THE
CANADA LAW JOURNAL

EDITOR:
HENRY O'BRIEN, K.C.

ASSISTANT EDITORS:
A. H. O'BRIEN, M.A., AND C. B. LABATT

VOL. LI.

1915

TORONTO:
CANADA LAW BOOK COMPANY, LIMITED
LAW PUBLISHERS
84 BAY STREET.

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Canada Law Journal.

VOL. LI. TORONTO, JANUARY, 1915 No. 1

ALIEN ENEMIES IN PUBLIC POSITIONS.

There has been much said during the past month about a very simple matter connected with the University of Toronto, which in some other countries would have been settled in short order; but men of our nation are proverbially slow in comprehension as well as deliberate in action. There is the additional feature that the parties concerned look at the situation through the mist of a class prejudice, which has distorted the landscape. Book learning, without the friction of everyday affairs, often dims the vision of scholastics who dwell together and naturally look at things from a one-sided point of view.

There have been on the staff of the University of Toronto several professors of German birth and education. These men are still subjects of Kaiser Wilhelm II., owe allegiance to him and to their native country, and declined to change such allegiance, even, indeed, if as Germans they could do so, by becoming naturalized British subjects. Their King and their compatriots have attacked us, and we are now fighting a bitter fight, à l'outrance, for the very existence of the British Empire, against a strong, resolute, relentless and ruthless enemy that for over twenty years has been plotting, preparing and praying for our humiliation and destruction. These three alien enemies, like the rest of their countrymen, have presumably been taught to hate and despise England and her people. It has, moreover, been instilled into the German people as part of their education that lying, deceit and treacherous espionage are virtues when used for the downfall of the hated rival that blocks the way to their cherished ambition of world dominion.

We have no means of assuring ourselves whether these professors, or any other Germans for that matter, are in any way

different in their mental attitude in this regard to others who have gone through the same training. All we know is that they are aliens, and, nationally, enemies; and bitter experience has proved that no reliance can be placed on the word or honour of a German when the welfare of his country is at stake. The truth is that during the continuance of this war it is not desirable to have alien enemies in the country at all. It is common knowledge that there are too many spies and traitors among them and the spy system of Germany has been England's greatest danger and difficulty.

Everyone knows now that the Secret Service department of Germany, in its scope and efficiency, is the most perfect system that the world has ever seen. It has spies in every country. They are to be found in every business and every walk of life. Newspapers and writers are subsidized to influence public opinion, and, to this end, appropriate agents have been found in private homes, in schools, in Universities, in shops and factories, and in fact everywhere where good work can be done. These agents, naturally, do not tell people what their mission is, and the more harmless and friendly they seem to be, the better they serve their master at Berlin.

A comprehension of all this is necessary for a proper understanding of the University situation. Several of the governors, having some such thoughts as these in mind, wisely and properly desired that these three German professors should be asked to resign or should be removed, at least during the continuance of the war. Notable among these governors was Sir Edmund Osler, one of the nominees, on the Board, of the Ontario Government. Apparently a compromise was arrived at, the majority of the Board deciding that these professors should have leave of absence to the end of the session; but that their salaries should, nevertheless, continue to be paid them. Sir Edmund Osler (and others) very properly objected to this, and, as his protest was voted down, resigned his seat on the Board. He realized the danger of the situation and acted promptly. And here, by way of illustration as to possible or probable dangers in these days from

the employment of alien enemies of the German race, let us suppose that one of those who supported President Falconer, say Sir Byron Walker, a keen business man, was in charge of the Ross Rifle Factory, or some gunpowder works, or any of the great public utilities—would he dare to retain in his employ a German workman, a subject of the Kaiser, no matter how efficient he might be, or how harmless he might appear to be? We trow not!

Not less objectionable, and for analogous reasons, is the retention of German professors or lecturers on the University staff. It serves nothing to say that they are not at present to be engaged in teaching. The very fact of their retention on the salaried staff, in the employment of and paid by the province, will be regarded by the public, and above all by the youth of the University, as a tacit assertion by the Governors of the harmless character of such men, and that they ought not to be regarded as alien enemies.

Turning now to the legal question. It was strongly urged by the President and others that the Royal Proclamation published in the Canada *Gazette* of August 15th and the subsequent explanatory public notice dated September 2nd, emanating from the Governor General at Ottawa, stood in the way of the dismissal of these men. The recital of the proclamation says:—

"And whereas there are many immigrants of German nationality quietly pursuing their usual avocations in various parts of Canada, and it is desirable that such persons should continue in such avocations without interruption."

The enacting clause provides that "such persons so long as they quietly pursue their ordinary avocations shall not be arrested, detained or interfered with, unless there is reasonable ground to believe that they are engaged in espionage, or attempting to engage in acts of a hostile nature, or to give information to the enemy, or unless they otherwise contravene any law, order in council or proclamation."

The public notice or explanatory proclamation of September 2 directs as follows:—

"That all persons in Canada of German or Austro-Hun-

garian nationality, so long as they quietly pursue their ordinary avocations, be allowed to continue to enjoy the protection of the law and be accorded the respect and consideration due to peaceful and law-abiding citizens; and that they be not arrested, detained or interfered with, unless there is reasonable ground to believe that they are engaged in espionage, or engaging or attempting to engage in acts of a hostile nature, or are giving or attempting to give information to the enemy, or unless they otherwise contravene any law, order in council or proclamation."

It is difficult to understand how any one could contend that these provisions in any way touch upon rights as between master and servant; manifestly they are not aimed at any such relation. Clearly what was intended was that the personal liberty of Germans or Austrians should not be affected by reason of their being alien enemies so long as they behaved in a peaceful, law-abiding manner. The use of the words "it is desirable that such persons should continue in such avocations without interruption" surely could not give an alien, or even a naturalized German or Austrian, rights which could not be claimed by a native born British subject.

The question, therefore, which the Governors ought to have considered is—was it or was it not desirable or right, as a matter of public policy, in the interests of the University to retain such alien enemies, as Germans have shewn themselves to be (or, at this time, even naturalized Germans, for naturalization is a disguise frequently assumed by spies) on the teaching staff, or in the paid employment of the Province. We think that the answer of the country at all events will be overwhelmingly in the negative. There is too much reason to believe that the Governors, or those of them who control the proceedings of the Board, have been influenced less by considerations of this kind than by the social, personal or academic relations between themselves and the professors or others of their nationality. And more than that; there are those who assert that, as to some of the students, there is not that strong British feeling that one would

expect to find in a Canadian University. Has the poison of Prussian thought anything to do with this?

In connection with this branch of the subject it is of interest to note that in the Ontario Public Schools Act (and the same law exists in other provinces) it is provided that: "Subject to the regulations, any *British subject* of good moral character and physically fit to perform the duties of a teacher and who passes the examination prescribed by the regulations, may be awarded a certificate of qualification as a teacher according to the regulations."

This provision shews the mind of the legislature on the subject. If this national safe-guard is desirable for those who instruct children at our public schools it is even more desirable as to those who mould the minds of students attending our Universities who will shortly take their place as trained subjects of the Empire.

If a professorship or lectureship is an "office" (which, as regards the former at all events, may well be contended—inasmuch as a professor in the faculty of Arts in the University is a statutory member of the Senate) the University Act, R.S.O. c. 279, s. 41, and the provisions of the Naturalization Act, R.S.C., 1906, c. 77, are worthy of consideration. Sections 4 and 5, like those of the Aliens Real Property Act (R.S.O., 1914, c. 108), deal with the rights of aliens in respect of real and personal property. But s. 6 enacts that nothing in ss. 4 and 5 shall qualify an alien for any office or for any municipal, parliamentary or other franchise, or to be the owner of a British ship, nor shall anything therein entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are by the Act expressly conferred upon him. The case of *Weir* v. *Matheson*, 11 Grant, p. 383, and on appeal, 3 Grant's E. & A. Rep., p. 123, may be referred to.

It is provided by s. 31 (b) (i) of the University Act, that no professor can be dismissed except upon the recommendation of the President, and he, it is said, has declined to act without instructions from the Ontario Government on the ground that it is

their business to lay down their policy on the subject, and that it would be unfair to dismiss German alien enemies from the University and retain those who are in other Government situations. The Premier has, however, said that the matter must be dealt with by the Board of Governors and the President. This apparent deadlock is very unsatisfactory to the public.

It is not easy to see how the Board of Governors can shelter themselves behind the section referred to, which had not in view such a state of things as now exists, and which was, it might be thought, plainly pointed at the academic qualifications and personal and moral character of a professor, of which the President who nominated him was better qualified to judge than a Board of lay Governors.

