Canada Law Journal.

VOL. LIV. TORONTO, APRIL, 1918. No. 4

CAN A SOLDIER WHO IS A MINOR MAKE A WILL?

It has been presumed with perhaps too much confidence that all soldiers in active service (whether they be of full age or not) are capable of making a will under the provisions of the Wills Act (R.S.O. c. 120, s. 14); but the recent case of *Re Wernher*, *Wernher* v. *Beit*, 117 L.T. 801, seems to cast considerable doubt on the accuracy of that position. The wills of soldiers under age generally deal with property of little value, and litigation as to the validity of such wills would not be likely to arise, due in the first place to the small amount usually involved, and in the next place to the natural desire of the relatives of the deceased to give effect to his last wishes, apart altogether from any considerations as to whether such bequests are or are not technically legal. When, however, as in *Re Wernher*, the estate affected by the will amounts to something in the neighbourhood of $5,000,000, the case assumes more serious proportions. The facts were simple: The young soldier whose will was in question was a son of the late Sir Julius Wernher, who by his will had given the deceased son a power of appointment over a sum of £1,000,000. The will in question was drawn by a solicitor and duly attested while the testator was in active service; he subsequently proceeded to the war and was killed, being still a minor. Even in this case those *in esse*, who would be entitled in default of appointment, were desirous of giving effect to the will; but in the interest of unborn persons who might become entitled the case was argued and various points advanced. It was contended that the section in the Wills Act did not authorize a will by a minor but merely dispensed with the formalities prescribed for the execution of wills and with this contention Younger, J., felt disposed to agree, but that he felt himself debarred from so doing because the Probate Division in

granted probate of the will which, as he conceived, precluded him from going into the question of its validity. It was also argued that, though the will might be valid as to the deceased's own personal property which amounted to about £400, it was invalid as an execution of the power of appointment; and also that, though as a minor, he might execute a will, yet he could not, while a minor, execute the power. But these contentions the learned Judge overruled on the assumption that the Probate Division had rightly granted probate; but he intimated that he thought in the interest of the unborn persons an application to revoke the grant should be made, and if necessary the case should be carried to the Court of Appeal.

The validity of a will of a minor soldier was upheld by Sir Jenner-Fust as long ago as 1848 in *Re Farquhar*, 4 Notes of Cases 651, a decision which had since been followed without question in the Probate Division, but Younger, J., was of the opinion that that case had been decided without due consideration. Among other matters not considered was the fact that the statute so interpreted does not reserve to the infant soldier returning to civil life power to revoke or alter his will until he shall have attained his majority—whereas if it is interpreted as not enabling soldiers under age to make wills, but as merely dispensing with the usual formalities as to execution, no such anomaly would arise.

On the whole, we think the learned Judge has shown rather conclusively that the validity of wills of soldiers under age is open to serious doubt.

ACTION BY VENDOR FOR SPECIFIC PERFORMANCE.

In the recent case of *McLaren* v. *Peuchen*, 14 O.W.N. 39, seems to raise a question which does not appear to have been considered either by counsel or the Court; and that is, whether a claim by a vendor for specific performance can properly be made the subject of a special endorsement. The claim of a plaintiff in such a case is apparently simply a demand for so much money, it may (as in the case in hand) be evidenced by a promissory note; and a money demand or a promissory note are both claims which

may be specially indorsed; but the claim of a vendor is really and truly something different, and in substance is in fact a claim for specific performance of a kind of contract to which the law attaches some particular features not common to other kinds of contract. Every contract of this kind is subject to an express or implied condition that the vendor is able and willing to show a good title to the land sold, the degree of goodness of the title depending on the terms of the contract. If, therefore, the vendor seeks specific performance by the purchaser he must be in a position himself specifically to perform the contract on his part: and it would seem that he cannot escape this liability by treating his claim as a mere money demand of which he is entitled to enforce payment irrespective of his ability to perform this contract on his part. In the case in question, the purchaser set up that he had claims against the plaintiffs for "shortages and deficiencies and for charges against the property conveyed which he had to pay, and also because of defect in title." These are all claims which, in an action for specific performance, the Court would rightly and properly investigate before decreasing the payment of the purchase money, as matters forming proper deductions therefrom, if allowed: but in the case in hand, the claim was treated as if it were a mere money demand properly the subject of a special endorsement and the alleged claims of the purchaser as merely the subject of a counterclaim. But if this is a correct view of the matter, which we venture respectfully to doubt, the question naturally arises what is the meaning of the clause we find on page 120 of the Rules under the heading of "*Claims to equitable relief*," viz: "The plaintiff's claim is for specific performance of an agreement dated the . . . day of . . . for the *sale by the plaintiff* to the defendant of certain *freehold* hereditaments at . . . ." This seems to have no meaning if the vendor of land may simply sue for so much money.

