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CONSIDERATION AND COMPOSITIONS WITH CREDITORS.

In the Law of Contract the doctrine of consideration often creates difficulties, and the application of this doctrine sometimes has strange results. Now we have had no satisfactory explanation of agreements of composition between debtors and their creditors. That this is so is recognized by high judicial authority for Lord Fitzgerald said in the well-known case of *Foakes* v. *Beer*[1]: "I concur with my noble and learned friend that it would have been wiser and better if the resolution in *Pinnel's* case[2] had never been come to, and there had been no occasion for the long list of decisions supporting composition with a creditor on the rather artificial consideration of the mutual consent of other creditors."

Before discussing the cases which directly bear upon this question, we should do well to remind ourselves of the following two principles of English law:—

1. It is well settled that if A owes B £10 and B agrees (otherwise than by deed) to take £5 in money at the same time and place as the £10 are payable in settlement of his claim, then, in spite of the £5 having been paid B can still sue A for the balance.[3] The House of Lords in *Foakes* v. *Beer*[4] gave effect to this rule but with considerable reluctance. Lord Blackburn thought the rule originated in a mistake, or in a dictum, in *Pinnel's* case.[5] "Communis error facit jus."

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1. 1884, 9 A.C. 605, at page 630.

2. 1602, 5 Rep. 117*a*.

3. *Cumber* v. *Wane*, 1718. 1 Str. 426, though the actual decision in this case cannot now be supported; see Smith's Leading Cases, vol. I. p. 349; and Sir William Anson's Law of Contract, 12th edition, p. 104.

4. 1884, 9 A.C. 605.

5. 1602, 5 Rep. 117*a*. Cf. *Lynn* v. *Bruce*, 1794, 2 H. Bl. 317, 3 R.R. 381; *Underwood* v. *Underwood*, 1894, P. 204; and *Couldery* v. *Bartrum*, 1881, 19 C.D. 394, per Jessel, M.R.

2. There is a maxim: "Res inter alios acta aliis neque prodesse neque nocere potest." Hence, if A owes B £10, and he also owes C £20, then, if B and C agree by a contract to which they alone are parties that they will accept ten shillings in the pound from A in settlement of their claims against him, it would seem that A could not plead this contract in an action brought against him by either B or C to recover the whole of his debt[6]. But suppose A and B and C are parties to a contract not under seal whereby B and C agree to accept ten shillings in the pound from A in settlement of their claims against him—what then? Is there any consideration moving from A for B's or C's agreement to forgive him a part of his debt? Is there a contract (implied or otherwise) between B and C that neither will sue A for the whole of his debt[6a]? If there is such a contract, can A avail himself of it? What is the effect of such a contract upon the original debts?

It is interesting to study the manner in which different judges have faced these difficulties.

In 1787 the case of *Heathcote* v. *Crookshanks* arose.[7] The defendant set up an agreement (apparently not under seal) between himself and his creditors that they would accept a composition in satisfaction of their respective debts, to be paid in a reasonable time. He also pleaded tender of the composition: The plaintiff was one of those creditors, and yet he obtained judgment in his favour.

Ashhurst, J., said: "The only question is whether his promise by the plaintiff to take a less sum than the whole demand was obligatory on the party ab origine or whether it was a nudum pactum for want of consideration. I am clearly of

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6. Compare *Price* v. *Easton*, 1833, 4 B. & Ad. 433, and *Tweddle* v. *Atkinson*, 1861, 1 B. & S. 393.

6a. If six persons who are tenants in common of a piece of land contract to sell the land, is there a contract (implied or otherwise) between these six persons that each and all will carry out the Contract of sale? Can one of the vendors obtain specific performance against any or all of the others?

7. 2 T.R. 24.

opinion that it was a nudum pactum in its creation. . . . This agreement is not binding in law: the plaintiff is always entitled to the whole demand; and therefore as this agreement has not been followed up by an actual acceptance, which is negatived by the record, it was not obligatory." Buller, J., said: "It has been said by the defendant's counsel that in effect by this agreement the debt was ascertained, a fund was provided for the payment of it, and all the creditors were bound to forbear. If the fact had been so, that might have been a good plea; but the reverse appears by the defendant's plea. Secondly, no fund is appropriated for the payment of the debt. If the debtor had assigned over all his effects to a trustee, in order to make an equal distribution among all his creditors, that would have been a good consideration in law for the promise; but no such fact appears in this case. Thirdly, it was said that all the creditors were bound by this agreement to forbear; but that is not stated by the plea. It is only alleged that they agreed to take a certain proportion; but that is a nudum pactum unless they had afterwards accepted it."

In *Cockshott* v. *Bennett*,[8] decided in 1788, the defendants, being considerably indebted to the plaintiffs, and to several other creditors, and being insolvent, assigned over all their effects in trust to pay 11s. in the pound to their creditors, to which they all consented and signed the deed; but the plaintiffs did not sign until the defendants had given them a note for the remaining 9s. in the pound. The defendants made a subsequent promise to pay it. The plaintiffs sued them upon it, but it appeared that the rest of the creditors would not have signed the deed, unless the plaintiffs did so likewise, and so judgment was given for the defendants on the ground that the note was fraudulently obtained. Ashhurst, J., in the course of his judgment makes this interesting statement: "The debt was annihilated by the deed of composition." It will be observed at once that the plaintiffs did not sue upon their original contract, and that neither the validity nor the effect of the

8. 2 T.R. 763, 1 R.R. 617.

deed of composition was discussed save in the above remarkabl. words of Ashhurst, J. The judges were much impressed by the fraud which had been committed by the plaintiffs upon the other creditors in concealing from the latter the fact that they had made arrangements to receive payment of their claims in full. The principle involved in this case was recognised in *Jackson* v. *Lomas*, 1791[9]; *Sumner* v. *Brady*, 1791[10]; *Feise* v. *Randall*, 1795[11]; *Leicester* v. *Rose*, 1803[12]; *Wheelwright* v. *Jackson*, 1813[12a]; *Wells* v. *Girling*, 1819[12b], and *Mallalieu* v. *Hodgson*, 1851[12c].

The next important case which arose for decision was *Butler* v. *Rhodes*, 1794[12d]. The plaintiff sued in assumpsit for goods sold and delivered. The defendant stated that he had proposed to his creditors to pay them a composition of 10s. in the pound and for that purpose to execute an assignment of all his effects to trustees for their benefit, that the plaintiff had consented to accept the composition, and had ordered a draft of the deed of assignment to be sent to his attorney for his perusal, which had been done, and his attorney had accordingly perused and approved it on his behalf; that in consequence the deed had been executed by the defendant, but that the plaintiff had refused to execute the deed. Lord Kenyon, Ch. J., ruled that this evidence was a complete answer to the plaintiff's action, and said that in consequence of this act of the plaintiff's the defendant had parted with all his property, and the other creditors had been induced to execute the deed[12e].

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9. 4 T.R. 166.

10. 1 H. Bl. 647. See the judgment of Lord Loughborough.

11. 6 T. R. 146.

12. 4 East. 372.

12a. 5 Taunton. 109.

12b. 1 Brod. & Bing. 447.

12c. 16 Q.B. 689, 83 R.R. 679; cf. *Fawcett* v. *Gee*, 1797, 3 Anstr. 910; *Carey* v. *Barrett*, 1879, 4 C.P.D. 379, per Lord Coleridge, C.J., and *Lewis* v. *Jones*, 1825, 4 B. & C. 506, 28 R.R. 360, per Bayley, J.

12d. Esp. 236; cf. *Brady* v. *Sheil*, 1807, 1 Camp. 147; and *Cork* v. *Saunders*, 1817, 1 B. & Ald. 46.

12e. Cf. *Tatlock* v. *Smith*, 1829, 3 Moo. & P. 676.

The next case to be studied is *Steinman* v. *Magnus*, 1809.[13] The defendant being in failing circumstances, the following agreement (not under seal) was entered into and signed by 17 creditors, the names of the plaintiffs being at the bottom of the lists: "We the undersigned, being respectively creditors of Moses Magnus, do hereby agree for ourselves respectively to take and accept £20 per cent. in full payment and satisfaction for our several and respective debts due at the date hereof; and upon payment of the said £20 per cent. we hereby release and for ever discharge the said M. Magnus for ever (sic) as to the remaining £80. And it is hereby agreed to receive the said £20 per cent. in manner following: viz., £5 per cent. secured by the acceptance of Mr. Garland. . . ." The plaintiffs were paid the £20 per cent. due to them, but brought this action for the recovery of the balance of their original claims. Judgment was given for the defendant. Lord Ellenborough, C.J., said: "It is true that if a creditor simply agree to accept less from his debtor than his just demand, that will not bind him; but if upon the faith of such an agreement a third person be lured in to become surety for any part of the debts on the ground that the party will be thereby discharged of the remainder of his debts; and still more when, in addition to that, other creditors have been lured in by the agreement to relinquish their further demands, upon the same supposition; that makes all the difference in the case, and the agreement will be binding. In *Fitch* v. *Sutton*[14] our opinion proceeded upon the precise terms of the case as stated to us on the report of the evidence; if the evidence had gone but a very little further, it would have altered our decision. But on the case now presented to us, it would be a mixed question of law and fact to go to the jury, whether, after the plaintiffs had entered into

13. 11 East. 390; cf. *Lewis* v. *Jones*, 1825, 4 B. & C. 506, 28 R.R. 360, per Holroyd, J.; *Cooling* v. *Noyes*, 1795, 6 T.R. 263 is of no assistance for the plaintiff succeeded on the ground of misrepresentation: see the judgment of Lord Kenyon, Ch. J. It is useless to quote *Fitch* v. *Sutton*, 1804, 5 East. 230, for the plaintiff proved that the defendant had promised to pay him the balance when of ability.