The President is also reported to have said, in connection with this subject, "We must have teachers." Under present circumstances we are prepared to deny the proposition. Canada can do without teachers for a few months. It is a matter of no importance whatever, during this war for our national existence, whether there are any teachers in the University, or indeed whether there is or is not a University at all, unless, indeed, it be used as a recruiting centre. Rather let the buildings be turned into barracks and the campus into a parade ground where the President and professors would teach their students the rudiments, at least, of military training, and so fit them to fight for their hearths and homes, for the existence of the Empire, and for freedom and liberty the world over. Much more than this is being done at Oxford and Cambridge, where several colleges are empty and some turned into hospitals, the majority of the students being at the front, or training to go there. What is good enough for these great historic centres of learning is certainly good enough for the University of Toronto, and this the President and Governors will find soon enough when they apply to the public to pay their present and their continually increasing deficits.

Since the above was written one of these professors, in view of the awkward position in which he found himself, applied for, and has been granted, naturalization papers. The learned judge who heard the case decided that he had successfully met, what he termed, the "highest test" by his declaration that "he wished success to the allies in this war." It will probably occur to others, as it does to us, that this was a very simple and easy thing to say; but, taken with other circumstances known to the public, it fails to satisfy the public. And after all the burden of proof is on the alien enemy who, in war time, seeks the privilege of naturalization in the country which his native land is attacking.

It has been said by disinterested and thoughtful writers that when an alien takes up his residence in a foreign country, intending to enjoy the protection of its laws, and to obtain his livelihood there, he should become, both legally and loyally, a citizen of that country, with full honesty of purpose. Some, however, may not see this obligation, and desire to be free to return at any time to their native land, their hearts being there and perhaps hoping to live there again. Their declining to be naturalized in the foreign country is sufficient evidence and the most convincing proof of this desire.

In the case before us there seems to have been a deathbed repentance in this respect, but it came too late, and leads to the natural assumption that the professor saw the danger of losing his job by remaining an alien enemy and so made this tardy application. The receipt of a "scrap of paper" from a judge does not effect a change of heart nor transform the recipient into a loyal British subject. We cannot, therefore, concur with the learned judge's ruling. The "highest test," which he said had been successfully met is, under the circumstances, no test at all; it is simply a declaration that the applicant was anxious, for personal reasons, to retain his position. We do not want that class of citizens in war time. In times of peace it is of little consequence.

May we also be permitted, with all respect, to make a further criticism. The learned judge is reported to have said that he

consulted some of the judges at Osgoode Hall and they thought the applicant ought to have his papers. We think the great majority of the public, to say nothing of ourselves, think otherwise. We are glad to bow to the views of our judges on legal propositions, but this is not a matter of law, but of fact—something for the consideration of a jury rather than of a judge. As law-abiding citizens we, of course, recognize that this professor is now a naturalized British subject: but—nothing more. A coat of whitewash does not change the material underneath.

We are told that the two other professors have at length resigned their positions in the University. It would have been more to their credit if they had done so before being forced out by the pressure of public opinion.

The conclusion from all this would seem to be (1) That no alien enemy should be naturalized in a country with which his native land is at war. (2) That in all branches of public service (Universities perhaps being the most important, as they are the training ground for future citizens), no public servant, professor or teacher should be appointed who is not a native-born British subject, or one who has been naturalized before his appointment and in a time of peace.

ONTARIO BAR ASSOCIATION.

The Council of the Ontario Bar Association promises an excellent programme for its next meeting, to be held at Osgoode Hall, Toronto on Wednesday and Thursday, January 6th and 7th. The profession are asked to keep these days free and by their presence help to make the meeting successful.

The circular issued by the Council and sent to the members of the profession in the Province of Ontario and otherwise widely circulated, gives full information as to various matters which are expected to occupy the attention of the association.

Amongst these we notice en passant, one, which, though but

of little general interest, may now be briefly referred to as it appertains to the field of legal journalism. It is as to the naming of a certain legal journal as the "official organ" of the association, whatever that may mean. We do not suppose that the association needs the bolstering up or the assistance of any organ. It stands or falls on its own merits and has succeeded admirably well without any outside backing. Again, if its proceedings are of sufficient interest to claim the attention of the profession (which they do), would it not be more dignified and satisfactory to publish and distribute its own literature itself and in its own way. Or, if the question of expense is of counterfailing importance (which it ought not to be) why should not the literature be given to every legal journal that might be willing to publish it.

Again, from a purely journalistic standpoint, and speaking for ourselves, we should prefer not to be in a position which might (or might appear to) hamper or in any way affect one's freedom in criticizing freely any action or views which might appear to us to be unwise or not in the interests of those we seek to serve. It is quite sufficient for us to be the organ of the legal profession as a whole.

The many subjects of professional and public interest which should come, and many of which will come, before the association will doubtless be luminously treated and discussed as they arise and they will in due course be noted for the benefit of our readers and commented on as occasion may require.

PAYMENT BY A STRANGER.

FURTHER OBSERVATIONS.[1]

If A. owes money to B., and B. insures A.'s life and also pays the premiums, what is the position if A. dies before he has paid the debt, and B. receives the insurance money? Does the debt still exist?

Before we discuss the cases bearing on this question it will be well to state a few general propositions relating to the present law concerning the contract of insurance.

By reason of the provisions of the Imperial Life Assurance Act, 1774,[2] and the Marine Insurance Act, 1906,[3] a contract of insurance is not binding on the parties unless the insured has an interest in the event insured against; but in the case of a contract of life insurance, it is sufficient if the interest exists at the time of the making of the contract, though it may cease to exist in whole or in part: and the whole amount agreed to be paid, not exceeding the value of the interest at the date of the contract, may be recovered.[4] This is often expressed by saying that a contract of life insurance is not a contract of indemnity.

It has long been settled that a creditor has an interest in the life of his debtor.[5]

It must, however, be borne in mind that the contract of life insurance was treated as a contract of indemnity till the year 1854, and that the provisions of the Life Assurance Act, 1774, were not extended to Ireland till 1866, when the Life Insurance (Ireland) Act, 1866,[6] was passed.

In *Ex parte Andrews*, 1816,[7] S. E. was indebted to each of

1. The previous article appeared in Vol. 48, p. 513.

2. 14 Geo. III. c. 48.

3. 6 Edw. VII. c. 41.

4. *Dalby* v. *India and London Life Assurance Co.*, 1854, 15 C.B. 365; 139 E.R. 465; and *Law* v. *London Indisputable Life Policy Co.*, 1855 1 K. & J. 223; 69 E.R. 439.

5. *Godsall* v. *Boldero* (1807), 9 East, 72; 103 E.R. 500. See A Digest of English Civil Law, edited by Mr. Edward Jenks, Book II, Part II, ss. 688, 690, and 695.

6. 29 & 30 Vict. c. 42.

7. 1 Madd. 573; 56 E.R. 210; 2 Rose 416. "E.R." refers to the English Reports.

his brothers, C. E. and T. E., and was entitled, in right of his wife, to certain property in the event of her surviving her mother. In these circumstances, two deeds were executed on the same day. They were made between S. E. and his wife of the one part, and C. E. and T. E. respectively, of the other part. By one deed S. E. assigned three-fourths of his interest to C. E., and by the other he assigned one-fourth thereof to T. E., upon trust, in the first place to reimburse themselves all costs, expenses and the like, next to retain their debts respectively, and then to pay the overplus to S. E. Subsequently C. E. and T. E. each effected a policy of insurance on the life of the wife, and, on her death, received the insurance money. A commission in bankruptcy was issued against S. E., and each brother tried to prove in the bankruptcy for his whole debt. Sir Thomas Plumer,[8] V.C., held that the assignments had placed the brothers in the situation of trustees, and that it was extremely difficult to maintain that the trustees, being allowed their payments, were not to account for what they had received for an advantage made of property committed to them as trustees. Being enabled by the act of the bankrupt to obtain part of their debts, they could not prove the whole. The learned Vice-Chancellor, therefore, ordered each of the brothers to account for what he had received under his policy of insurance, being allowed what he had expended, including the premium.