We are inclined to think the endorsement in the case in question (having regard to the facts disclosed) was wholly irregular and unwarranted by the practice and did not warrant the Court in pronouncing a summary judgment.

The question of the measure of damages in actions on contracts for the sale of land is discussed quite recently in the English Law

Times, vol. 144, p. 232; and it will there be seen that both as regards the vendor and purchaser it is governed by rules peculiar to such contracts, and not by the rules applicable to other contracts; and for that reason the vendor cannot, as in other cases, recover the price without himself doing such equity as the circumstances of the case may require—where therefore the Court deals with such contracts as they would do with other contracts they are liable to disregard the principles on which equitable relief is administered and thus defeat that section of the Judicature Act which gives those principles predominance.

LEGAL EDUCATION.

This subject was brought prominently before the profession in Ontario at the recent meeting of the Ontario Bar Association by a report of one of its Committees appointed to consider the subject. It is one which cannot appropriately be dealt with until this war is over for reasons too evident to be worth mentioning; nor would we do more than mention it now except for the fact that it has been brought to our attention by a representative body such as the Ontario Bar Association. At present we only desire to refer to the matter shortly, and more with a view to giving food for thought, than to express any definite views on the subject. Indeed, it cannot be said that the Bar as a whole or any others except the members of the Committee are in any way committed to the conclusions set forth by them.

The Committee favors, as will be seen by the report, the system adopted at the Harvard Law School. This system has its advantages, but it may be questioned whether it is under all the circumstances what we should adopt in this country. The first difficulty that presents itself is the great expense attending it; a very important one in these days, and which alone might prevent its being adopted here for perhaps many years to come.

Those who prefer our present system consider that the mind of the student should be led to the desired result by the historical road, with something more practical in view than by the possibly more scientific mode adopted at Harvard. It is claimed by those

in favor of the present system that our laws, being the evolution of centuries, cannot be properly understood without taking into consideration the historical setting above referred to, and the use of text books, and in this respect there may be something in the assertion that a mere teacher, who has not been in active practice, however profound his knowledge and in other respects efficient, cannot be as useful an educator as one who, perhaps less scientific and less learned, is able from his own experience to make clear difficulties and to be helpful in the explanation of matters likely to arise in the conduct of litigation.

As there is no question raised as to the personnel of the excellent staff of our Ontario Law School nothing need be said on that subject. But it may be mentioned that before the war the Principal, who had so ably and satisfactorily performed his arduous duties, did suggest that there should be some additional strength of a permanent character to the teaching staff. When the proper time comes this will, doubtless, be dealt with in a proper and liberal spirit.

An eminent educationist, Courtney Kenney, M.A., LL.D., Professor of Law in Cambridge University, takes exception to the system adopted at Harvard, and upholds the one which prevails in England as well as in this country. Those interested might also refer with advantage to the exhaustive report recently printed by the Carnegie Foundation upon the "case" law system of legal training as adopted in the United States as contrasted with the English and other European systems.

On the question as to the adequacy of this "case" system reference may well be made to the thoughtful and philosophic discussion of the subject of legal education in an article by Professor John H. Wigmore in 30 *Harvard Law Review* at page 812. Amongst other things he points out that the "historic sense is a necessary sense for the lawyers; and the case study system does not supply data for its genuine cultivation." See also an article by the Honourable Simeon E. Baldwin quoted in the *American Law School Review*, November, 1915, page 8.

What these learned and scholarly men have said on the subject is well worthy of consideration, and will doubtless be referred

to at some future time when the matter comes up for further discussion.

One word in conclusion. We quite realize that there is need for something broader and more scientific in the education of lawyers than we have at present—more training of the mind and more insight into jurisprudence as a science and the historical development of the law. This has, heretofore, been neglected—pushed aside by the necessities of a young country, but it must come if we are to hold our own in social, economic and political movements such as are now being worked out in every nation whether at war or not. May it not be that the solution for us should be the combination of the two systems, retaining our own for the practical necessities of the profession, but adding at its conclusion a post-graduate course giving our students the advantages which it is claimed the Harvard system possesses.

The report of the Committee on Legal Education speaks for itself, and is as follows:—

"At last year's meeting of the Ontario Bar Association a Committee was appointed with a view to considering legal education in the Province of Ontario, and various suggestions as to improving the same. It was felt that the Law School has done good work in improving legal education in this Province, but that marked improvements could still be made. The committee was asked to suggest what methods would be the best in its opinion to effect that purpose. Fortunately, during the past year the famous Harvard Law School published a history of that School from 1817 to 1917, and the facts stated in it have been of great assistance to the Committee.