14. 1804, 5 East. 230.

this composition in conjunction with Garland and the other creditors, it were not a fraud upon those persons, within the principle of the case of *Cockshott* v. *Bennett*,[15] to endeavour to obtain a further payment from the defendant whom they all purposed to liberate upon the terms of that agreement.''[16] Now, the plaintiffs in this case were suing upon their original contract, and this circumstance (among others) distinguishes the case from *Cockshott* v. *Bennett*. Lord Ellenborough, therefore, seems to be extending the principle involved in the latter case, but three years afterwards, he appears to take a different view in *Boothbey* v. *Sowden*, 1812.[17] The creditors of the defendant signed an agreement (not under seal) as follows: "We the undersigned creditors of Robert Sowden of Exeter do hereby agree to grant him 3, 6, 9 and 12 months on the amount of our respective demands and to take his notes payable in London for the said amount, provided the rest of the creditors will do the same. 14th February, 1811." Lord Ellenborough in the course of his judgment said: "*There was a sufficient consideration for each of the creditors entering into this agreement that it was subscribed by all the others.* If the plaintiffs could shew that the defendant had refused to give them the notes according to the terms of the agreement, they might be remitted to their original remedy. But I think that remedy is suspended by the agreement, unless an infraction of the

15. Vide supra.

16. Cf. *Ex p. Milner*, 1885, 15 Q.B.D. 605.

17. 3 Campb. 175; cf. *Anstey* v. *Marden*, 1804, 1 Bos. & P. (N.R.) 124, 8 R.R. 713 (a case relating to the assignment of debts in which the remarks of Sir James Mansfield, Ch. J., should be noted). In *Bradley* v. *Gregory*, 1810, 2 Campb. 383, 11 R.R. 742, where the plaintiff had agreed to accept a composition and to sign a composition deed and the defendant had undertaken to procure the acceptances of a third person for 7s. in the pound, to give his own notes for 3s. more, to prepare a composition deed with a clause of release and to procure the other creditors to execute it, Lord Ellenborough held that such agreement operated as satisfaction. In *Wiglesworth* v. *White*, 1816, 1 Stark. 218, Lord Ellenborough held that if the creditors had agreed that the defendant should assign all her effects in satisfaction of their debts there would have been accord and satisfaction; but it appeared that the creditors had agreed not to accept less than £238. Hence one of the creditors was allowed to sue for the whole of his original debt.

agreement on the part of the defendant is proved by the plaintiffs.''[17a] The words in italics are most important, for they contain the first reference to the facts that consideration is received by each creditor from the others and that this consideration supports the agreement of composition. This case, however, was not followed in *Cranley* v. *Hillary*, 1813,[18] where the defendant pleaded that the plaintiff had agreed in writing (not under seal) with the defendant and the rest of his creditors that he would take a composition of 8s. in the pound to be secured by promissory notes to be given by the defendant, the same being guaranteed by F. & Co., and that the defendant should assign to the creditors certain debts, upon which they should execute a general release. The agreement was executed by the defendant, and all the other creditors, except the plaintiff, received their composition, and executed a general release. The plaintiff might have received his promissory notes if he had applied for them, but there was no evidence that the defendant had given or tendered them to the plaintiff or that the latter had ever applied for them. The plaintiff sued on a bill of exchange which had been accepted by the defendant before the above agreement was entered into, and judgment was given in his favour. Lord Ellenborough said: ''The rule is, that the person to be discharged is bound to do the act, which is to discharge him, and not the other party.'' Dampier, J., quoted Littleton, S. 340.

In *Wood* v. *Roberts*, 1818[18a] the plaintiff sued for a balance

17a. Cf. *Garrard* v. *Woolner*, 1832, 8 Bing. 258.

18. 2 M. & S. 120; cf. *Reay* v. *White*, 1833, 1 Cr. & M. 748, where, however, the plaintiffs failed for it was held that tender had been waived. Vaughan, B., said, "The defendants have done all that the circumstances imposed upon them," and relied on *Jones* v. *Barkley* 1781, 2 Dougl. 684. The insistence upon the exact performance of the contract on the part of the debtor and the consequent difficulties in pleading may be seen in *Soward* v. *Palmer*, 1818, 8 Taunt. 277; 19 R.R. 515; *Shipton* v. *Casson*, 1826, 5 B. & C. 378; *Cooper* v. *Phillips*, 1834, 6 Tyr. 170; *Deacon* v. *Stodhart*, 1839, 9 C. & P. 685; *Rosling* v. *Muggeridge*, 1846, 16 M. & W. 181; *Evans* v. *Powis*, 1847, 1 Exch. 601; 74 R.R. 777; *Hazard* v. *Mare*, 1861, 6 H. & N. 434. Even equity required strict performance in Lord Hardwicke's time, *Ex. p. Bennet*, 1743, 2 Atk. 527.

18a. 2 Stark. 417.

upon an account stated. The defendant said that the plaintiff having taken possession of the defendant's property some of which he sold, arrangements had been made with different creditors to receive a composition for their respective debts. D. and H., being creditors of the defendant to the amount of £60 agreed to take £30 in discharge of their debt, upon the express condition, on the part of the plaintiff, that he, taking the residue of the property, would also discharge the defendant. D had received £20 part of that sum from the plaintiff, and another creditor had agreed to take 10s. in the pound but without any communication with the plaintiff, and a warrant of attorney which had been given by the defendant to the plaintiff as a security for his debt had been delivered up to the defendant. Abbott, L.C.J. (afterwards Lord Tenterden) held that if the plaintiff had, by his undertaking to discharge the defendant induced any other creditor to accept a composition and discharge the defendant from further liability he could not afterwards enforce his claim, since it would be a fraud upon that creditor.[19]

At length, in 1831 the case of *Good* v. *Cheesman*[19a] was decided, and has since been treated as the leading authority on the subject. It appeared that four of the defendant's creditors of whom the plaintiff was one signed the following memorandum which was not under seal:—"Whereas William Cheesman, of Portsea, brewer, is indebted to us for goods sold and delivered and being unable to make an immediate payment thereof we have agreed to accept payment of the same by his covenanting and agreeing to pay to a trustee of our nomination one third of his annual income, and executing a warrant of attorney as a collateral security until payment thereof. As witness our hands this 31st of October, 1829." The defendant

19. Where the defendant was liable to the plaintiff under a covenant, and several of the defendant's creditors including the plaintiff, agreed by parole to execute a composition deed, it was held that the plaintiff could still sue on the covenant. No reasons are given. *Lowe* v. *Egington*, 1819, 7 Price 604.

19*a*. 2 B. & Ad. 328, 36 R.R. 574.

had obtained possession of this paper and had procured it to be stamped, but he never signed it. Another of his creditors, one Gloge, never acceded to this agreement, nor was any trustee ever appointed, or covenant entered into, or warrant of attorney executed as therein mentioned. The plaintiff brought an action against the defendant for the whole of his original claim, but the jury found that the agreement was absolute and judgment was given for the defendant. Lord Tenterden, C.J., said that there was not an accord and satisfaction properly and strictly so called, but that it was a consent by the parties signing the agreement to forbear enforcing their demands *"in consideration of their own mutual engagement of forbearance."* He then proceeded thus. "Then is not this a case where each creditor is bound in consequence of the agreement of the rest? It appears to me that it is so, both on principle and on the authority of the cases in which it has been held that a creditor shall not bring an action where others have been induced to join him in a composition with the debtor, each party giving the rest reason to believe that, in consequence of such engagement his demand will not be enforced. *This is, in fact, a new agreement, substituted for the original contract with the debtor, the consideration to each creditor being the engagement of the others not to press their individual claims."* Parke, J.,[20] evidently took the same view when he said: *"Here each creditor entered into a new agreement with the defendant, the consideration of which to the creditor was a forbearance by all the other creditors who were parties, to insist upon their claims.* Assumpsit would have lain on either side to enforce performance of this agreement"; and so did Patteson, J., who said: *"The agreement was entered into by him (that is, the plaintiff) on a good consideration, namely, the undertaking of the other creditors who signed the paper at the same time with him, on the faith which everyone was induced to entertain of a forbearance by all to the debtor."* Littledale, J., in the course of his judgment observed; "This is not strictly an accord and

20. Afterwards Lord Wensleydale.

satisfaction or a release but it is a new agreement between the creditor and debtor, such as might very well be entered into on a valid consideration. It was not necessary in this particular case that there should be an actual assignment or execution of a warrant of attorney, if it only rested with the plaintiff and the other creditors that the contract should be carried into effect, and the defendant was always ready to do his part, it is the same as if he had actually executed an assignment or warrant of attorney." This case, therefore, is different from *Heathcote* v. *Crookshanks*.[21] In the course of counsel's argument, Parke, J., had said: "It did not appear by the pleadings in that case (that is, *Heathcote* v. *Crookshanks*) that the creditors agreed to forbear. Here it may be inferred that they did."

