "prize fight" contained in Cr. Code, 1906, s. 2 (31), if the contest be one in which each strives to overcome or conquer the other, although there is no prize offered to the victor.

R. v. *Wildfong,* 17 Can. Cr. Cas. 251; *R.* v. *Fitzgerald,* 19 Can. Cr. Sas. 145; and *Steele* v. *Maber,* 6 Can. Cr. Cas. 446, referred to.

On a trial for manslaughter against one of the contestants in a so-called boxing contest in respect of the death of the other contestant in the ring following a knock-out blow, the jury in considering whether the contest was one prohibited by the provisions of the Criminal Code as to prize fights, may take into consideration the weight of the gloves as bearing on the intention that the fight should terminate by one or the other being incapacitated, although limited to ten rounds.

James Sho K.C., for the Crown. *A. L. Smith,* for Pelkey.

ANNOTATION ON THE ABOVE CASE.

The present sections of the Criminal Code of 1906, relating to "Prize fights" have their origin in the Statutes of Canada, 44 Vict. ch. 30, being "An Act respecting prize fights." This Act was consolidated in the Revised Statutes of Canada of 1886 as ch. 153 of same. A reference to the original statute may be of assistance in ascertaining the meaning of secs. 104 to 108 inclusive of the Criminal Code 1906, those being the sections bearing the sub-title "Prize fights." The case of *R.* v. *Pelkey,* above reported, contains a dictum *per* Harvey, C.J., that the presence or absence of a prize which is suggested by the name of the offence has no significance whatever and as there is nothing suggesting a prize in the statutory definition the offence may be complete as a "prize fight," although there be no prize or the handing over or transfer of money or property on the result. A similar dictum is contained in the case of *R.* v. *Wildfong,* 17 Can. Cr. Cas. 217, decided by Judge Snider, of Hamilton, in 1911. The point cannot be said to have been actually essential to the result in either of these two

cases, and while the opinions expressed as to the effect on the offence where there is no prize, are of importance because of the high judicial standing of the two Judges named, they do not appear to be authoritative as precedents by reason of the fact that this question did not come up squarely for decision and both cases went off on other grounds.

In the "Act respecting prize fighting," R.S.C. 1886, ch. 153, the interpretation clause declared that, unless the context otherwise required, the expression "prize fight" means an encounter or fight with fists or hands between two persons who have met for such purpose by previous arrangement made by or for them. The Act provided the punishment for challenging to fight a prize fight, and such offence was declared to be a misdemeanour and punishable on summary conviction. Engaging as a principal in a "prize fight," or aiding or abetting a "prize fight," were likewise misdemeanours and were punishable on summary conviction. Special duties to prevent "prize fights" were imposed upon sheriffs and police officers in like manner as such duties are now stated in secs. 627 and 628 of the Criminal Code, 1906. Judges of the Superior and County Courts were given all the powers of justices of the peace as regards offences under the Prize Fighting Act, and such powers they still have by virtue of sec. 606 of the Criminal Code, 1906, which replaces in part sec. 10 of the original statute, 44 Vict. ch. 30. Section 9 of that Act which was the predecessor of the present sec. 108 of the Criminal Code, 1906, was as follows:—

"9. If, after hearing evidence of the circumstances connected with the origin of the fight or intended fight, the person before whom a complaint is made under this Act is satisfied that such fight or intended fight was *bonâ fide* the consequence or result of a quarrel or dispute between the principals engaged or intended to engage therein, and that the same was *not an encounter or fight for a prize* or on the result of which the handing over or transfer of money or property depends, such person may, in his discretion discharge the accused or impose upon him a penalty not exceeding fifty dollars."

While section 108 was not directly invoked in the principal case above reported it is of importance for the interpretation of the term "prize fight" in the preceding secs. 104 to 107 inclusive, having regard to the statutory definition of "prize fight" as contained in sub-sec. 31 of sec. 2 of the Criminal Code, 1906. Sub-sec. 31 appears in the same terms as the definition in the original Act, when read with the limitation which is imposed by sec. 2 as regards all of the statutory definitions, namely, that the interpretation shall be as stated "unless the context otherwise requires."

This sec. 9 had a marginal note as follows: "If the fight was not a prize fight but an actual quarrel."

With reference to the meaning of statutory interpretation clauses generally, the following extract from Beal's Cardinal Rules of Legal Interpretation, 2nd ed., 299, is of interest: "An interpretation clause should be used for the purpose of interpreting words which are ambiguous or equivocal, and not so as to disturb the meaning of such as are plain. An

interpretation clause should be taken as declaring what may be comprehended within the term where the subject matter and circumstances require that it should be so comprehended."