The next case is *Humphrey* v. *Arabin*,[9] 1836. J. H. obtained judgment for the sum of £3,000 against D. L., and assigned it by deed to J. I. Further D. L. executed his bond to J. I. for the payment of the sum of £800 with interest, and J. L. obtained judgment thereon. J. I., whilst he was so entitled to the said sums, effected a policy of insurance on the life of D. L. for £999 19s. 0d., and effected a further policy of insurance in the name of J. H. on the life of D. L. for £999. On the death of D. L. the sum of £1,998 19s. 0d. was paid to J. I. by the insurance company. Lord Plunket, L.C., observed: "There is no one circum-

8. Appointed Master of the Rolls in 1818.

9. 1 Ll. & Gt. Plunk. 318.

stance which puts him (the insurer) in the character of a surety for the debtor. He has no right to call on the debtor's executors to pay the debt; and it is no concern of his whether the debtor is able to pay or utterly insolvent. . . . It is clear that the creditor has no right to call upon the debtor to make the assurance, or pay any part of the expense of it, or, if the assurance company should become insolvent, to repay him any of the premiums he has paid. The debtor, on the other hand, has no right to call on the creditor to make any assurance, or to keep it alive when made; he knows not whether it has been made or not; it is a contract between other persons, with which he has no concern or privity; and I cannot find any principle or authority for holding that he should, by anything growing out of that contract, be discharged from the payment of his just debt, which he has neither discharged nor satisfied, nor caused to be discharged or satisfied." This reasoning reminds us of the maxim in Roman law "*res inter alios acta aliis neque nocere neque prodesse potest.*"

Henson v. *Blackwell*[10] was decided in 1845. The wife of the plaintiff was entitled under the will of her father to one-fifth share of a moiety of an annuity of £300, and to a fifth part of a legacy of £700. By an Indenture of Assignment made between the plaintiff and his wife of the one part, and the defendant of the other part, after reciting (*inter alia*) that the plaintiff was indebted to the defendant in the sum of £300, upon a promissory note, the plaintiff and his wife, and each of them, assigned to the defendant all that the said annuity, and all and every annual or other sum or sums of money, which they were entitled to under the will, upon trust to retain the same when received in liquidation of the sum of £300, interest and certain costs and expenses. The defendant subsequently insured the life of the wife in the Norwich Union Life Assurance Office in the sum of £200, without the privity or knowledge of the plaintiff or of his wife. On the death of the wife, the defendant received the sum of £200 from the office. The plaintiff filed a bill

10. 4 Hare 434; 67 E.R. 718.

to redeem the property comprised in the assignment and prayed that the defendant might be charged with the amount he received on the policy. Sir James Wigram, V.-C., said: "The event, against the consequences of which it was his (the defendant's) interest to guard, was the death of the husband, leaving the wife surviving . . . he had a right to a guarantee against the consequences of her surviving the plaintiff. . . . The case of *Ex parte Andrews* . . . is an authority in point, . . . he (Sir Thomas Plumer) stated the law as clearly as possible in favour of the proposition contended for by the plaintiff. . . . If it had been a void policy from the beginning, he (the plaintiff) could claim nothing. . . . She (the wife) did not survive her husband. The risk intended to be guarded against was at an end; and I think that, when the risk ceased, the guarantee must be considered as satisfied." There was a decree for redemption, with a declaration that the plaintiff was not entitled to have the amount received on the policy set off against the mortgage debt.

In 1849, *Bell* v. *Ahearne*,[11] another Irish case, arose for decision. L. B., the mother of a mortgagor joined her son in a collateral bond to secure the amount of the mortgage money due to the defendant, who subsequently effected a policy of assurance on her life. L. B. died and the defendant received the insurance money. The mortgagor filed his bill to redeem the premises mortgaged to the deefndant who had gone into possession, and there was a claim to have credit for the insurance money. The Right Honourable Maziere Brady, L.C., followed *Humphrey* v. *Arabin*, and decided against this claim.

The answer to the question put at the commencement of this article is that the debt still exists, and that B. is entitled to demand payment from the legal personal representatives of A.

JEFFREYS LEWIS COLLINSON.

Wason Chambers,
4 Harrington St.,
Liverpool.

11. 12 I.E.R. 576.

*INJURIES TO STREET CAR PASSENGERS IN BOARDING AND ALIGHTING.**

Inception of Liability.—Ordinarily the relation of carrier and passenger, in so far as railways operated in city streets for the carriage of local passenger traffic is concerned, commences when a person attempts to board a car as a passenger, those in charge of the car having indicated an express or implied acceptance of him as such.

Consequently the liability of the company for injuries sustained by a passenger owing to the negligence of its employees attaches at the same instant; that is at the inception of the contract of carriage. In this connection it must also be borne in mind that the converse of this proposition is true, viz., that until such relation is created no liability can attach. True it is sometimes difficult to determine when this relation begins, but as is said in a case in Missouri, "one test alike applies to all, and that is the relation can only be created by contract between the parties, express or implied. There must always be an offer and request to be carried on one side, and an acceptance on the other. . . . It is true that the acceptance must in many cases be implied."

So a person who is upon the street approaching a car, even though he has the intention of becoming a passenger does not, either by the mere act or intent alone, become one so as to create towards him on the part of the carrier, the obligation which the latter owes to a passenger. His status is that of a traveller to whom the company owes the same obligation which it owes to any other traveller upon the street. He is not upon the premises of the carrier, but rather upon the public highway where he may be independent of any intention to become a passenger. He has in no way become obligated to pay his fare so as to entitle the carrier to demand it or to in any way control his action. Therefore the relation of carrier and passenger not having been created the company cannot be held liable for any injury sus-

*The authorities for the propositions laid down in this article will be found in the number of the *Central Law Journal* for December 4, 1914.

tained by him before he reaches or comes in contact with the car.

Of course, in the case of a suburban railway, a different situation may exist as where it provides stations and platforms for the accommodation of intending passengers. Here the relation of carrier and passenger may arise while the person is in the station or on the platform waiting for an approaching car with the intention of boarding it. In such case the company's liability commences with the inception of the relation and not from the time of attempting to enter the conveyance.

The fact, however, that a person is upon the premises of the carrier, such as a platform provided for intending passengers, and while there awaiting the approach of a car for the purpose of taking passage, is injured, yet the company, not being an insurer, cannot from this fact alone be held liable for any injury sustained unless the evidence shews a want of proper care on its part.

Attempting to Enter Car on Wrong Side.—A carrier cannot be expected to anticipate all contingencies which may arise by attempts of passengers to improperly board a car. Here we have the application of the principle just stated, viz., that there must be an offer and acceptance to create the relation of carrier and passenger. Accidents from this cause arise more frequently from attempts of persons to board cars operated for summer traffic. During this season of the year it is the practice in many cities to use cars which are open on both sides, having a barrier on each side which is lowered or raised according to the direction in which the car is proceeding. These cars are also equipped with a running board along the side which is also similarly lowered or raised. Entrance to the car as well as exit therefrom is properly by the lowered running board.

A person is not, however, in all cases guilty of such negligence as a matter of law as will preclude recovery from the fact that he attempts to enter the car from the side opposite to that upon which the barrier is down. Circumstances may be such that the employees in charge of the car may, after notice of the

fact that a person is so attempting to enter, be guilty of such negligence as to render the questions of negligence and contributory negligence ones for the jury to determine.

Similarly where a boy was in the habit of entering the car at the front end on the side next to a parallel track and while waiting for that purpose the motorman of an approaching car which had slowed up said "get on kid," and as he had one foot on the step, the car suddenly started, throwing him to the pavement, the case was held to be one for the jury.

While this may be true, yet it would seem, and is undoubtedly the law, that where the company has no notice of such contemplated action by one intending to become a passenger it will not be liable for any injury sustained by a person attempting to board a car in this manner.

Starting a Car While Boarding.—Many injuries are sustained by passengers owing to the sudden starting of a car while attempting to board it. It is a common practice for those in charge to start not only before a passenger has become seated, but generally before he has actually entered the car and frequently as he is in the act of stepping upon the platform thereof. While it is undoubtedly true that as a general proposition it is not negligence *per se* to start before a passenger is seated, yet there are without question circumstances which would render the company liable for such a course of action if injury results. Thus this would be the case where the passenger may be so infirm by reason of infancy, old age, sickness, lameness or other cause that the carrier is chargeable with notice of such infirmity and of the consequent result of what the ordinary movement of the car would be if such person were not seated.

It would of course not be practicable to require that in all cases a street car should remain still until a passenger has become seated but "there are instances in which a car should be permitted to remain still until the passenger is seated; that is, where the passenger is old, feeble, crippled or in any condition which makes it reasonably apparent to those in charge of the car that the person needs unusual care and precaution for his or her protection."

Similarly a violent start before passengers are seated of such force as to throw and injure them will render the company liable.