It is submitted, that, quite apart from any contract there may have been among the creditors themselves, there was a sufficient consideration moving from the defendant for the plaintiff's promise to forgive him a part of his full claim, namely, the defendant's promise to do three things, that is, (*a*) to enter into a covenant; (*b*) to pay certain moneys to a trustee to be nominated by creditors; and (*c*) to execute a warrant of attorney. The judges were clearly not inclined to follow *Heathcote* v. *Crookshanks*, but the authority of that case was not completely shattered until 1884, when Lord Blackburn referred to it in *Foakes* v. *Beer*[22] and said: "That decision goes entirely on the ground that accord without satisfaction is not a plea. The plea there pleaded would, I think, now be held perfectly good, see *Norman* v. *Thompson*,"—a case to be discussed presently.

The principle involved in *Good* v. *Cheesman* was adopted by Tindal, C.J., who, in giving the considered judgment of the Court of Common Pleas in *Alchin* v. *Hopkins, Clerk*,[23] said:

21. 1787, 2 T.R. 24.

22. 9 A.C. 605.

23. 1834, 1 Bing. N.C. 99, 41 R.R. 574. The agreement was not under seal.

"For the principle on which such an agreement is held to operate as an answer to an action by a creditor who has come into it, is, that there has been a substitution of a new agreement, by mutual consent, and on good consideration in the stead or place of the old contract."[24] This may be true but we are not told what the consideration consists of or who gives it.

In *Reay* v. *Richardson*, 1835,[24a] the plea of the defendant failed for the following reason which was given by Bolland, B.: "It appears on the plea, that there were other creditors, who it was intended should become parties to the agreement; but the plea does not state that they did so. The consideration for the agreement, therefore, failed, and neither of the parties are bound." Lord Abinger, C.B., makes the following interesting statements: "The consideration for the plaintiffs entering into such an agreement would be the benefit derived to the defendant from his being exonerated from the claims of the general body of his creditors; but if that object is not obtained, why are the plaintiffs and Sir W. H. Richardson to be bound to take the composition? If, indeed, the main object of the agreement has been obtained, by the principal part of the creditors assenting to it, but some one creditor has refused his assent, it may be binding upon the others. Upon that, however, I offer no opinion, though I have always considered that there ought to be evidence of the assent of all the creditors to the arrangement."

In *Norman* v. *Thompson*, 1850,[25] Pollock, C.B., said: "The first question is simply whether an agreement between less than

24. Nevertheless, the agreement in this case was held void under 13 Eliz. C. 20, which prohibits "All chargings of any benefice with cure, with any pension or any profit out of the same, to be yielded or taken;" and it was unenforceable, because it was not signed by the defendant as required by the Statute of Frauds.

Cf. *Thomas* v. *Courtnay*, 1817, 1 B. & Ald. 1; as to the effect on the original contract.

24a. 2 C.M. & R. 422. The defendant set up a parole agreement. Cf. *Ex p. Bateson*, 1840, 1 Mont., D. & De G., 289, Sir G. Rose's judgment.

25. 4 Exch. 755, 80 R.R. 762. The jury had found that there was a verbal agreement to accept 10s. in the pound by instalments. In *Brown* v. *Dakeyne*, 1847, 11 Jur. 39 the question was whether the plea of composition with creditors had been proved; and the judges held that it had not. See the judgment of Lord Denman.

the whole number of the body of creditors, to accept a composition, is binding upon those parties who enter into that agreement. I do not think there is any ground for doubting that such an agreement is binding. It is a good consideration for one to give up part of his claim, that another should do the same. That position appears to me not to need any authority." Parke, B., speaks to the same effect; but all this does not explain how it is that a debtor who gives no consideration for a creditor's promise to accept less than his just demand in discharge of his claim should be allowed to plead the consideration and promise given by the creditors to one another.

The Exchequer Chamber decided *Boyd* v. *Hind* in 1857.[26] This was an action for goods sold and delivered. The defendant pleaded an agreement between himself and the plaintiff and divers other creditors to accept a composition. It was proved that the defendant called a meeting of his creditors, at which the plaintiff was present, and a composition was proposed but not arranged. A witness, who was clerk to an accountant employed by the defendant stated that he afterwards shewed the plaintiff a composition paper, which had already been signed by some of the creditors, and requested him to sign it also. This paper purported to be a memorandum by which each of the undersigned creditors in consideration of the agreement therein contained on the part of the others, agreed with the others, and also with the defendant, to accept a composition of 10s. in the pound, by approved bills, and on the receipt of such bills to execute a release. The witness said that after looking over the list of creditors, the plaintiff asked if L. had signed, and on being answered in the negative, he said he would not sign till L. had signed. He left the plaintiff with the understanding that he was to get L. to sign and then the plaintiff would sign. The witness afterwards saw L. and explained and procured him to sign the paper, and he afterwards saw the plaintiff and claimed the performance of his promise to sign if L. had signed, but the plaintiff refused to do so. The judg-

26. 1 H. & N. 938, 108 R.R. 909.

ment of the court (Cockburn, C.J., Wightman, Williams, Crompton, Crowder, and Willes, JJ.), was delivered by Williams, J., who said: "It appears to us that there is no evidence whatever that the plaintiff authorised Darby (the witness) as his agent to make any representation to L. as suggested. The proof goes no further than to shew that the plaintiff promised Darby, as the agent of the defendant, that he (the plaintiff) would sign in the event of L. having signed. But even if there were evidence of such authority, so that the plaintiff could be properly said to have induced L. to sign, we think that this would not support either the plea actually pleaded, or any other valid plea which (pursuant to the leave given to amend) could be put on the record. The law with respect to defences founded on composition between a debtor and his creditors appears not to have been distinctly defined until the case of *Good* v. *Cheesman*. It used to be sometimes laid down that a right of action once vested could only be barred by a release, or by accord and satisfaction. But since the decision of that case, the law has been regarded as settled, that a composition agreement, by several creditors although by parol, so as to be incapable of operating as a release, and although unexecuted, so as not to amount in strictness to a satisfaction, will be a good answer to an action by a creditor for his original debt, if he accepted the new agreement in satisfaction thereof; and that for such an agreement there is a good consideration to each creditor, viz., the undertaking of the other compounding creditors to give up a part of their claim." In discussing *Wood* v. *Roberts*, Williams, J., proceeded thus: "But it appears to us that, in substance, the learned judge only ruled (in accordance with the doctrine established some years afterwards in *Good* v. *Cheesman*) that the agreement by the plaintiff to accept the composition was rendered binding on him by reason of the good consideration arising out of the agreement of the other creditors, also to accept it, and that if it were held otherwise it would be a fraud on them." He then referred to *Butler* v. *Rhodes*, and said: "The learned judge appears to have relied chiefly on the

circumstances that in consequence of the act of the plaintiff, the defendant had been led to part with all his property. In the present case the defendant was not induced to alter his position in any way by the promise of the plaintiff to sign the composition paper. The two cases may thus be distinguished . . . For these reasons, we are of opinion that, though the plaintiff may have rendered himself liable to an action on the breach of a promise to sign the composition paper, he has done nothing which can be pleaded as a defence to the present action."

In 1877 an important case in bankruptcy arose for decision, namely, *Slater* v. *Jones*.[27] To an action on a bill of exchange, the defendant pleaded that he summoned a meeting of his creditors in the manner prescribed by the Bankruptcy Act, 1869, and that the requisite majority resolved, "that a composition of 6s. in the pound on the amount of the defendant's debts, whereof 2s. should be payable in 4 months, and 2s. in 8 months and 2s in 12 months from the complete registration of the resolution, should be accepted in satisfaction of the debts due from the defendant to his creditors respectively." There was a replication that the time for the payment of any part of the said composition had not elapsed, and no part of the same had been tendered or paid to the plaintiff. Judgment was given in favour of the defendant. Kelly, C.B., said: "Here the creditors have become bound by a resolution that a composition to be paid by instalments, or at a future time, shall be accepted in satisfaction; and I think that a person who is bound by such a resolution, is also bound, by necessary implication, not to sue the debtor before the time for payment comes, or until default is made. This construction receives confirmation from many of the cases cited, and especially from those referred to by my brother Bramwell, and collected in the second volume of Starkie on Evidence, p. 17, whence it appears that an agreement by

27. L.R. 8 Ex. 186; and see *Dare* v. *Mortgage Insurance Corporation*, 1894, 1 Q.B. 54; cf. *Newell* v. *Van Praagh*, 1874, L.R. 9 C.P. 96; *Ex p. Gilbey*, 1878, 8 C.D. 248; *Re Hatton*, 1872, 7 Ch. 723; and *Ex p. Peacock*, 1873, 8 Ch. 682.

all[28] the creditors to accept a composition, though not properly an accord and satisfaction, is really a new agreement, for which the consideration to each creditor is the forbearance of all the others. A creditor, who is party to such an agreement, cannot sue for his original debt in contravention of the rights of the others." It might at first seem that the debtor had been no party to the resolution or agreement of the creditors to accept a composition, but the debtor had summoned the meeting, and the judgment of Bramwell, B., contains the following remarkable words: "Either this resolution is equivalent to an accord and satisfaction, defeasible by matter subsequent, and when the event happens whereby it is defeated, (i.e, the debtor's default) a cause of action accrues, or else the composition resolution contains two implied terms, one by the creditors that all will forbear to sue until default, the other by the debtor that, in case he fails to pay the composition at the time agreed, he will pay the whole debt.[28a] And to insert these terms is strictly in accordance with *Good* v. *Cheesman*, where Parke, J., expressed his opinion that upon default in performance of the terms of the agreement, an action would lie, and also with the justice of the case." But surely Parke, J., meant that an action would lie on the composition agreement—not on the original contract between the debtor and the creditor. It is quite clear that Bramwell, B., found considerable difficulty in explaining composition agreements.