"It is felt that the system of having *one* instructor only, namely, the principal, who devotes his full time to the Law School, is unsatisfactory. There should be at least *two* who would give their whole time to the Law School. In the words of Langdell, a former celebrated head of the Harvard Law School, 'A teacher of law should know expertly not so much the contents of the law as the method of studying it.' What qualifies a person, therefore, to teach law is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or

argument of causes—not experience, in short, in using law, but experience in learning law; not the experience of the Roman advocate or of the Roman prætor, still less of the Roman procurator, but the experience of the jurisconsult.

"In 1873 the Harvard Law School added to its staff James Barr Ames. 'He was a recent graduate of the School, without experience in practice, but he had won considerable success as a teacher in Harvard College.' President Eliot, in explanation of the choice, said that it would not be surprising if young teachers could do a portion of the work of instruction better than older men.' Fifteen years later President Eliot said, 'What is to be the ultimate outcome of this courageous venture?' In due course, and that is no long term of years, there will be produced in this country a body of men learned in the law who have never been on the Bench or at the Bar, but who nevertheless hold positions of great weight and influence as teachers of law, as expounders, systematizers, and historians. This, I venture to predict, is one of the most far-reaching changes in the organization of the profession that has ever been made in our country.

"In 1875 the system of the preceding five years at Harvard of employing lecturers who were in practice at the Bar was definitely abandoned: 'As experience seemed to show that temporary appointees who were practitioners did not make the best teachers of law, and that a man who could teach law well as a lecturer could teach it far better as a permanent professor. Many qualities which lead to success at the Bar are of little value to the teacher; on the other hand, devotion to teaching as a life work is essential to the best work in teaching. The immediate result of this determination was the addition of a fourth full professorship of law.

"The Langdell system, improved and adapted by Ames, is known as the 'case system' of teaching law, and there was a hard struggle before this method was adopted, 'but finally all Langdell's colleagues adopted it and it was carried to other Law Schools. The number of students at Harvard greatly increased; distinguished English lawyers approved it; the students trained under it gained notable success at the Bar. Long before Langdell's retirement as Dean the case for his system was won.'

"It is pointed out that that system is more exactly a system of study rather than of teaching, and it does not interfere with the professors using it in their own way. 'Its chief thesis is that the student in preparing for a lecture should study cases, rather than the conclusions which others have derived from the cases; *petere fontes* is its motto. Having prepared himself for a lecture by such study, the student may then, consistently with the application of the system, receive help from the teacher in any way in which the teacher is able to give it.' In other words, in a teacher's own particular way.

"The Harvard Law School has gone in a great deal for elective courses, and in answer to objections to that method, the Harvard contention is, 'that no one can learn at a Law School the entire contents of the law, that all a school can accomplish is to train the student in principles and method, teach him how to look up a new case and leave him to do so; and that many subjects of law offer a good medium for such training.'

"As a result of the improvements of the School it soon appeared that the School was to be a pioneer in the field of broad and theoretical training of *teachers* in the science of law.' This last development is one that would cure our difficulties in legal education throughout the Dominion of Canada, for it would provide men trained as instructors for Law Schools, who, with the added advantage of a wider outlook, would possess a knowledge of Canadian life and conditions.

"The history of the Harvard Law School deals with the four methods in which legal education has been carried on since the early history of civilization. '*First*, the method of apprenticeship, where the student learns his law from sitting for many years in Court watching the administration of justice. The *second* method, by having some lawyer learned in a certain subject, present to the student in a set lecture, or in a treatise, the whole law on his particular topic. The *third* method, by a comment by the teacher on a text in the student's hands, 'and this method still survives in the text-book schools.' The *fourth* method and the method used at Harvard, which trains the students in legal investigation through a first-hand study of judicial decisions and

other sources, and tests by class discussion the results of this investigation. To insure the success of this method it must be employed by professional teachers chosen, not for their skill in the practice of law or even on the Bench or in writing treatises, but for legal scholarship and the ability to make men think.

"The committee, of course, recognizes that the addition of a second permanent professor is an added expense and that much of the success of the Harvard Law School rests on the financial support given to it. We therefore have to deal with the financial condition.