Aside from this class of cases there is also that of persons who are injured by the sudden starting of the car while in the act of boarding. In cities of any considerable size it continually occurs that, at certain hours of the day, there are places where several persons are waiting with the intention of entering the conveyance. Under such circumstances it is the duty of those in charge of the car (this duty is usually imposed upon the conductor since he is the one who gives the starting signal), to take notice of the fact that people are so waiting, an indication by some one or more having been given of a desire to take passage, and to observe whether all who have such an intention and are apparently carrying it into effect, are in a position of safety. If regardless thereof and while a person is so boarding the car and is in a position of danger it is considered an act of negligence on the part of the company for the motorman to suddenly and violently start the car of his own volition or for the conductor to give the signal to start in purusance of which the motorman acts. A reasonable opportunity for intending passengers to board the car must be given, whether they are boarding the car at a regular stopping point or at a place other than that when the stop is made in response to a signal. On the other hand it is essential in order to render the company liable that those in control of the car must have notice or reasonable means of notice of an intention to board the car.

Boarding Moving Car.—The rule as generally stated is that it is not negligence *per se* for a person to board a moving car, but that the question of negligence is one for the jury. In determining the liability of a street railway company for injuries received by a person in attempting to board a moving car any one or more of several elements may be controlling. Of course the fact that the car was moving may be some evidence of negligence. The rate of speed at which it was moving is one of the most important considerations. If moving at a rapid rate then

it might be, and it would seem that it should be, regarded as negligence, *per se*, for one to attempt to board it. It is impossible to draw any uniform dividing line, however, between different rates so as to create an absence of negligence on the one side and an existence thereof on the other, since there are always other elements to be considered. Among these are the physical condition of the person, whether he be vigorous and active, or, on the other hand, enfeebled or weakened by reason of age or some infirmity; the condition of the street or place at which he attempts to board the car such as whether some appreciable degree of danger is added owing to the existence of snow, ice, water, excavations, obstructions and the like; the fact of his being encumbered to a considerable extent with bundles or packages so as to impede the free exercise of his physical powers; a considerable number of persons on the platform or steps; thus rendering it difficult to obtain a position of safety; and standing forth most prominently of all in every case is the fact of whether there was any express or implied invitation to board the car so as to create the relation of carrier and passenger. In view of some one or more of these elements must the question of negligence be determined. In this connection it is also to be noted that in cities of any considerable size it is a frequent if not common practice to decrease the momentum of the car as it approaches a place where some intending male passenger is waiting, tacitly inviting him to board the car without bringing it to a full stop. Ordinarily with the car thus running at a slow rate of speed it would not be negligence to attempt to board it. If, however, under such circumstances a person apparently vigorous yet handicapped by some infirmity such as rheumatism, or the like, which is not apparent until he attempts to move should endeavour to board even a slow-moving car it might be regarded as negligence *per se*. And in any event the mere slackening of the rate of speed is not of itself an invitation to board the car. There must be some other indication on the part of those in charge of the car to accept such person as a passenger after being apprised in some way by

him of a desire to become one. And where only one inference can reasonably be drawn from the facts it seems that the question of negligence or no negligence may be determined by the court as one of law.

Boarding Car by Front Platform.—The fact that a person boards a car by the front platform instead of the rear one is not negligence, *per se,* there being no apparent reason why the former way is not as safe as the latter and there being furthermore no notice forbidding such an act or any objection thereto on the part of those in charge of the car.

In fact, in many cases it is a common practice for passengers to enter a car either at the front or rear end and frequently even, though there may be gates upon the front platform which are closed upon both sides, an express invitation to enter by the front platform is extended to intending passengers by the act of the motorman in opening the gate on the proper side for the entrance of persons, thus accepting them as passengers and creating the contract relation between them and the company. Aside from this, however, in the absence of any express affirmative act on the part of the motorman a person attempting to so board a car is not guilty of negligence, *per se,* the car having stopped, if the motorman ought in the proper discharge of his duty to have been aware of his presence. Thus it has been held proper to refuse to grant request to instruct that "the defendant is not chargeable with negligence if the motorman started the car while the plaintiff was attempting to board it by the front platform, if he was not aware of the plaintiff's presence there." The court said: "This request was properly refused; it is seen at a glance that the request limits defendant's liability to the knowledge of the motorman, thus entirely excluding any consideration of the circumstances which tended to shew that if the motorman had properly discharged his duty he ought to have known of plaintiff's presence. Such rule, if adopted, would have permitted the motorman to have been guilty of gross dereliction of duty, whereby he placed it beyond his power of being cognizant of plaintiff's presence, and then allege such neg-

ligence as a defence, because thereby he was deprived of knowledge of plaintiff's presence at the car."

If, however, the car is moving when a person attempts to board it by the front platform, it seems that he may be held to a greater degree of care than if he had attempted to enter it under the same condition from the rear.

—*Central Law Journal.*

JAPANESE COURTS.

By Hon. George W. Wickersham,

Formerly Attorney-General of the United States.

Shortly before leaving Washington one of the Federal judges said to me, "When you are in Japan, you will, of course, visit the courts. After you have done so, write out an account of just what you see. I have often wondered how the procedure in those courts would impress an American, especially a lawyer, accustomed to our judicial tribunals."

During my visit to Tokio, I spent a morning in the imperial law courts, and, remembering what my judicial friend at home suggested, it occurs to me that your readers may be interested in a description of what I saw and heard and in my impressions of a very brief inspection of the courts in action.

An Audience with the Chief Justice.

Mr. T. Miyaoka, former Vice Minister of Foreign Affairs, and now one of the leading attorneys of the Empire, called upon me at the Imperial Hotel, shortly before 10 o'clock in the morning, and escorted me to the courthouse. This is a very large brick building, three stories high, looking much like the courthouses in a number of our American cities. The corridors, with the court attendants here and there, the lawyers hurrying to and fro carrying portfolios, sometimes followed by clerks bearing books or documents; the wandering crowds of idlers or witnesses or suitors—all presented an appearance familiar to those who have to do with courts in our own land.

We went first to the office of the Attorney-General, a functionary who is merely the principal Crown prosecutor, all the administrative functions which in America are devolved upon the Attorney-General being here vested in the Minister of Justice. The Attorney-General received us pleasantly, but unfortunately he spoke no English, and I could exchange views with him only through the medium of my friend, Mr. Miyaoka, who speaks English with perfect fluency. The Attorney-General then escorted us to the chambers of Mr. Yokota, the presiding judge of the Supreme Court of the Empire, and the highest judicial officer in Japan. This court, which is properly known as the Court of Cassation, is composed of twenty-four justices, who sit in divisional courts of five justices each, to which cases are carried on appeal from lower courts, for review of errors of law only. The court sits *en banc* in certain exceptional cases of grave importance only. Chief Justice Yokota received us most cordially. He spoke no English, but was familiar with German, having studied jurisprudence in Germany. The judicial system of Japan is modelled on that of Germany, and a number of the judges have been educated in that country. Tea—the inevitable tea, which accompanies all ceremonies, from a shopping visit to a formal call upon high officials—was served, and after a chat about the differences between the judicial systems of Japan and the United States, the chief justice told me that, unfortunately, no branch of his court was in session, but that a number of the intermediate courts of appeal and the district courts were then sitting, and that he would accompany us in a visit to them. He added that it had been a long time since he had been in any of those courts, and that he would enjoy seeing them once more.

Facing the Ornamental Judges.

So we left his room—a large, scantily, almost shabbily, furnished apartment—and proceeded to one of the intermediate courts of appeal, where some fifty or sixty of the rioters who picked up a row in Kioto a few weeks ago—and incidentally brought about the fall of the last ministry—were being retried.

They had been tried in the district court, and appeals taken from the judgments, both by the defendants who were convicted, and by the government, as to some of those who were acquitted, to this court of appeal, in which the case was being heard *de novo*. We entered by the door from the judge's consultation room, and took seats behind the judges. They took no notice of our entry, but proceeded with the business in hand. The room was a rather large apartment, severely plain in its furnishings, and arranged quite like one of our own court rooms. The three judges sat in a row on a platform, raised about two feet above the floor, and at their right, a little apart from them, also on the bench sat the Crown prosecutor, while the clerk who was taking note of the proceedings sat on the left. The judges wore black gowns ornamented with a sort of embroidered cape, or yoke, of red braid, and a species of liberty cap with tabs of black crepe behind. The barristers wore the same style of gown, ornamented with white braid in a fashion similar to that of the judges, and the same sort of cap.