Good v. *Cheesman* has received recognition in the House of Lords for Lord Blackburn approved of it in the case of *The Société Générale de Paris* v. *Geen*, 1883.[29] He adopted the reasoning of Lord Tenterden and Parke and Patteson, JJ., and added: "I may observe that that agreement (that is, a composition agreement) need not be under seal, and need not unless the agree-

28. There seems to be no necessity for this word. Perhaps the learned judge was thinking only of cases of bankruptcy.

28a. It would appear to be different since the Bankruptcy Acts, 1883 and 1890. Compare Lord Blackburn's remarks in *Breslauer* v. *Brown*, 1878, 3 A.C. at p. 705; and *Campbell* v. *Im Thurn*, 1876, 1 C.P.D. 267.

29. 8 A.C. 604, a case under the Bankruptcy Act, 1869.

ment embraces in it real estate or something which would bring it within the Statute of Frauds, even be in writing, but may be by word of mouth."[29a] It may, however, be reasonably argued that the above remarks of Lord Blackburn were mere obiter dicta and unnecessary.

In April last, Horridge, J., had to decide a point which was not exactly covered by the above authorities. The case in which this point arose was the *West Yorkshire Darracq Agency Limited* (*In Liquidation*) v. *Coleridge*.[30] The jury found that a verbal contract had been made between the liquidator and the directors of the plaintiff company that if the directors other than the defendant would forego their fees the defendant would also do so. The defendant contended that this contract was "res inter alios acta" so far as the company was concerned, but the learned judge gave judgment for the company, and relied mainly on the observations of Kelly, C.B., in *Slater* v. *Jones* which are quoted above. It is respectfully submitted that this decision is correct, but that the reasons given by Horridge, J., are very far from being adequate to support it. The learned judge treated the company as having been a party to the agreement through the liquidator, and held: (*a*) *that the company gave no consideration;* and (*b*) that the agreement was binding on the company; but he took care to add that no point had been taken as to the power of a liquidator, under the Companies (Consolidation) Act, 1908, or otherwise, to bind the company by such an agreement.[31]

This case strains the doctrine of consideration to breaking point, and leads one to agree with Sir William Markby who contends that an express undertaking of a liability ought to be held binding "not upon the stupid ground that a moral con-

29a. Cf. Sir John Romilly in *Pfleger* v. *Browne*, 1860, 28 Beav. 391.

30. 1911, 2 K.B. 326.

31. Having regard to s. 214 of the Act, it may well be doubted whether the company was bound by the agreement; but cf. the judgment of Lord Alverstone, C.J., in *The Cyclemakers' Co-operative Society* v. *Sims*, 1903, 1 K.B. 477; and James, L.J., in *Re English & Scottish Marine Insurance Co.*, 1870, 23 L.T.N.S. 685. The report of this case in 5 Ch. App. 737, does not contain James, L.J.'s remarks on this point.

sideration supports a promise, but upon the ground that a liability was intended and ought to be enforced."[32] Agreements of composition cannot be supported by an application of the doctrine of consideration in cases where there is no deed[33] and no consideration moving from the debtor.[33a]

There can be no doubt that the chief reason for maintaining such agreements is the prevention of frauds upon the parties to them. This was insisted upon by Richards, Lord Chief Baron, in *Greenwood* v. *Lidbetter*, 1823,[33b] where he said: "I am aware that courts of equity have always evinced great jealousy in matters of arrangement with creditors, where made in any manner; and they have held parties bound in some very strong cases of voluntary compositions. The main principle in all the cases is, the protection which equity extends to all persons from fraud, and even from the possibility of fraud: as far as it can, by vacating all engagements actually founded on it, or having an object of fraud; and enforcing others having no consideration to support them, lest they might become the instrument or the means of fraud. On the latter ground they uphold voluntary compositions with creditors, and annul underhand agreements made with some of them, without the knowledge or privity of all, even although they may not, in fact, operate prejudicially to any of them. This equitable principle, as I said before, has been of late years recognised and adopted by courts of law." Of course the judges have not always *said* that this was the ground of their decisions, but then we should remember this statement of Mr. Justice Holmes[33c]: "The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws

32. Elements of Law, 5th ed. pp. 317-318.

33. A deed acts by way of estoppel; or carries "with it an internal evidence of a good consideration": Blackstone's Commentaries, II. 295, 446.

33a. Cf. *De La Bere* v. *Pearson*, 1908, 1 K.B. 280; another example of the straining of the doctrine of consideration.

33b. 12 Pri. Reports 183, Graham and Garrow, B.B., speak to the same effect; cf. Lord Eldon in *MacKenzie* v. *MacKenzie*, 1809, 16 Ves. 372.

33c. The Common Law, p 35.

all the juices of life." Mr. Jethro Brown has the same idea when he writes: "Again, that the judicial adoption of custom is retrospective proves nothing, for this is a characteristic of judge-made law in general, an inevitable result of the imperfection of human institutions, the sacrifice of formal justice that in the long run substantial justice may be done. The fact that judges often base their decision upon custom is paralleled by the fact that judges often base their decision upon convenience; in determining the significance of all such action, we must remember that in the unideal world wherein we live, justice is wider than law; that much to which judges pay great deference is in no sense law and does not even of necessity become law as a result of the judicial decision."[34]

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34. The Austinian Theory of Law, p. 323, Sir William Anson in his Law of Contract, 12th edition, p. 108, says: "The composition with creditors is, therefore, no exception to the general rule; creditor X not merely gets payment of 10s. in the pound from his debtor A, but the benefit of a promise procured by A from creditors Y and Z that they too will be content with a payment of 10s. in the pound." It may be true that in the great majority of cases the debtor procures some of the creditors to join in the composition; but this is not invariably so. See also Sir Frederick Pollock's Principles of Contract, 8th edition, p. 201; and Halsbury's Laws of England, vol. II., p. 326; and vol. VII., p. 441.

DISALLOWANCE.

An application for the disallowance of an Act of the Alberta legislature relating to the Alberta and Great Waterways Railway Company brought up again the construction of the British North America Act in regard to the important subject of disallowance by the Governor General of provincial legislation.

On this occasion it came before the present Minister of Justice, the Hon. Mr. Doherty. This application was dealt with on the merits of the case, but an allusion was made by the Minister of Justice to the practice and precedents in respect of recommending disallowance by reason of unjust provisions, or because of its

interference with vested rights, or the obligations of contract, and he referred to a recent report by the former Minister of Justice, Sir Allen Aylesworth, who held that the Governor General should not be advised to disallow for such reason. The present Minister of Justice apparently does not quite take this broad and, as it seems to us, incorrect and illogical ground.

The result of Sir Allen Aylesworth's ruling (which by the way was quite unnecessary for the determination of the case then before him) was in effect to lay down the rule that there should be no disallowance, except where the Act is ultra vires of a provincial legislature. In other words it is making waste paper of the British North America Act so far as disallowance is concerned. We venture to think this view is entirely at variance with the intention of the framers of our constitution, and has probably resulted from the pressure of political expediency.

And further, if a Provincial Act is ultra vires, why take the trouble of declaring it to be so? The provisions must, of course, have meant more than that. The written constitution of the United States protects vested interests, but the safeguard intended by the B. N. A. Act to cover the matters referred to by the present Minister of Justice are moribund until some government is strong enough to vitalize the enactment.

The remarks of Mr. Doherty in referring to the general principles involved will be of interest in the history of the exercise of the power of disallowance, and as such it is well to record what he says. His remarks were as follows:—

"It is true, as has been frequently pointed out, that it is very difficult for the government of the Dominion, acting through the Governor General, to review local legislation or consider its qualities upon questions of hardship or injustice to the rights affected, and this is manifest not only by expressions in reports of the ministers, but also by the fact that but a single instance is cited in which the Governor General has exercised the power upon these grounds alone. The undersigned entertains no doubt however, that the power is constitutionally capable of exercise, and may on occasion be properly invoked for the purpose of preventing, not inconsistently with the public interest, irreparable injustice or undue interference with private rights or

property through the operation of local statutes intra vires of the legislatures. Doubtless, however, the burden of establishing a case for the execution of the power lies upon those who allege it, and, although the undersigned is not prepared to express any approval of the statute in question, which he feels must be regarded as a most remarkable execution of legislative authority, he is, nevertheless, not satisfied that a sufficient case for disallowance has been established, either on behalf of the bondholder, the bank or the companies, especially when it is considered that the legislation sanctioned by the Assembly evidences as it does a very deliberate and important feature in the policy of the local government."