In support of these propositions the following authorities are referred to:—

"An interpretation clause is . . . not to be taken as substituting one set of words for another, nor as strictly defining what the meaning of a word must be under all circumstances. We rather think that it merely declares what persons may be comprehended within that term, where the circumstances require that they should": *Reg.* v. *Cambridgeshire* (1838), 7 A. & E. 480, at 491, Lord Denman, C.J.

"With regard to all these interpretation clauses, I understand them to define the meaning, supposing there is nothing else in the Act which is opposed to the particular interpretation. When a concise term is used, which is to include many other subjects besides the actual thing designated by the word, it must always be used with due regard to the true, proper and legitimate construction of the Act": *Midland R. Co.* v. *Amberyate, Nottingham and Boston and Eastern Junction R. Co.* (1853), 10 Hare 359, at 369, Turner, V.-C.

With regard to the statutory definition it is submitted that, notwithstanding its terms, a prize is still essential to the offence of engaging or participating in a prize fight; and that this interpretation is assisted by the wording of sec. 108 of the Criminal Code, 1906, and the marginal note to same which reads as follows: "When fight is not a prize fight."

That the statutory definition does not cover all of the ingredients of the offence is shewn by the principal case in which Harvey, C.J., reviews the authorities on the point and concludes that the encounter or fight aimed at by the statute must necessarily be an encounter by way of fight in which each strives to overcome or conquer the other; in other words, that the fight must be one in which each of the parties is to fight until he can no longer stand up to continue the combat. It will be noted that in sec. 108 the term used is "fight," not "prize fight," and that the marginal note emphasizes this by its wording, "when fight is not a prize fight." Reading sec. 108 along with the other sections it is submitted that the offence for which sec. 108 provides is not any of the offences specified in secs. 104 to 107 inclusive, but a lesser offence in which there is no prize, either to the successful contestant or to any one else; in other words, that the fight was not for a prize or to influence the depending result in which the handing over or transfer of money or property was at stake.

This lesser offence would in most cases be developed upon a prosecution for the greater offence of "prize fighting." If there need be no prize or handing over of money or money's worth to constitute a prize fight, and if sec. 108 be read as applicable to the same offence as that to which the preceding sections relate, how is it to appear that the fight was not for a prize? If the question of prize or no prize has been eliminated from the offence of prize fighting by virtue of the statutory definition in Code sec. 2, sub-sec. 31, there would be no need for the prosecution to shew either

that there was a prize or that there was not. Can it be that the onus of proving that there was no prize is upon the accused? And is it to be left to the accused in the event of there being no prize to also shew that the fight was *bonâ fide* the result of a quarrel or dispute? While evidence as to the latter might not be essential to the principal or greater offence of prize fighting, it is probably admissible in mitigation; but different considerations as to the admissibility of evidence would apply as to proving that the fight was not for a prize, if a prize be not requisite to the offence of participating in a prize fight. It does not seem reasonable that the accused should be forced to give that evidence in order to get the benefit of sec. 108. Clear words should appear where it is intended by a statute to make it an offence to fight to a finish without a prize, where prior to the statute the striving for a prize was an essential; and it might also be expected that more precise terms than are to be found in sec. 108 would be necessary to displace the onus of proof ordinarily laid upon the prosecution.

Reading together all of the sections above referred to it seems more probable that sec. 105 requires that the "prize fight" engaged in must be a fight in which (1) each strives to overcome or conquer the other, (2) there was a prize, which might consist of a reward to one or both contestants or might consist of what is termed the "gate receipts" or a prize in the sense that the transfer of money or property depended on the result of the fight undertaken with such transfer in view by the contestant who is charged, and (3) that the fight was pre-arranged.

It is submitted further that the offence under sec. 108 is a lesser offence in which there are the same elements as the offence of "prize fighting" except that the prize is lacking, and that in default of satisfactory proof by the prosecution that there was a prize in the sense above indicated, the prosecution has the alternative of offering evidence that the fight or intended fight was *bonâ fide* the consequence or result of a quarrel or dispute between the principals, and the magistrate may thereupon impose the lesser penalty of a fine not exceeding $50, or may in his discretion discharge the accused. Then, if there were no prize and no quarrel or dispute there would be no offence and the accused would have to be discharged unless the fighting were in public so as to cause public alarm and so constitute an affray, as to which see sec. 100 of the Criminal Code, 1906.