There were some fifty defendants seated on benches directly in front of the judges, and behind them their counsel, behind whom again was the usual crowd of court spectators. In the Japanese courts there are no juries, and all questions are asked by the presiding judge. Counsel for either side may suggest to the court the putting of a particular question, but the court may accept the suggestion or not, as it sees fit. When we entered, the presiding judge was calling the defendants for identification. Each man, as his name was pronounced, arose and replied to questions as to his age, residence, occupation, etc. Many of the defendants were students, and it was evidently the old story of turbulent youth in conflict with established institutions. Many of them had fine faces, and they arose and stood with quiet dignity as they answered the judge. Their rioting was intended as a protest against the increase of taxation to maintain the military establishment only, and a warning to the government that the limit of burden upon a poor, patient, and industrious people had been reached. I should like to have followed the whole

course of their retrial, but time did not permit, and we left them to visit one of the district courts, where a defendant was being tried for larceny.

In a Businesslike Atmosphere.

Again we found three judges, the Crown prosecutor, and the reporter, and the same arrangement as in the appellate court. The defendant was testifying in his own behalf. He stood directly in front of the presiding judge, not ten feet distant from him, and answered his questions in a clear voice, without any apparent hesitation. The judge seemed conversant with the case, for he put questions rapidly, giving a funny little grunt of acquiescence after every answer. Occasionally one of the associates wrote a suggestion and handed it to the president, and once or twice the defendant's counsel asked the court to put a certain inquiry. The whole proceeding—and the same may be said of those in several other courts I visited—was conducted in a quiet, colloquial way. In every instance I was impressed with the simple businesslike atmosphere. The judges were proceeding without any fuss; the counsel while respectful in manner, were very direct and easy in speech, making but few suggestions, and the whole burden of conducting the case seemed to fall on the presiding judge, even his associates seldom interfering.

Some of the Japanese lawyers with whom I have talked say that they feel that very often the court does not elicit all the facts, and that our system of having witnesses questioned by counsel would be better; but, on the other hand, some lawyers maintain that better results are realised by the system, which puts upon the court the duty of getting at the truth, maintaining that the witnesses are more apt to talk frankly to the court than to the lawyer for the opposite side who is engaged, as they think, in trying to make them out liars. Of course, as I could not understand the language, I could only get a general impression derived from closely scanning the faces and the manner of the participants in the trials. In all of the eight or ten courts

visited during the day, the same atmosphere prevailed, and so far as I could judge the court was patiently, impartially, and quietly probing the witnesses produced and finding out what they had to tell about the transaction in question. After the evidence is all in, and counsel have summed up, the court deliberates and agrees upon its judgment, which must be formulated in definite written findings of fact, followed by a statement of the legal conclusions resulting from them.

The System's Merits and Defects.

The judges whom I saw were worthy young men. They are appointed for life, but they receive small salaries, and I am told that many of them after eight or ten years' service on the bench resign and take up the practice of the law for which their judicial experience is considered as especially fitting them. The work of the bar is largely litigation, as, it seems, the people in Japan have not yet formed the habit of taking advice of counsel with regard to questions of law before getting into lawsuits. In one of the courts, the lawyers representing both sides were standing before the court as we entered, and after a general colloquy with the presiding judge lasting a few moments they bowed and retired. "It is a suit against a corporation for breach of some technical provision of the law," explained my companion, "and the counsel for the defendant wishes time to make sure what he shall say about it, and the judge, he says, 'Yes, you may take some short time for that purpose.'" "I have heard of similar incidents in our American procedure," I replied. "When you don't know quite what defence to make, you ask for delay." Human nature is the same, despite differences of race, creed, and language, and courts of all civilized countries have much in common. I came away quite favourably impressed with what I saw, and wondering whether, on the whole, in 95 per cent. of the cases, a decision by three judges, trained in the investigation of facts, would not be as nearly right as the verdict of twelve citizens casually gathered in from the general community.

I hear, and read in the English newspapers published in Japan, the complaint that in criminal cases the judges of the trial courts are too much influenced by the reports of the examining magistrates, or judges d'instruction, and that if the *procés d'instruction* develops evidence strongly adverse to the prisoner, it is almost impossible for him to escape conviction on trial. The instruction is, of course, *ex parte,* and a case may readily be built up against a prisoner, which on trial would not stand the test of cross-examination. But just here comes in the weakness of the Japanese system. There is no cross-examination, except such as the court chooses to adopt, and hence an impression of guilt derived from reading the record of the *procés d'instruction* may well determine the course of the presiding judge in adopting or refusing to put a suggested line of questioning to a witness. I do not pretend, however, to have formed any definite opinions concerning Japanese legal procedure from one day spent in their courts, but it has occurred to me that possibly an account of my visit might interest some of your readers.—*Case and Comment.*

We are told that Lord Haldane will probably resign from the British Cabinet. The public do not appear to be satisfied that he has those strong views in reference to the war between Germany and England, that is desirable at the present crisis. The evidence so far seems to run in that direction. These are not days that any flabby, am-not-quite-sure views of Germany's past and present attitude, and the needs of the British Empire are desirable in those occupying prominent positions in the Government. What is wanted in these days is the strong, robust British feeling and intelligent apprehension of things displayed by such patriotic imperialists as Lord Roberts in England, or the late Colonel O'Brien in Canada. These are the kind of men that should be prominent in days like these.

REVIEW OF CURRENT ENGLISH CASES.

TRUST—RESULTING TRUST—FUND RAISED BY SUBSCRIPTION FOR SPECIAL OBJECT — SURPLUS — RESULTING TRUST FOR SUBSCRIBERS—RULE IN CLAYTON'S CASE.

In re British R.C.B. Fund, British Red Cross Society v. *Johnson* (1914), 2 Ch. 419. In this case a fund was raised by subscription for the relief of the sick and wounded in the Balkan war. The fund was applied as far as required and a surplus remained which admittedly belonged to the subscribers by way of resulting trust. The question was how it was divisible. On behalf of some of the subscribers it was claimed, that the rule in *Clayton's* case, 1 Mer. 572, 608, applied, and that, having regard to the way the fund had been applied, the money now on hand must be treated as derived from subscriptions received after November 8, 1912, and belonged to the subscribers who had subscribed after that date. But Astbury, J., held that the rule in *Clayton's Case* had no application to the present case and that the balance belonged to all of the subscribers in the proportion of the amounts respectively subscribed by them.

WILL—LEGACY—ADEMPTION—BEQUEST FOR PURCHASE OF LAND FOR BENEFIT OF PARISH— —SUBSEQUENT PURCHASE OF LAND FOR LIKE PURPOSE—SUBSEQUENT CONFIRMATION OF WILL BY CODICIL.

In re Aynsley Kyrle v. *Turner* (1914), 2 Ch. 422. In this case the question was whether a certain legacy in a will had been adeemed. The facts were that the testator, by his will, dated 31 December, 1904, bequeathed a legacy of £500 to trustees on trust to purchase land in Madley to be used as a glebe for the vicarage of the parish church of Madley, and declared that he made the bequest in pursuance of the expressed wish of his wife. His wife died in 1896, and he had told the vicar of the parish that he intended to do something for the parish in her memory, and that she would have liked best that it should be a gift of a piece of land known as St. Mary's Meadow. In 1905, the vicar, having heard that this meadow was for sale, informed the testator, and he purchased it for £375 and conveyed it to trustees for the parish in augmentation of the endowment, the deed reciting that the testator had purchased the land for the parish in memory of

his wife. On 17 November, 1911, he made a codicil, and, without making any alteration in the above-mentioned bequest, gave certain additional legacies and otherwise confirmed his will. Joyce, J., who tried the action, considered that there was no inconsistency between the bequest, and the gift *inter vivos*, the latter being the gift of a particular piece of land which had been discussed before the will was made and might have been an act of spontaneous bounty on the part of the testator quite independent of the legacy, or of any moral obligation he might feel to fulfil his wife's request to do something for the parish; and the subsequent confirmation of the will after the gift had been made, though not of itself decisive of the question, was at all events entitled to consideration as turning the scale when there is any doubt.

COMPANY—DIRECTORS—CONTRACT WITH ANOTHER COMPANY IN WHICH A DIRECTOR HOLDS SHARES—SHARES HELD BY DIRECTOR IN TRUST—NOTICE OF IRREGULARITY—RESCISSION.