JOURNALISTIC ETIQUETTE.

We have received from a firm of solicitors a letter complaining that an article appeared in this journal commenting on and criticizing a recent decision of a Divisional Court, in the Province of Ontario, and stating that, acting for the defendants, they were "instructed to say that they consider it highly improper that an editorial should be written commenting on the decision of the Divisional Court while an appeal is pending to the Court of Appeal."

We are, of course, aware that it is not proper while a case is in litigation to publish anything in any way calculated to prejudice the fair adjudication of the cause. But it comes somewhat as a surprise to us to learn, that there should be any member of the profession who would think that a fair discussion of the law of any reported case would be an invasion of that rule. It is needless to say that articles from the solicitors or counsel of parties engaged in a pending cause might be objectionable, but the comments and criticisms of independent and impartial writers reviewing and criticizing the decisions of the courts as they from time to time appear in the reports stand on a very different footing. Indeed, it is the very fact that the courts are open to this fair and reasonable criticism of the decisions which is one of the safeguards for the proper administration of justice, and, therefore, one of the principal duties of a legal periodical.

We have yet to learn that there is any rule of etiquette, or propriety, which demands that such criticism should be withheld until it is ascertained whether all possibility of appeals have been exhausted.

It is also to be remembered that solicitors are officers of the court, and have a duty in that regard as well as a duty to do the best they can, within professional limits, for their clients. They should, at all times, aid the court in coming to a proper and fair conclusion, even though in so doing they might seem to be disloyal to their clients. If this be so, surely it is proper and right that a legal journal should act as an amicus curiæ, and we venture to think that this is in the nature of a duty, rather than something to be deprecated. We are sure judges are always glad of any light that might be thrown on any difficult point of law.

In conclusion, we need scarcely remind our readers that judgments of trial judges as well as of Divisional Courts are constantly criticized in the English legal journals, and no objection is taken.

THE LIBERTY OF THE SUBJECT.

The opponents of vaccination and inoculation are up in arms over a bill introduced into the Ontario Legislature, which contains some very stringent and most objectionable provisions. Not being a medical journal it is not in our province to discuss medical matters; but the proposed interference with the liberty of the subject makes us free to refer to the bill.

By one section the father and mother of every child born in the province is at some appointed time within three months after its birth to take the child to a proper medical practitioner for the purpose of being vaccinated. The father or mother not complying with these provisions incurs a penalty not exceeding $25.

Another provision is that in every municipality where smallpox exists, or where, in the opinion of a local board of health, it is in danger of breaking out, all inhabitants, who have not been

vaccinated during seven years, must present themselves for vaccination to the proper medical practitioner, and the person who neglects or refuses to obey this order incurs a penalty not exceeding $25.

Considering that a large and an increasing number of the community have conscientious scruples against vaccination, and that others have, to their cost and lifelong detriment, found it injurious to health, this legislation has a very Russian aspect; and we are not surprised that it is meeting with bitter opposition. It is scarcely possible that any such measure can become law.

MARRIAGE WITH FOREIGNERS.

It concerns British subjects, both men and women, and perhaps more particularly the latter, to have some knowledge of the legal incidents likely to arise in relation to marriage with foreigners.

A Blue Book,[1] dealing with the laws relating to marriage in force in certain foreign countries, has recently been presented to both Houses of Parliament, revising previous official information issued on the subject.

The principal object of this publication is, as stated in the Introductory Note, to enable British subjects, desiring to contract marriage with a subject of any one of the countries mentioned therein, to take such precautions as they may think fit (*a*) to ensure that their marriage will be valid in all countries, and (*b*) to avoid committing a breach of the law of a foreign country, in which their marriage is to take place.

The information given is directed to the following three points:—

(1) Whether British Consular Officers are permitted by the local laws to solemnize marriages in the foreign country, and whether marriages, so solemnized, are there recognised as valid; information upon this head is only given in regard to such mar-

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[1] (Cd. 5993), *Laws relating to Marriage in force in certain Foreign Countries*. London: Wyman & Sons. 1911.

riages as British Consular Officers are empowered to solemnize in virtue of the Foreign Marriage Act, 1892, and the Orders in Council made thereunder;

(2) What special formalities are prescribed by the local law in the case of British subjects desiring to marry in the foreign country;

(3) What special formalities are prescribed by the law of the foreign country in the case of subjects of such foreign country desiring to marry British subjects in the United Kingdom.

This publication does not profess to set forth the English law relating to the points above mentioned, except in so far as the Foreign Marriage Act, 1892, is concerned; but in connection therewith it is very material to consider also the intention of the Marriage with Foreigners Act, 1906.

The latter Act expressly deals with matters relating to points (2) and (3).

As to (2), the first section provides in what way a British subject may obtain from the Registrar, or (if resident abroad) from the Marriage Officer, such a certificate as is required by the foreign law, to establish that no legal impediment exists to the proposed marriage; as to (3), in the case of foreign countries, with which arrangements have been made to the satisfaction of His Majesty for the issue of "certificates of no legal impediment" to a subject of any such foreign country, the second section gives power to make regulations by Order in Council (*a*) requiring any person subject to the marriage law of that foreign country, who is to be married to a British subject in the United Kingdom, to give notice of the fact to the person by, or in the presence of whom, the marriage is to be solemnized, and (*b*) forbidding any person, to whom such a notice is given, to solemnize the marriage, unless a certificate of no impediment is produced to him.

It is not yet possible, so the report states, to give definite information as to the application of the Marriage with Foreigners Act, 1906, to marriages contracted abroad by British subjects with foreigners; and it does not appear that the power

to make regulations under the Act, in respect of marriages of foreigners with British subjects contracted in the United Kingdom, has yet been exercised, so that section 2 of the Act is absolutely inoperative.

It is true that a slight and partial attempt to meet the trouble has been made by the Home Office, in the exercise of its inherent jurisdiction apart from the last-mentioned Act, by issuing a circular urging the clergy and registrars to insist upon the production by the foreign party of a certificate of no impediment, before celebrating a marriage between a British subject and a French citizen, and such a certificate may be procured from the French Consulate; it may be, too that, by comity, the consular authorities of other foreign countries give similar assistance; but this is not enough, and, in the absence of a general international agreement, the position remains full of serious risks.

There may be difficulties, which are not apparent, in establishing reciprocity herein between the United Kingdom and other countries; but whatever the difficulties may be, they should be resolved, so as to secure for British subjects, upon an international legal basis, the protection contemplated by the Marriage with Foreigners Act in making marriages, contracted in accordance therewith, universally valid.

In this connection it may be mentioned that the Hague Convention for the Regulation of Conflict of Laws respecting Marriage, signed 12th June, 1902, is annexed to the Blue Book, although Great Britain is not a party to it, because its provisions may indirectly affect the marriage of British subjects with nationals of the signatory States. The principal of the Convention is declared in its first article, thus: "The right to contract marriage is governed by the law of the country of each of the future spouses, except where that law expresly provides for the application of another law:" the article is subject also to certain reservations in favour both of the law of the place of celebration and of the law of the nationality of the respective parties, in particular as to religious obligations and disabilities.

Great Britain, Austria, Hungary, Russia and the United States, are the principal Powers which have not as yet given their adhesion to the Convention, but it contains provisions for adoption by non-signatory Powers represented at the Conference.

Reverting to the special subject-matter of the Blue Book, the three principal points above mentioned may be severally considered:—Firstly, how far, if at all, are British Consular Officers competent to solemnize marriages in a foreign country? It is, of course, a condition precedent that, to give him such competency, a British Diplomatic Agent or Consul shall hold a warrant from his own Government duly constituting him a Marriage Officer.

Belgium and Greece are the only countries in respect of which it may be said with certainty that British consular marriages, there celebrated, would be held also to be there valid; and, in the former, only when both the contracting parties are British subjects.

In certain countries, such as Denmark, France and Italy, the validity of such marriages, whether one or both of the parties is, or are, British, is not free from doubt.

So in others, for example, Argentina, Hungary, Mexico, and Russia, consular marriages are permitted to be celebrated, and are tolerated, but they are not recognised as valid in those several countries: the parties, therefore, must remember that, in the absence of a ceremony valid according to the local laws, they may be treated as unmarried, and thereby be subjected to serious inconvenience. It must be observed further, that in Russia, British Consular Officers are forbidden to solemnize a marriage, either party to which is (*a*) a Russian subject, or (*b*) a member of the Orthodox Church.

In Spain, British consular marriages are not permitted, because there is no reciprocity with our own country in that behalf: and (perhaps) in the Netherlands, because Great Britain is not a party to the Hague Convention, upon which the kingdom of the Netherlands relies.