If one consents to be beaten, the person who inflicts the battery is not ordinarily chargeable with an offence; the limit to this doctrine being, that the beating must be one to which the party has the right to consent: *Pillow* v. *Bushnell*, 5 Barb. 156. No concurrence of wills can justify a public tumult and alarm; and so persons who voluntarily engage in a prize fight, and their abettors, are all guilty of an assault: *Rex* v. *Perkins*, 4 Car. & P. 537. And see *Rex* v. *Billingham*, 2 Car. & P. 234; *Reg.* v. *Brown*, Car. & M. 314. But see *Duncan* v. *Commonwealth*, 6 Dana 295.

Sparring with gloves is not dangerous or likely to kill, and a death caused by such sparring is not manslaughter, unless continued to such an extent that the parties are exhausted so that a dangerous fall, causing death, is likely to result from its continuance: *R.* v. *Young*, 10 Cox C.C.

371. And the question whether such a contest is merely a sparring exhibition or a prize fight, within the meaning of statutes condemning prize fights as misdemeanours, is one of fact for the jury in a prosecution for a resulting homicide: *People* v. *Fitzsimmons*, 69 N.Y.S.R. 191, 34 N.Y. Supp. 1102.

In *R.* v. *Coney*, 8 Q.B.D. 534, two men fought with each other in a ring formed by ropes supported by posts and in the presence of a large crowd. Amongst the crowd were the prisoners, who were not proved to have taken any active part in the management of the fight, or to have said or done anything. They were tried and convicted of aiding and abetting an assault. Upon a case reserved the conviction was quashed by eight Judges against three, the majority holding that mere voluntary presence at a fight does not as a matter of law necessarily render persons so present guilty of aiding and abetting an assault, although the mere presence unexplained may, it would seem, afford some evidence for the consideration of a jury: *R.* v. *Coney*, 8 Q.B.D. 534, *per* Denman, J., Huddlestone, B., Manisty, Hawkins, Lopes, Stephen, Cave and North, JJ. (Coleridge, C.J., Pollock, B., and Mathew, J., *diss.*). This decision appears to overrule *R.* v. *Murphy*, 6 C. & P. 103; *R.* v. *Perkins*, 4 C. & P. 537; and *R.* v. *Billingham*, 2 C. & P. 234, if and so far as they decided that mere presence at a prize fight is encouragement. Cf. *R.* v. *Young*, 8 C. & P. 644, where mere presence at a duel was held not enough to warrant conviction for aiding and abetting in the murder of one of the combatants.

In *R.* v. *Young*, 10 Cox 371, seven men were indicted for manslaughter. They had been sparring with gloves on, and the deceased was with them. After several rounds the deceased fell and struck his head against a post, whilst he was sparring with the prisoner. The men were all friendly, but as the deceased and the prisoner came up to the last round they were "all in a stumble together." The medical testimony was to the effect that sparring might be dangerous, but that death would be unlikely to result from such blows as had been given. The danger would be where a person was able to strike a straight blow, but the danger would be lessened as the combatants got weakened. Bramwell, B., said, the difficulty was to see what there was unlawful in this matter. It took place in a private room; there was no breach of the peace. No doubt if death ensued from a fight, independently of its taking place for money, it would be manslaughter; because a fight was a dangerous thing and likely to kill; but the medical witness here had stated, that this sparring with the gloves was not dargerous, and not a likely thing to kill. After consulting Byles, J., Bramwell, B., said, that he retained the opinion he had previously expressed. It had, however, occurred to him that supposing there was no danger in the original encounter, the men fought on until they were in such a state of exhaustion that it was probable they would fall, and fall dangerously, and if death ensued from that, it might amount to manslaughter, and he proposed, therefore, so to leave the case to the jury and reserve the point if necessary. The prisoners were acquitted.

In *R.* v. *Orton*, 14 Cox 226 (C.C.R.), it was held upon a case reserved

that if persons meet to fight intending to continue till they give in from injury or exhaustion, the fight is unlawful whether gloves are or are not used.

An exhibition of fighting with fists or hands, to witness which an admission fee is charged to the public and at which it is announced that the stake money will go to the contestant who knocks out his opponent in a stipulated number of rounds is a "prize fight" within the Criminal Code: *Steele* v. *Maber*, 6 Can. Cr. Cas. 446.

But a sparring match with gloves under Queensbury or similar rules given merely as an exhibition of skill and without any intention to fight until one is incapacitated by injury or exhaustion, is not a "prize fight": *The King* v. *Littlejohn*, 8 Can. Cr. Cas. 212.

A sparring or boxing match for a given number of rounds which would not ordinarily exhaust either participant, is not a "prize fight," although the boxers were paid fixed sums, not depending upon the result, for giving the exhibition: *The King* v. *Fitzgerald*, 19 Can. Cr. Cas. 145.