Transvaal Lands Co. v. *New Belgium etc. Co.* (1914), 2 Ch. 488. This was an action to set aside two transactions between the plaintiff and defendant companies, on the ground that the resolutions by which they were authorized were invalid because of the personal interest of two of the directors in the subject matter of the transactions. The articles of the plaintiff company provided that "no contract or arrangement entered into on behalf of the company with any directors, or any firm of which a director is a member, shall be avoided, nor shall such directors be liable to account to the company for any profit realized by any contract or work by reason of such directors holding that office or of the fiduciary relation thereby established, provided he discloses the nature of his interest; but no director shall vote in respect of any contract in which he is concerned." The transactions in question were, (1) a contract by the plaintiff company to buy certain shares of a third company held by the defendant company; and (2) a contract to sell certain forfeited shares of the plaintiff company to the defendant company. Two of the directors of the plaintiff company were also directors of the defendant company. One of them (Samuel) did not vote as "being a director" of the defendant company. The other (Harvey), who held shares in the defendant company in trust for his wife and another, did vote in favour of the resolutions, and without his vote there would have been no quorum. The plaintiff company subsequently discovered that the director, Samuel, who did not vote, held about

a fifth of the shares of the defendant company, and the Court held that the defendant company had failed to establish that notice of the extent of his interest had been disclosed. The question, therefore, as stated by the Court of Appeal, was this: Can a director of a company on behalf of the company buy shares or other property from himself, or from a company in which he is pecuniarily interested? This question the Court of Appeal (Cozens-Hardy, M.R., Eady, L.J., and Pickford, J.) answer in the negative, unless the articles expressly allow it to be done. But the Court was of the opinion that the article above referred to was not wide enough to do so, and that it was immaterial that Harvey held the shares in the defendant company as trustee. Having voted for both transactions, and there not being a quorum without his vote, both transactions were declared invalid and rescinded, there being no difficulty in restoring the *status quo*. The judgment of Astbury, J., who tried the action, was therefore affirmed.

LANDLORD AND TENANT—LEASE—COVENANT TO BUILD—COVENANT TO REPAIR—COVENANT TO DELIVER UP—WAIVER OF COVENANT TO BUILD—RE-ENTRY—MEASURE OF DAMAGES.

Stephens v. *Junior Army and Navy Stores* (1914), 2 Ch. 516. This was an action by a lessor against lessees for breach of covenants to build and repair, and claiming a right to re-enter. The lease was dated 20 September, 1901, and the covenant to build provided that the contemplated building was to be erected on or before 1 July, 1911, and to cost not less than £2,000. The lease also contained a covenant to repair existing buildings and buildings covenanted to be erected. There were no buildings on the land and no building was erected pursuant to the covenant, but the plaintiff, after the 1 July, 1911, accepted rent, and thereby waived the covenant to build. The defendants denied the right of re-entry, and pleaded that they had tendered the rent which the plaintiff refused to accept, but they offered to determine the lease and deliver up possession, which the plaintiff refused. Joyce, J., who tried the action, gave judgment for the plaintiff for possession and for £2,000 for breach of the covenant to build. On appeal, it was contended for the defendants that the measure of damages was not £2,000, but the loss which the plaintiff had actually sustained. On the plaintiff's part it was contended that though the covenant to build was waived, the covenant to repair was in effect also a covenant to build, and that there was a continuing breach of that covenant for which the plaintiff was

entitled to £2,000 as damages. The Court of Appeal (Cozens-Hardy, M.R. and Eady, L.J., and Pickford, J.) reversed the decision of Joyce, J., holding that there being an express covenant to build, an implied covenant to build did not arise on the covenant to repair, and therefore that no right of re-entry had arisen. Consequently, so far as the claim to possession was concerned, the action was dismissed; but a reference was directed to inquire what damages the plaintiff had sustained by reason of the breach of the covenant to build, such damages to be assessed on the footing that the lease was still subsisting, and that the plaintiff had not established a right to re-entry.

VENDOR AND PURCHASER—CONTRACT—ENJOYMENT OF LIGHT—AGREEMENT PREVENTING ACQUISITION OF RIGHT TO LIGHT—NON-DISCLOSURE—SPECIFIC PERFORMANCE—FORCING TITLE ON PURCHASER.

Smith v. *Colbourne* (1914), 2 Ch. 533. This was an action for the specific performance of a contract for the sale of land and buildings. On investigating the title, the purchaser discovered that an agreement had been made by the predecessor in title of the vendor whereby certain windows affording light to the premises had been kept open by agreement with the owner of adjoining property. This agreement had not been disclosed to the purchaser, and it was claimed that it amounted to a material mis-description of the premises of such a character as to relieve the defendant from his purchase. Astbury, J., who tried the action, gave effect to the objection and dismissed the action with costs, but the Court of Appeal (Cozens-Hardy, M.R., Eady, L.J., and Pickford, J.) reversed his decision. The contract in question was contained in a lease in which there was no mention of the windows, and the Court of Appeal held that in such circumstances there was no implied warranty that *de facto* windows were ancient lights. That the agreement which prevented the statutory period of prescription from beginning to run did not constitute an incumbrance on the property, and there was no obligation on the part of the vendor to disclose its existence. The Court, moreover, held that the title was not too doubtful to be forced on an unwilling purchaser.

EXPROPRIATION OF LAND—PAYMENT OF COMPENSATION INTO COURT—COSTS OCCASIONED BY PAYMENT INTO COURT—COSTS OF PROCEEDINGS FOR PAYMENT OUT OF COMPENSATION—LAND CLAUSES CONSOLIDATION ACT (8-9 VICT. C. 18), S. 80—(RAILWAY ACT, ONT. (R.S.O. C. 185), S. 90 (26)—RAILWAY ACT, CAN. (R.S.C. C. 37), S. 214 (5)—MUNICIPAL ACT (R.S.O. C. 192), S. 329 (4).)

In re Griggs (1914), 2 Ch. 547. In this case land had been expropriated by the predecessors of the London County Council, and the purchase money had been paid into Court under the provisions of the Land Clauses Consolidation Act, which provides that the expropriators are to pay the costs of the investment of the moneys, the payment of dividends on the investment, and of "all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants." In order to obtain payment of the money out of Court it became necessary to obtain letters of administration to two persons' estates. Astbury, J., held that the cost of obtaining such letters were part of the costs payable by the expropriators, and the Court of Appeal (Cozens-Hardy, M.R., Eady, L.J., and Pickford, J.) affirmed his decision.

SHIPPING—STEERAGE PASSENGER—CONTRACT TICKET—"FORM APPROVED BY BOARD OF TRADE"—"CONTRACT NOT TO CONTAIN ON FACE THEREOF ANY CONDITION, STIPULATION OR EXCEPTION NOT CONTAINED IN THE FORM"—QUALIFYING CONDITIONS ON BACK OF TICKET—EXCEPTION NOT APPROVED BY BOARD OF TRADE—MERCHANTS SHIPPING ACT, 1894 (57-58 VICT. C. 60), S. 320.

Ryan v. *The Oceanic Steam Navigation Co.* (1914), 3 K.B. 731. This and three other cases included in this report arise out of the loss of the *Titanic*. The plaintiffs were the representatives of deceased steerage passengers suing under the Fatal Accidents Act. The Merchants Shipping Act, 1894, s. 320, provides that contract tickets issued by shipowners must be in the form approved by the Board of Trade; and the Board of Trade had approved a certain form and directed that a contract ticket "shall not contain on the face thereof any condition, stipulation or exception not contained in this form." On the tickets issued to the deceased passengers there were on the back certain conditions which exempted the steamship company from liability for negligence which, as the Court found, had the effect of varying the implied obligations arising from the conditions on the face of the contract. The jury found that the defendants had been

guilty of negligence, and Bailhache, J., who tried the case, gave judgment in favour of the plaintiffs on the ground that the conditions on the back of the contract not having been approved by the Board of Trade, and being a variation of those on its face, were invalid; and his judgment was affirmed by the Court of Appeal (Williams and Kennedy, L.J., Buckley, L.J., dissenting).

NUISANCE—VARIOUS COMPANIES LAYING MAINS UNDER STREETS—INJURY CAUSED TO MAINS OF ONE COMPANY BY BURSTING OF THOSE OF ANOTHER—APPLICATION OF DOCTRINE OF RYLANDS V. FLETCHER—STATUTE—TWO ACTS TO BE TAKEN AS ONE—CONSTRUCTION.