As to the second point, that is, what special formalities are

prescribed in the case of British subjects desiring to marry in a foreign country, it may be said generally that, except where consular marriages are held to be valid in the place of celebration, a British subject must conform to the special provisions of the local law affecting the marriage of foreigners, as well as to the essential conditions of the law of his own domicil.

If the parties profess different religions, particularly in Catholic countries, for example in Austria, an additional difficulty arises, and no absolute assurance can be given that a "mixed" marriage will be deemed valid in that country; the marriage of an Austrian with a foreigner who has been divorced from his first spouse, and, having left the Catholic Church, has become a Protestant, is invalid.

The requirements as to certificates to be produced by foreigners wishing to contract a marriage in Austria vary in the case of each foreign nationality concerned; the only certificate which is required in the case of British subjects (apart from the usual Certificate of Birth, and formal evidence of status), is one to the effect that the consent of parents or guardians is not, according to English law, necessary for the marriage of persons who have completed their twenty-first year. This certificate, which may be obtained from H.B.M. Consul-General at Vienna, is demanded when the British subject is between 21 and 24, and sometimes even when he (or she) is over 24 years of age.

As to Switzerland, the Federal Law requires that every marriage solemnized in the territory of the Confederation must be preceded by the publication of the promises of marriage; the record of which shall set forth the first names and surnames, profession, place of domicil and of origin, of the future spouses and their parents; in the case of widowers, or widows, or divorced persons, the first names and surnames of the former spouse, and the period within which objection may be entered.

Where the future husband is a foreigner, the publication shall only take place on production of a declaration, by the competent foreign authorities, that the marriage will be recognised in the foreign domicil with all its legal consequences.

The Cantonal authority is authorised to grant exemption from this formality, and to accept in default of the declaration aforesaid any other proof deemed sufficient; when the marriage comes on to be solemnized, the production of the like declaration is required, subject to the same power of exemption reserved to the Cantonal Governments.

There is no civil marriage in Bulgaria, but the Bulgarian authorities tolerate the solemnization of marriages by foreign consular officers in the kingdom; such marriages, however, are not recognised as valid, where either of the parties belongs to the Orthodox Church, unless the required religious marriage is performed.

Conversely in nearly every other foreign country, except the United States, the religious solemnization of a marriage must be implemented by a civil ceremony, in order to constitute a valid marriage contract.

With regard to the third point, that is, what special formalities are prescribed in the case of subjects of a foreign country desiring to marry British subjects in the United Kingdom, it may be observed (as also in respect of the second point) that the requirements of the foreign law are more precise, and more exacting, than the reciprocal requirements of the English law. Therefore, in every case of a projected marriage with a foreigner, the law of the foreign nationality applicable thereto must be carefully ascertained and followed, confirmed also by a certificate as above stated.

Our relations with France are so intimate that it may be specially useful, by way of illustration, to infer briefly to the provisions of the French law in this behalf; they are indicated in article 170 of the Civil Code in these terms:—

"A marriage contracted in a foreign country between French citizens, or between a French citizen and a foreigner, shall be valid if solemnized according to the forms in use in that country, provided that it has been preceded by the publication, prescribed by Article 63, of the Title 'Of Records of Births, Deaths, and Marriages,' and that the French citizen has not infringed the regulations contained in the preceding chapter.

"This shall also apply in the case of a marriage contracted in a foreign country between a French citizen and a foreign woman, if solemnized by a French diplomatic officer, or consul, in conformity with French law.

"Nevertheless, diplomatic officers and consuls may solemnize a marriage between a French citizen and a foreign woman in those countries only which shall be designated by decrees of the President of the Republic."

The Presidential decrees in force under this Article designate only certain Oriental countries.

The regulations referred to above have too much detail to be set out here; they relate to the formalities concerning the publication of the proposed marriage, the production of the birth certificate (or, in default, of an "Acte de notoriété"), consent of parents or other necessary parties, the ceremony of the marriage itself, the marriage record, and the conditions necessary to establish the legal capacity of the parties.

Within three months after his return to France, the Frenchman, so married abroad, must register his marriage at the place of his residence.

It is of some interest to note the evolution of history shewing itself in the inclusion of Japan within the purview of this Report. The Japanese Marriage Law is summarised by an organic Article which declares that: "The requisites of a marriage are governed as to each party by the law of his or her nationality. As to its forms, however, the law of the country where it is celebrated governs."

For comparison or contrast with the English law, a brief mention may be made of two or three collateral points incidentally dealt with in the Report. In some foreign countries, Portugal and Peru for example, marriages may be contracted by a specially authorised proxy; in nearly all, including the United States, illegitimate children are legitimated by the subsequent marriage of their parents. Breach of promise is variously treated: in Argentina no court shall entertain a suit to enforce the promise, or to obtain compensation for damages caused

thereby; in Germany special damages only may be awarded to the lady betrothed and abandoned, or to her parents, and either party may demand a return of the betrothal presents; under the Servian law, in the event of the withdrawal of one of the parties, the other party may claim restitution of the expenses incurred, and an indemnity for the disgrace.

If a consideration of the Report suggests any alterations of the English law, the most important appears to be (as above indicated) to render effective the machinery already provided by the Marriage with Foreigners Act, 1906.—*Law Magazine and Review.*

A writer in *Case and Comment* refers at length to something which should engage the attention of municipal authorities in cities, towns and villages where moving picture shows exist. It appears that the basis of these photographic films is celluloid, which is known to be a highly inflammable substance and burns with explosive force. In the darkened auditorium of every place of this kind, usually in the rear, and often between the audience and its only avenue of escape, is the booth or enclosure in which the cinematograph is set. Thousands of feet of this quick-burning film are whirled before the lenses of these machines in every one of these places every day. There is a powerful light in the booth. Heat and fire are in close proximity to an explosive material. It needs only a little carelessness to bring them together; and that would mean death and disaster.

REVIEW OF CURRENT ENGLISH CASES.

TRUSTEES — INVESTMENT — AUTHORITY TO INVEST IN STOCK OR SECURITIES OF ANY BRITISH COLONY OR DEPENDENCY— "COLONY"—"DEPENDENCY."

In re Maryon-Wilson (1912) 1 Ch. 55. In this case trustees were authorized to invest the trust funds in the stock or securities of any British colony or dependency. The tenant for life desired the trustees to invest in stock of the Provinces of Ontario, Quebec, Nova Scotia, British Columbia, Manitoba and Saskatchewan. The trustees were willing to make the investments if they had power so to do and applied to the court for advice, and Eve, J., held that the provinces above mentioned were none of them either colonies or dependencies and, therefore, that the investments proposed would not be within the power—and the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) held that he was right. Their Lordships being of the opinion that though the Dominion Canada is a colony, yet the various provinces of which it is composed do not separately and individually come within the definition of either "colonies" or "dependencies." They also express the opinion that instruments authorizing investments not sanctioned by the general law ought to be strictly construed. But the Master of the Rolls expressed the opinion that the trust deed authorized investments in the stock of any province which had been a colony prior to Confederation, where such stock had been issued prior to the merger of such colony in the Dominion.

TRUSTEE—UNAUTHORIZED INVESTMENT—CLAIM OF REMAINDERMAN TO EXCESS OF INTEREST REALIZED BY UNAUTHORIZED INVESTMENT—TENANT FOR LIFE AND REMAINDERMAN—TRUSTEE ALSO TENANT FOR LIFE.

In re Hoyles, Row v. *Jagg* (1912) 1 Ch. 67. In this case a trustee who was also tenant for life of a trust fund, invested it in a unauthorized security and during her life received increased interest in consequence of such investment. She having died the remainderman claimed that her estate was bound to refund for the benefit of those entitled in remainder, the excess of interest over and above what would have been derived from an authorized investment. There had been a small loss on the capital so in-

vested, which the representative of the tenant for life submitted to make good, and Eady, J., held that on the loss being made good the estate of the tenant for life was not liable to account for the extra interest.

WILL—CHARITY—"THE ORMOND HOME FOR NURSES"—MATERNITY NURSES FOR THE POOR—TESTATRIX HERSELF "THE HOME."

In re Webster, Pearson v. *Webster* (1912) 1 Ch. 106. Whether a good charitable gift had been made was the question in this case. A testatrix had carried on during her lifetime a small private establishment which she called "The Ormond Home for Nurses," in which she herself acted and procured some others to assist her, to whom she paid wages, as maternity nurses for poor people; for which services a small charge was made according to the ability of the patients to pay. She left a will whereby she bequeathed her properties to "The Ormond Home for Nurses." It appeared that the testatrix carried on the business in a small rented house into which she also received persons to train as nurses, and also a few pupils who paid fees, for whom she provided lectures by a qualified medical expert. It was contended that the Home was not a charity, and when the testatrix died it ceased to exist, and that before there could be a cy près application there must be a general charitable intent and not a mere gift to a non-existent institution. Joyce, J., came to the conclusion that the disposition was a good charitable gift, and that a scheme should be directed for its application.

ASSIGNMENT OF CHOSE IN ACTION—FRAUD OF ASSIGNOR—EQUITY OF DEBTOR TO SET UP FRAUD OF ASSIGNOR AS AGAINST ASSIGNEE—DAMAGES AGAINST ASSIGNOR—JUD. ACT (36-37 VICT. C. 66), S. 25(6)—(ONT. JUD. ACT, S. 58(5)).