Beck, J.] RE BAYLIS INFANTS. [13 D.L.R. 150.

Infants—Parents' right to custody—Welfare of child to govern.

In determining whether the father or mother, who are living apart, shall have the custody of a minor child, the wishes of the mother are to be considered, as well as the wishes of the father, but the primary consideration is the welfare of the child.

In awarding the custody of infants to their mother as against the father, the order should provide that the latter shall have reasonable access to them.

H. A. Mackie, for applicant. *A. F. Ewing*, for mother.

Province of Saskatchewan.

SUPREME COURT.

Haultain, C.J., Johnstone, Lamont, and Brown, JJ.] [13 D.L.R. 182.

RURAL MUNICIPALITY OF VERMILLION HILLS *v.* SMITH (No. 2).

Taxes—Action for collection—Who may maintain—Rural municipality—Taxes assessed by local improvement district.

A rural municipality that succeeds a local improvement district, may, in the name of its council, recoved unpaid land taxes

assessed before the organization of the rural municipality by the local improvement district under the provisions of ch. 36, Sask. Statutes of 1906, and ch. 88, R.S.S. 1909, as well as the Supplementary Revenue Act, ch. 37, R.S.S. 1909.

Appeal—Amendments—Action in name of municipality—Substitution of council.

Where an action to recover taxes is improperly begun in the name of the municipality instead of its council an amendment will be allowed on appeal substituting the name of the municipal council as plaintiff.

Constitutional law—Conflict with British North America Act.

The provisions of the Local Improvements Act, R.S.S. 1909, c. 88, and the Supplementary Revenue Act, c. 37, R.S.S. 1909, pertaining to taxation, when applied to equitable interests in land in which the Crown holds some interest as well as the legal title, do not violate s. 125 of the British North America Act, where the interest of the Crown is not taxed but the interest of its lessee only.

Calgary and Edmonton Land Co. v. *Attorney-General*, 45 Can. S.C.R. 170, applied.

What taxable—Grazing leases.

The interest of a lessee of public lands under a grazing lease from the Crown, is taxable under the Local Improvements Act, Sask. of 1906, c. 36, as amended by c. 88 of R.S.S. 1909, and the Supplementary Revenue Act, c. 37, R.S.S. 1909.

Rural Municipality of Vermillion Hills v. *Smith*, 10 D.L.R. 32, affirmed; *Calgary & Edmonton Land Co.* v. *Attorney-General*, 45 Can. S.C.R. 170, applied.

J. F. Frame, and *J. F. Hare*, for appellant. *H. V. MacDonald*, for respondent. *J. M. Carthew*, for the Attorney-General.

Bench and Bar

Judicial Appointments.

England.

The Right Honourable Sir Rufus Daniel Isaacs, K.C., V.O., K.C., M.D., has been appointed Lord Chief Justice of England in the room of Baron, now Viscount Alverstone, resigned. Sir

Rufus was born in London, October 10, 1860. He became Solicitor-General in 1910 and subsequently Attorney-General. He has been a member of the House of Commons since 1904, sitting for the town of Reading.

ONTARIO.

Lorne Bruce Chadwick Livingstone, of the Town of Tilsonburg, Province of Ontario, Barrister-at-Law; to be Judge of the County Court of the County of Welland, in the said Province. (Sept. 24.)

George Montgomery Vance, of the Village of Shelburne, Province of Ontario, K.C., to be Judge of the County Court of the County of Simcoe, in the said Province.

BRITISH COLUMBIA.

William Alexander Macdonald, of the City of Vancouver, Province of British Columbia, K.C., to be a Puisne Justice of the Supreme Court of British Columbia.

SASKATCHEWAN.

William Oswald Smyth, of Swift Current, Province of Saskatchewan, barrister-at-law, to be the Judge of the District Court of the Judicial District of Swift Current. (Oct. 8).

Alexander Duncan Dickson, of Qu'Appelle, Province of Saskatchewan, barrister-at-law: to be the Judge of the District Court of the Judicial District of Humboldt. (Oct. 8).

Charles Edward Dudley Wood, of Regina, Province of Saskatchewan, barrister-at-law: to be the Judge of the District Court of the Judicial District of Weyburn. (Oct. 8).

Flotsam and Jetsam.

The lady litigant had paid out good money to clerks and bailiffs till she was nervous about it.

"Who is that?" she whispered to her lawyer, as a new functionary put in an appearance.

"That? That's the crier," the lawyer replied.

"Goodness! Can't I do my own crying and save the fees?"—*Judge.*