Charing Cross Electricity Supply Co. v. *Hydraulic Power Co.* (1914), 3 K.B. 772. In this action, plaintiffs, an electricity supply company, and the defendants, an hydraulic power company, had under statutory powers laid their mains in the same street. The defendant company's mains burst without any negligence and injured the plaintiffs' mains, for which cause the action was brought. Scrutton, J., who tried the action, gave judgment for the plaintiffs—(1913), 3 K.B. 442—and his judgment was affirmed by the Court of Appeal (Lord Sumner, Kennedy, L.J., and Bray, J.) on the ground that the doctrine of *Rylanas* v. *Fletcher* (1868), L.R. 3 H.L. 330, applied notwithstanding that the plaintiffs' land was occupied by licence and not under any right of property in the soil, and that in the absence of any statutory authorization of the nuisance the defendants were liable for the escape of the water from their mains. Part of the defendants' mains were laid under an Act which expressly exempted them from liability, and the rest were laid under Acts which contained no such exemption, and which declared that all of the Acts should "be read and construed together as one Act," and it was held that the effect of this provision was to take away the exemption which down to its passing the defendants had enjoyed under the former Act.

NOTICE OF APPEAL FROM JUSTICES—ACCEPTANCE OF SERVICE BY SOLICITOR FOR RESPONDENT—"GIVING NOTICE OF SUCH APPEAL TO THE OTHER PARTY."

Godman v. *Crafton* (1914), 3 K.B. 803. In this case a simple point of practice was involved. An order had been made on an appeal from a case stated by justices in the absence of any one representing the respondent, and the question was raised by the

Master of the Crown Office as to whether the respondent had been duly served with notice. The Act authorizing the appeal provided that the appellant should give "notice of such appeal to the other party." The solicitors who acted for the respondent had accepted service of the notice, and it appeared by evidence that they had authority to give such acceptance. Lord Coleridge, Avery, and Atkin, JJ., held that the service on the solicitor was sufficient, as the Act did not expressly require that the service should be personal.

ILLEGITIMATE CHILD—WILFUL NEGLECT OF CHILD—LIABILITY OF FATHER—PERSON "HAVING CUSTODY, CHARGE AND CARE"——CHILDREN'S ACT, 1908 (8 EDW. VII. c. 67), s. 12 (1); s. 38 (2)—(CRIMINAL CODE, s. 241.)

Liverpool Society for Prevention of Cruelty to Children v. *Jones* (1914), 3 K.B. 813. This was a prosecution under the Childrens' Act, 1908, for neglecting four children. It appeared that the children were illegitimate, and living with their father and mother; and the question raised was whether the father could be made liable under the Act. The Divisional Court (Lord Coleridge, and Avory, and Atkin, JJ.) held that the fact that their mother, who was their sole legal parent and guardian, was living in the house, did not prevent the father from having jointly with her the custody and care of the children within the meaning of the Act, so as to render him liable, if he wilfully neglected them. See Criminal Code, s. 241.

HIGHWAY—PREMISES ABUTTING ON STREET—RIGHT OF ACCESS ADVERTISEMENT ON WALL OF PREMISES—INTERFERENCE WITH RIGHT—DAMAGE—INJUNCTION.

Cobb v. *Saxby* (1914), 3 K.B. 822. In this case the defendant set up a counter claim for relief against the plaintiff for interfering with his access to an outer wall of his premises. The facts were, that the plaintiff and defendant were owners and occupants of adjoining premises both abutting on a street, but the building of the defendant projected a short distance beyond the plaintiff's building. There was no door or opening into this side wall, but it was useful to the defendant for placing advertisements thereon. The plaintiff erected a hoarding so as to prevent the defendant from having access from the street to his wall, which was the grievance complained of. The action was tried by Rowlatt, J., who held that the defendant's right of access to the street as owner of his premises was not limited to the mere right of ingress and

egress from his premises to the street, but included a right of access to his wall (in which there was no door or opening) for the purpose of repair, or for using it as a place for advertisements. The injunction was therefore granted as prayed.

MARINE INSURANCE—RUNNING DOWN CLAUSE—DAMAGE IN CONSEQUENCE OF COLLISION.

France Fenwick & Co. v. *Merchants Marine Insurance Co.* (1914), 3 K.B. 827. This was an action on a policy of marine insurance whereby it was provided "if the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums . . . the company will pay the assured" a certain proportion of the said sums. The facts were somewhat peculiar. The insured ship by negligent navigation collided with a vessel in front of her, causing little damage, but after this collision the other ship (by reason of attractive forces brought in play by the collision, and owing to their proximity, coupled with the wash of the propeller of the insured ship against the starboard bow of the other after the insured ship got ahead of her) came into collision with a third ship to which a large amount of damage was done, and for which the owners of the insured ship were held responsible, and they paid sums in respect of the damage so done to the third ship, which they claimed to recover in the present action; and it was held by Bailhache, J., that the collision with the third ship was a consequence of the collision of the insured ship with the other ship, within the meaning of the clause, and therefore that the defendants were liable.

INSURANCE—RE-INSURANCE—COMPROMISE BETWEEN ORIGINAL ASSURED AND ORIGINAL INSURERS—RE-INSURERS NOT ENTITLED TO BENEFIT OF COMPROMISE.

British Dominion General Ins. Co. v. *Duder* (1914), 3 K.B. 835. This was an action on a policy of marine re-insurance. A total loss having occurred of the vessel insured, the plaintiffs had effected a compromise with the assured, on the original policy of insurance; and the question was, whether, in the absence of any express agreement to that effect, the defendants, the re-insurers, were entitled to the benefit of that compromise; and Bailhache, J., who tried the action, held that they were not, but were liable for the full amount of the re-insurance; but that they were entitled to the benefit of any rights in respect of the abandonment

of the ship insured which they would have had if no compromise had been effected.

CRIMINAL LAW—FIRST DISCLOSURE OF CRIMINAL ACT BY ACCUSED IN CROSS-EXAMINATION AS A VOLUNTARY WITNESS IN COURT PROCEEDING — PROTECTION FROM PROSECUTION — LARCENY ACT, 1861 (24-25 VICT. C. 96), S. 85—(CANADA EVIDENCE ACT (R.S.C. C. 145), S. 5.)

The King v. *Noel* (1914), 3 K.B. 848. By the Larceny Act, 1861, s. 85, a person is exempt from prosecution for larceny if, previously to being charged with the offence, the accused shall have first disclosed such act on oath in consequence of any compulsory process of any Court of Law or Equity. In the present case the offence charged was first disclosed by the cross-examination of the accused as a voluntary witness in a civil proceeding, without any objection on his part; and the Court of Criminal Appeal (Ridley, Coleridge and Scrutton, JJ.) held that this disclosure had not been made in consequence of "any compulsory process" within the meaning of the Act, and consequently that the defendant was not exempt from prosecution: see the Canada Evidence Act (R.S.C. c. 145), s. 5.

PROMISSORY NOTE—NOTE GIVEN FOR GOODS SUPPLIED TO MAKERS OF NOTE—SURETY—ORAL CONTEMPORANEOUS AGREEMENT IN DEFEASANCE OF PROMISSORY NOTE—EVIDENCE.

Hitchings & Coulthurst Co. v. *Northern Leather Co.* (1914), 3 K.B. 907. This was an action against the makers and indorser of a promissory note. The note was given for goods supplied by the plaintiffs to the makers. The indorser set up that he made a contemporaneous oral agreement with the plaintiffs to the effect that if the goods supplied were not equal to sample he was not to be called upon to pay the note. Bailhache, J., who tried the action, held that the agreement, not being in writing, was invalid, and evidence of it therefore inadmissible.

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Ont.] [Oct. 13.

CANADIAN NORTHERN ONTARIO R.W. Co. v. HOLDITCH.

Expropriation—Railway Act — Municipal plan — Severance of lots—Injurious affection—Reference back to arbitrators —R.S.C. 1906, *c.* 37.

For the purposes of expropriation under the Dominion Railway Act, unless lots laid out on the owner's registered plan are so united as to form one complete whole, each lot taken by the railway company is an independent, separate and complete property in itself and the owner is not entitled to compensation for injurious affection to one such lot, no part of which is taken and which is severed from the land expropriated by a railway or by land sold to another person. *Cooper-Esses* v. *Acton Local Board*, 14 App. Cas. 133, distinguished. Duff and Anglin, JJ., *contra*.

The owner of land adjacent to or abutting upon the street over which a railway passes is entitled, by 1 & 2 Geo. V. c. 22, s. 6, to compensation for injury to such land but the compensation can only be awarded by the Board of Railway Commissioners and is not a matter for arbitration under the Railway Act.

Held, *per* Duff and Anglin, JJ.:—The arbitrators appointed to value the land so expropriated are *functi officio* when their award is delivered and an appellate court has no power to remit the matter to them for further consideration. *Cedars Rapids Manufacturing Co.* v. *Lacoste* (1914), A.C. 569, referred to.