Stoddart v. *Union Trust Co.* (1912) 1 K.B. 181. In this case by the result of certain interlocutory orders, two distinct actions between different parties were amalgamated and tried together. That this is a legitimate result of the Judicature Act we take leave to doubt. The facts of the case as developed in this double-barrelled action were as follows. One Price sold a newspaper to the defendant for £1,000, the defendant paid £200 in cash and bound himself by contract to pay Price the balance of the purchase money of £800. This contract Price assigned to the plaintiff, for value and without notice of any fraud on the

part of Price in inducing the contract. The plaintiff sued the defendant for this £800 and the defendant set up that Price had induced the defendant to enter into the contract by misrepresentations as to the circulation and earnings of the newspaper, and that the £200 paid was all that it was worth. He also counterclaimed for damages in respect of such misrepresentation against the plaintiff and Price. The Master in Chambers struck out the counterclaim as against Price, but on appeal to a judge, he struck out the counterclaim as against the plaintiff and restored it as against Price, with the result that two actions were amalagamated as above mentioned. Under the Ontario Judicature Act a counterclaim is only pleadable where the claim is either against the original plaintiff alone or against him and some other party, but a counterclaim against some third party in which the plaintiff is not a party is wholly unauthorized. The procedure in this case can not, therefore, be relied on as a precedent in Ontario. But if the procedure was strange the result of the trial was equally unique. The action was tried by Bucknill, J. The "counterclaim" of the defendant against Price was first tried and the jury found that misrepresentations had been made and they assessed the damages of the defendant at £800. The learned judge refused to make a declaration as between the plaintiff Stoddart and defendant that the paper was only worth £200 and that there was nothing due, therefore, on the contract assigned, on the ground that that was matter not of defence but of counterclaim, but he gave the defendants leave to amend his defence, as distinguished from his counterclaim, in any way which might be open to them on the facts found by the jury as against Price.

The judge at the trial then gave judgment for the defendants on the claim and gave judgment for the defendants on the counterclaim against Price. During the argument of the plaintiff the defendants' counsel stated that the defendants did not seek to avoid the original contract for the sale of the paper. In this curious state of facts the Court of Appeal (Williams, Buckley and Kennedy, L.JJ.) held that the defendants could not set up the claim to £800 damages for the fraud of the vendor by way of defence to the plaintiff's claim as assignee of the contract; and, on the other hand, that the plaintiff was entitled to judgment for £800. This conclusion was arrived at as Williams, L.J., says, "with some regret." As Buckley, L.J., points out, the defendant had an equity to set aside the contract altogether, but that he did not assert, and the assignee having done no wrong was in no way liable to damages; which, as Kennedy,

L.J., says, is a personal claim against the wrongdoer and something dehors the contract. If, as he says, the case had been one in which the defendants were entitled to elect, and had elected on the ground of fraud to cancel and rescind the contract and treat it as void, then a different position would have arisen. The case is an important one as shewing the limitation within which the fraud of a debtor can be set up as against his assignee.

LIFE INSURANCE—CONDITION—BREACH—"ASSURANCE SHALL BE VOID AND THE PREMIUMS PAID SHALL BE FORFEITED"—PREMIUMS PAID AND ACCEPTED AFTER BREACH OF CONDITION.

Sparenborg v. *The Edinburgh Life Assurance Co.* (1912) 1 K.B. 195. This was an action to recover premiums of insurance paid on a life policy in the following circumstances. The policy in question was affected in 1894 and was subject to a condition that the "assurance shall be void and the premiums paid shall be forfeited" if the assured should go beyond the limits of travel therein specified without obtaining license from the insurers. In 1897 the plaintiff in ignorance or forgetfulness of the condition without licence went beyond the specified limits. He returned and went on paying the premiums on the policy, which were accepted by the insurers in ignorance of there having been any breach of the conditions. In 1911 the plaintiff attempted to sell the policy, and the proposed purchaser raised the objection as to it not being world-wide and free from restrictions. The plaintiff then wrote to the defendants informing them of his journey in 1897 and asked them to indorse the policy as world-wide and free from restrictions. This the defendants declined to do except on payment of an extra premium and interest thereon, which would have been payable had the licence been granted. This the plaintiff refused to do and claimed that the premiums paid since the forfeiture in 1897 should be refunded. Bray, J., who tried the action "reluctantly" came to the conclusion that the words "premiums paid" included not only the premiums paid up to the time of the forfeiture, but also the premiums which were subsequently paid and, therefore, that the plaintiff could not recover them. He reaches this conclusion on the ground that the words in their natural meaning include the premiums paid after breach. But that this is really the "natural meaning" of the words seems open to question. the word "paid" is in the past tense and might quite as naturally be held to include merely the premiums which had been paid at the time of forfeiture. It appears from the reporter's

note that the defendants very liberally agreed on payment of the premium of 1911 to forego the forfeiture, and indorse the policy as "world-wide and effective."

ORDER FOR JUDGMENT UNDER RULE 115 (ONT. RULE 603)—JUDGMENT SIGNED MORE THAN TWELVE MONTHS FROM DATE OF ORDER—NOTICE OF INTENTION TO PROCEED UNNECESSARY.

Deighton v. *Cockle* (1912) 1 K.B. 206. Under the English practice, where no proceedings are taken in an action for twelve months, the opposite party is entitled to a month's notice of intention to proceed: Rule 973. In Ontario there is no such rule. In this case the plaintiff obtained, on a summary application under Rule 115 (Ont. Rule 603), an order for judgment. Judgment was not signed until more than twelve months afterwards, and then without giving a month's notice of intention to proceed. Scrutton, J., reversing the order of the Master, held that the judgment was irregular, and set it aside, but the Court of Appeal (Williams, Buckley, and Kennedy, L.JJ.) held that *Staffordshire Joint Stock Bank* v. *Weaver* (1889) W.N. 78, on which Scrutton, J., acted was wrongly decided, and that no notice of intention to proceed was necessary.

PRACTICE—APPEARANCE UNDER PROTEST—CONDITIONAL APPEARANCE—ENLARGING TIME TO OBJECT TO JURISDICTION.

Keymer v. *Reddy* (1912) 1 K.B. 215. From this case it appears that it is the practice in England, when an appearance under protest is entered, for the officer to allow the party entering the appearance a reasonable time to move to set aside the writ of summons, and unless the defendant moves within that time, to seal the appearance with an entry that it is to stand as unconditional. No such practice, we believe, prevails in Ontario. In this case the Court of Appeal (Moulton and Farwell, L.JJ.) held that the practice above referred to has no statutory authority, and does not in any way limit the power of the court to enlarge the time for moving to set aside the writ beyond the time allowed by the officer of the court. The meaning of the practice is stated to be, *to prevent the hands of the court being tied,* and that the omission of a defendant to apply to set aside the writ within the prescribed time, raises a presumption against him of waiver of objection to the jurisdiction, and entitles the officials of the court, in the ordinary course, to treat the appearance as absolute.

PRACTICE—FOREIGN CORPORATION—SERVICE OF WRIT ON FOREIGN CORPORATION—CARRYING ON BUSINESS IN ENGLAND—LONDON COMMITTEE—RAISING OF LOAN WITHIN JURISDICTION—RULE 55—(ONT. RULE 159).

Actiesselskabet v. *Grand Trunk Pacific Ry. Co.* (1912) 1 K.B. 222. The principal office of the defendant company in this case was in Montreal, and the action was brought by the plaintiffs, a Norwegian company, to recover demurrage upon the plaintiff's ship Hercules, the case depending, as far as the facts were concerned, on what happened at the port of Prince Rupert in Canada. The writ of summons was served on one Norman, the secretary of the London Committee of the defendant company in London, England. This "committee" was formed for the purpose of raising loan capital for the construction of the defendants' road, and is an advisory committee of the board of directors, and has also a general supervision of the finance of the company, with power also to make investment of the funds of the company. The defendants applied to set aside the service of the writ on Norman, on the ground that the defendants were not carrying on business within the jurisdiction. The Master set aside the service, Laurance, J., reversed the order, and the Court of Appeal (Williams, Buckley and Kennedy, L.JJ.) upheld the order of Laurance, J.

SHIP — FIRE CAUSED BY UNSEAWORTHINESS — EXTENT OF SHIPOWNERS' LIABILITY—BILL OF LADING—MERCHANTS SHIPPING ACT, 1894 (57-58 VICT. C. 60), S. 502.

Virginia Carolina Chemical Co. v. *Norfolk & N. A. Steam Shipping Co.* (1912) 1 K.B. 229. In this case Bray, J., and the Court of Appeal (Williams, Buckley and Kennedy, L.JJ.) decided that where a bill of lading contained a proviso that the shipowner was not to be liable for any loss or damage to goods therein mentioned, occasioned by fire or unseaworthiness, provided all reasonable means had been taken to provide against unseaworthiness; the shipowner is precluded from setting up the provisions of s. 502 of the Merchants Shipping Act (which provides that a shipowner is not to be liable for any loss or damage happening without his fault or privity), as a defence to a claim for loss by fire occasioned by unseaworthiness—although the Act would otherwise protect the shipowner from the loss even though due to unseaworthiness.