Appeal allowed with costs.

Armour, K.C., and *Geo. F. Macdonnell*, for appellants. *Robert McKay*, K.C., for respondent.

Ont.] NORFOLK v. ROBERTS. Oct. 14.

Municipal corporation—Undertaking with ratepayer—Non-collection of taxes—Discretion.

Held, *per* Idington and Anglin, JJ.:—Where there is no stat-

mory prohibition thereof it is not illegal for a municipality in the *bonâ fide* exercise of its discretion, and to carry out an undertaking with a ratepayer, to refrain from collecting the taxes levied on the latter's property over and above a fixed annual sum stipulated for.

Per Duff and Brodeur, JJ.:—A ratepayer has no status to maintain an action to compel the municipality to collect the balance of such taxes.

Judgment of the Appellate Division, 28 O.L.R. 593, affirmed.

W. N. Tilley, for the appellant. *Armour*, K.C., for the respondent.

Que.] HYDE v. WEBSTER. [Oct. 13.

Partnership—Lease—Scope of Authority—Resiliation—Form of action—Appropriate relief—Pleading—Practice.

A partnership, consisting of H. and W. which was to expire by effluxion of time on 31st December, 1912, held a lease of warehouse property in Montreal, of which the term expired on the 30th April, 1913. During the absence of H., in September, 1912, and without authority from him to do so, W. obtained a renewal of the lease for three years, from the 1st of May then following, which was repudiated by H. on his return to Montreal. In an action by H. to have the renewal lease declared null and void, there was no evidence to shew that the partnership had profited by the renewal lease at the time the action was brought.

Held (The Chief Justice and Brodeur, J., dissenting), that the plaintiff had a sufficient interest to enable him to maintain the action and obtain a declaration that the lease was not binding upon the partnership or upon himself as a member of the firm.

Per Fitzpatrick, C.J., dissenting. In the Province of Quebec distinct and consistent pleading is essential and, as the plaintiff did not bring his action to obtain relief from his obligation under the renewal lease, but merely to have that lease declared null and void, he could not, in the action as brought, have a declaration that the lease was not binding. *Forbes* v. *Atkinson* (Pyke, K.B., 40), referred to.

Per Brodeur, J., dissenting. As the evidence shewed that the renewal of the lease had been obtained in circumstances

where such renewal was necessary in the interests of the partnership, the partner who obtained the lease was acting within the scope of his authority as a member of the firm and the lease was valid and a subsisting asset of the partnership.

Appeal allowed with costs.

Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin, and Brodeur, JJ.

Bench and Bar

Judicial Appointments.

James McKay, of Prince Albert, in the Province of Saskatchewan, K.C., to be a Judge of the Supreme Court of Saskatchewan, with the style and title of a Justice of the Supreme Court of Saskatchewan, vice Thomas Cooke Johnston, resigned. (December 16, 1914.)

Leeds and Grenville Law Association.

At a meeting of the Association held on December 28, 1914, resolutions were passed to place on record its great appreciation of the services to the administration of justice and the profession of Oliver Kelly Fraser, Esquire, who for over fourteen years was Local Registrar of the Supreme Court, Registrar of the Surrogate Court and Clerk of the County Court. After a bright professional career of some years he assumed these offices in his full and vigorous manhood and brought to the discharge of his duties a keen intellect, great executive ability and a high moral standpoint. He filled the offices with credit to himself and satisfaction to the public and the profession. His courtesy to the public and his kind and genial manner will long be remembered by his old friends and associates and surpassing these will be our recollection of the brave manner in which he fought against a mortal disease and in weakness and suffering was cheerful to the end. Resolutions were also passed expressing sympathy with Mrs. Fraser and the family in the great loss which they had sustained, and that the Association attend the funeral of the late Mr. Fraser in a body.

The funeral took place on Dec. 29 and was largely attended.

Obituary.

THOMAS LANGTON, K.C.

On the 10th day of December, 1914, the profession lost in Mr. Thomas Langton a man of rare abilities. He was not only a sound and accurate lawyer but a man of cultivated taste, an adept as a botanist, artist and photographer, and was moreover of a sweet and gentle disposition which made him beloved by all who had the good fortune to be on the list of his friends. He was the son of Mr. John Langton, a man who distinguished himself for many years in the public service, as the Government Auditor. He was born in 1849 and was in his 66th year at the time of his death. He was a graduate of Toronto University, receiving his degree of M.A. in 1871, was called to the Bar in 1872, and was made a Q.C. 1890. He practised for many years as a partner of Sir Oliver Mowat and the Hon. Jas. Maclennan and on their retirement became head of the firm of Mowat, Langton and Maclennan. Early in his professional career he became associated with Mr. Holmested as co-editor of the Judicature Act and Rules, of which three editions were published. Mr. Langton was never of a very robust physique, a drawback which prevented him from essaying jury business, but before the Courts at Osgoode Hall he was heard with appreciation as a man whose law was sure to be sound. For the last eighteen months a distressing malady removed him from the sphere of active labour. Even to his recreation he could impart a philosophic turn, as may be seen from his lines on the game of golf to which he compares to the game of life, and in which may be found, mingled with a sweet seriousness, a graceful and piquant wit. To those who play the game, and can appreciate a good thing, no apology is needed for reproducing them here.

"What is thy Life? A ball! Teed smooth and clean,
In high hope driven towards the distant green,
Now topp'd, now fairly hit; and as it flies
Where hazards many are, encountering lies
That hang, and cups that baffle—should thy ball
Through foozle or ill-fate into a bunker fall
What boots it to despond? A stroke (or more) delivered lustily
Will lift it scored and blacken'd though it be
To the fair green beyond.

Tho' stymies foil, and 'pull' and 'slice' combine
To far divert it from the perfect line,
Serenely followed through in varied loft and role
'Twill reach (with few or many putts) the final hole.

This little *jeu d'esprit* he cleverly illustrated with his own pen, demonstrating thereby both his literary and artistic ability. Alas! for his friends the game is o'er, he played it as becometh a good golfer, in an honest and true-hearted way.

War Notes.

Our readers will appreciate the preservation in a permanent form for future reference the remarkable poem well known under the name of "The Day," by Henry Chappell, a railway porter at Bath. Nothing finer as a denunciation has ever appeared in the English language. Its appropriateness at this time is manifest to all:—

You boasted the Day, and you toasted the Day,
And now the Day has come,
Blasphemer, braggart, and coward all,
Little you reck of the numbing ball,
The blasting shell, or the "white arm's" fall,
As they speed poor humans home.

You spied for the Day, you lied for the Day,
And woke the Day's red spleen,
Monster, who asked God's aid Divine,
Then strewed His seas with the ghastly mine;
Not all the waters of all the Rhine,
Can wash thy foul hands clean.

You dreamed for the Day, you schemed for the Day,
Watch how the Day will go,
Slayer of age and youth and prime,
Defenceless slain for never a crime,
Thou art steeped in blood as a hog in slime,
False friend and cowardly foe.

You have sown for the Day, you have grown for the Day,
Yours is the harvest red,
Can you hear the groans and the awful cries?
Can you see the heap of slain that lies,
And sightless turned to the flame split skies,
The glassy eyes of the dead?

You have wronged for the Day, you have longed for the Day
That lit the awful flame.
'Tis nothing to you that hill and plain,
Yield sheaves of dead men amid the grain,
That widows mourn for their loved ones slain,
And mothers curse thy name.

But after the Day, there's a price to pay,
For the sleepers under the sod,
And He you have mocked for many a day,
Listen, and hear what He has to say,
"Vengeance is Mine, I will repay,"
What can you say to God?

The following extract from an article in an English contemporary throws light on the Prussian character and the attitude of Germany towards other nations:—

"To-day Prussia stands to the modern world in almost precisely the same position as the barbarians stood towards Rome. She is still pagan at heart; the work of the Teutonic knights evangelised only the surface of her people, who still remain, as any student of Comparative Religion can testify, the greatest repository of heathen traditions.

The 'Kultur' and ideals of her rulers and people remain to this day those of Genseric and his hordes; and 'the good old God of Prussia,' to whom the Kaiser makes frequent reference, is neither more nor less than Odin under another name. Their triumph would draw over the world a moral and intellectual night as dark as that which followed on the sinking of the sun of Rome, and all the forces of progress are vitally concerned in preventing that triumph."

Q. Why may we expect a failure in the crops next year?
A. Because in all probability there will be no Germ(—)nation.