BANKRUPTCY—PROVABLE DEBT—LIABILITY CAPABLE OF BEING ESTIMATED—ANNUITY SUBJECT TO CONDITION.

Victor v. *Victor* (1912) 1 K.B. 247. In this case the action was brought to recover the amount of an annuity payable by the defendant to the plaintiff under a covenant contained in a separation deed. The deed was made in 1905 and the deed provided that if the parties resumed cohabitation the covenants were to be void. In 1911 the defendant was adjudicated bankrupt, the plaintiff did not prove her claim. In these circumstances the Court of Appeal (Cozens-Hardy, M.R., Moulton and Farwell, L.JJ.), overruling the judgment of Darling, J., held that the debt was one that which might have been proved in the bankruptcy and therefore that the action was not maintainable. The court distinguished the claim from one for alimony payable under the decree of a court; because the latter is from time to time subject to be varied, having regard to the circumstances of the husband and the whole conditions of the case, which has been held to be a claim which is not provable in bankruptcy.

PRACTICE—APPLICATION FOR SUMMARY JUDGMENT UNDER RULE 115 (ONT. RULE 603)—AFFIDAVIT OF CLAIM—DEPONENT UNABLE TO SWEAR POSITIVELY TO FACTS—ABSENCE OF JURISDICTION—COSTS OF ABORTIVE MOTION.

Symon v. *Palmer* (1912) 1 K.B. 259. This was an application for a summary judgment under Rule 115 (Ont. Rule 603). The English Rule requires that the affidavit verifying the plaintiff's cause of action is to be made by the plaintiff "or by any other person who can swear positively to the facts." The affidavit in the present case was made by the manager of the plaintiff's business and was made on information and belief. The defendant filed no answer. Bucknill, J., gave leave to sign judgment, but on appeal the Court of Appeal (Williams and Buckley, L.JJ., Kennedy, L.J., dissenting), held that the affidavits did not comply with the rule and that the motion must be dismissed, and that the costs of the motion were payable by the plaintiff forthwith. We may note that in a recent case of *Perrin* v. *Fouriezos*, before the Divisional Court (the Chancellor and Latchford and Middleton, JJ.), on 8th February last, the court in a similar state of facts held the affidavit to be sufficient. The above case had not then appeared.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.] [Feb. 15.

SIVEN *v.* TEMISKAMING MINING COMPANY.

Mining Act—Accident—Master and servant—Negligence—"Pentice."

Appeal by defendants from judgment of FALCONBRIDGE, C.J. K.B., upon the findings of a jury in favour of plaintiff for $2,500 as damages for an accident to the plaintiff, who was seriously injured by a stone falling down a shaft in which he was working. This stone came through a man-hole situated above the mouth of the shaft. There was a trap door over the mouth of the shaft in which the plaintiff was, but it was left open by one of the workmen, causing the accident. The Mining Act, 8 Edw. VII. c. 21, s. 164, provides that where a shaft is being sunk below levels in which work is going on, a suitable "pentice" should be provided for the protection of the workmen in the shaft.

Held, 1. That, under the circumstances, a suitable "pentice" had not been provided, because when the trap door was opened there was in fact no "pentice" at all. The defendants were, therefore, liable.

2. That the defence that another workman was negligent in not keeping the trap door shut was not a defence of common employment, which has no application in the case of a breach of a statutory duty; and a statutory duty takes no account of inconvenience or expense when it is absolute in its terms.

Rose, K.C., and *Sedgewick*, for defendants. *Slaght*, for plaintiff.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] [Feb. 19.

HUGGARD *v.* BENNETTO.

Gift—Husband and wife—Delivery of possession—Evidence.

In order to transfer the property in a chattel by a verbal gift only, there must be an actual delivery to the donee. If

manual delivery is not feasible, words of present gift accompanied by change of possession might constitute delivery.

Tellier v. *Dujardin*, 16 M.R. 423, and *Kilpin* v. *Ratley*, [1892] 1 Q.B. 583, distinguished.

Macneill, for plaintiff. *Fullerton* and *Foley*, for defendant.

Full Court.] [Feb. 20.

BROWN *v.* TELEGRAM PRINTING COMPANY.

Pleading—When action at issue—Amendment of pleadings—Application for special jury.

When the statement of defence has been amended, the action is not at issue, under Rule 301 of the King's Bench Act, until the expiration of ten days from the delivery of the amended statement of defence and an application for a special jury may, under section 60 of the Jury Act, be made within six days after the expiration of such ten days.

A. B. Hudson, for plaintiff. *F. M. Burbidge*, for defendants.

KING'S BENCH.

Robson, J.] [Feb. 14.

RE PHILLIPPS & WHITLA, SOLICITORS.

Solicitor and client—Taxation of costs—Appeal from certificate of taxing officer—Bringing in objections.

Rule 682 of the King's Bench Act should be read along with par. (*d*) of Rule 965, and is the rule to be applied in case of an appeal from the certificate of the taxation of costs between solicitor and client, and not Rule 684 which applies only to the taxation of costs between party and party, and therefore the carrying in of written objections to items of the bill before the taxing officer as provided for in Rule 968 and the officers reviewing the items so objected to under Rule 969, are not necessary preliminaries to such an appeal, although these two rules apply to taxations between solicitor and client as well as between party and party.

Re Robinson, 17 P.R. 137, and *Re Mowat*, 17 P.R. 180, referred to.

A. B. Hudson, for solicitors. *Jameson*, for client.

Bench and Bar.

JUDICIAL APPOINTMENTS.

Charles Tyrrell Sutherland, of the Town of Meaford, in the Province of Ontario, Esquire, Barrister-at-law, to be Judge of the County Court of the County of Grey in the said Province, vice William J. Hatton, Esquire, deceased. (Feb. 27.)

Flotsam and Jetsam.

The late Mr. Justice Grantham was a genial, good-natured, kind-hearted, bluff old Englishman. For these qualities his memory will long be cherished. His judicial "indiscretions" were often caused by these very virtues. He was a man of strong opinions, who did not hesitate to express them in strong language. In these days, strong individuality in a judge is not in favour. If Mr. Justice Grantham had occupied a seat on the Bench a hundred years ago, his doings and sayings would have come down to the present generation, and he would have ranked as one of the good old judges. Individuality was held in more esteem in olden days.—*Law Notes.*

Another Victorian personality has passed away with the death of Sir George Lewis. So much has been written about this famous solicitor during the past month, that it is needless for us to comment on his extraordinary career. One characteristic cannot, however, be allowed to pass without notice by us. His generosity to necessitous brother professionals was without stint. Only a small circle knew how liberally he gave, and, generally, anonymously.—*Law Notes.*

Judge Parry's new book, "Judgments in Vacation," is full of good stories. The judge was rebuking a man in Court for supporting his wife in a story which obviously was not true. "You should really be more careful," said His Honour, "and I tell you candidly I don't credit your wife's story." "Yer may do as yer like," was the retort, "but I've got to."

Judge Rentoul, K.C., will soon rival the late Mr. Commissioner Kerr for plain speaking. Last month in the City of London Court in the course of hearing judgment summonses he said, "I consider it an absolute fraud on the Court for solicitors'

clerks to come here and conduct judgment summonses when there are thousands of solicitors in London who have very little to do. It is also a fraud on the profession of solicitors."

THE WISDOM OF LAWYERS.—It appears that judges and lawyers have contributed a liberal share to the stock of popular sayings.

It is Frank Bacon who speaks of matters that "come home to men's business and bosom," who lays down the axiom that "Knowledge is power," and who utters that solemn warning to enamoured Benedicts, "He that hath a wife and children hath given hostages to fortune."

We have the high authority of Sir Edward Coke for declaring that "Corporations have no souls," and that "A man's house is his castle."

The expression "An accident of an accident" is borrowed from Lord Thurlow. "The greatest happiness of the greatest number" occurs in Bentham, but as an acknowledged translation from the jurist Beccaria.

To Leviathan Hobbes we owe this maxim, "Words are wise men's counters, but the money of fools." It is John Selden who suggests that by throwing a straw into the air one may see the way of the wind; and to his contemporary, Oxenstiern, is due the discovery "With how little wisdom is the world governed."

Mackintosh first used the phrase "A wise and masterly inactivity." "The schoolmaster is abroad" is from a speech by Lord Brougham.

In the familiar phrase "A delusion, a mockery, and a snare," there is a certain Biblical ring, which has sometimes led to its being quoted as from one or other of the Hebrew prophets: the words are, in fact, an extract from the judgment of Lord Denman at the trial of O'Connell.—*Green Bag.*

From "the other side":—"A man was arrested on the charge of robbing another of his watch and chain. It was claimed that he thrown a bag over his victim's head, strangled and robbed him. There was so little evidence, however, that the judge quickly said: "Discharged!" The prisoner stood still in the dock, amazed at being given his freedom so soon. "You're discharged," repeated the judge. "You can go. You're free." Still no move from the prisoner, who stood staring at the judge. "Don't you understand? You have been acquitted. Get out!" shouted the judge. "Well," stammered the man, "do I have to give him back his watch and chain?"—*Law Notes.*