"For a number of years our School was not self-supporting and was a very heavy drain upon the finances of the Law Society, but for a number of years before the war the deficit caused to the finances of the Law Society in that way had long been made up and much more than made up, and the Law School was not only self-supporting, but was piling up a considerable surplus, which it was conceded on all hands should be applied for the further improvement of the Law School. Improvements have been made, but not on the wide scale necessary or financially possible, Of course, since the war, with the heavy enlistment of young men, the attendance at the Law School has been very much reduced, which very materially changed the financial position, but it is believed that after the War the normal condition of affairs in the matter of students' attendance will return and possibly there will be an increase, and the surplus revenues of the Law School could and should be devoted to its improvement. The Harvard Law School has received handsome legacies from various lawyers, and it is trusted that that example may be followed here. The late Mr. Stewart blazed the way, and it is hoped that some of the senior barristers will in *due time* see their way clear to follow his example, and experience shows that after a few bequests others follow in rapid succession.

"It may be asked why does the Committee not recommend the turning over of legal education to the universities of the Province? It is felt by the Committee that to remove the Law School from Osgoode Hall would have the tendency 'to cut off legal education from the living body of the law.' Schools have been established

in the United States which have had that tendency and we would not like to fall into that danger in Canada. 'For the life of the law is in its concrete application.'

"A staff of permanent professors, in close contact with the Courts at Osgoode Hall, would have the effect, in the first place, of providing systematic legal training, and in the second place, the students in similar close touch would see their theoretical training practically applied.

"It is not suggested that everything can be done at once, but it is recommended that a second professor, giving his whole time to legal instruction, should be added to the Law School. But if a suitable person of that kind can not be found in this Province, he should be obtained from the United States or from Great Britain. Undoubtedly, although in England and Ontario we are ahead of the Americans in practice and procedure, they are ahead of us in questions dealing with the history and theory of the law. The immense volume of their reports has necessitated a close study of the underlying theory of the law on various questions and of the general current, and they thus avoid the 'somewhat superficial method' employed at times in some other jurisdictions.

"The suggestion to add a second full professor does not in any way reflect on the present lecturers in the Law School who, are capable and competent men, but who, of course, devote their principal time and attention to the practice of their profession, as the emoluments are quite insufficient to warrant them in giving more than part of their time to the Law School.

"It might also be well, if the lecturers are willing to do so, for the Law Society to arrange to have them go down to the Harvard Law School for a few weeks in turn, compensate them properly for the time spent in so doing, and enable them at first hand and by daily investigation to observe conditions and results. Much of it, of course, would seem somewhat elementary to them, but they would come away with much useful information.

"We feel sure that the Principal of the Law School will be very happy to co-operate in any suggestions to improve the Law School, and it may be found that many of the views set out here are not dis-similar from those that he himself entertains."

FLAWS IN THE COMMON LAW.*

I wish to preface what I have to say by observing that I claim, in my humble way, to be second to no one in my admiration for our ancient common law and our case-law system which is inseparably connected with it; and no one rejoices more than I do that the attempt made in the reign of King Henry VIII. by Reginald Pole, the King's cousin, to have the common law superseded by the civil law came to nothing. Therefore when I speak of flaws in the common law, I speak as one might speak of flaws in a diamond.

Nevertheless there are certain features and doctrines in the common law so contrary, in my opinion, to common sense, justice, reason, and humanity, or one of them, that I can suggest only one explanation of the fact that they have been allowed to continue generation after generation and century after century. Just as it is recognized as a common defect of Englishmen, that they know no language but their own, so it is, I think, a common defect of British lawyers everywhere that they study no system of law but their own. For my own part circumstances have led, during the last few years, to my acquiring a certain elementary knowledge of Roman law and the modern civil law systems built upon it; and in nearly every one of the cases to which I desire to refer this morning, the rule of the civil law is different to that of the common law.

The first point to which I wish to call your attention is the unlimited freedom of testamentary bequest regardless of claims of family. If a man be of sound disposing mind he is at liberty, however wealthy he may be, to leave his family destitute, and devise and bequeath his whole estate to a home for lost dogs, save only, in Ontario, but not in England, a wife's right to dower in his freehold lands. So far back as in the 4tl edition of his Commentaries, published in 1770 (pages 449-450), Blackstone says:

> 'Our law has made no provision to prevent the disinheriting of children by will; leaving everyman's property in his own

*This paper was read by Mr. A. H. F. Lefroy, K.C., at the meeting of the Ontario Law Society at Osgoode Hall, Toronto, on February 22nd, 1918.

disposal upon a principle of liberty in this, as well as every other action; though, perhaps, it had not been amiss, if the parent had been bound to leave them at the least a necessary subsistence.'

And he adds:—

'By the custom of London indeed (which was formerly universal throughout the kingdom) the children of freemen are entitled to one-third of their father's effects to be equally divided among them; of which he cannot deprive them.'

Roman law recognizes no such liberty to disregard the claims of family. So much did it regard the rights of children that even a gift made *inter vivos* by a childless donor was revocable by subsequent birth of a child (Code 8, 55 (56), 8); and this is followed in the modern law of France, Italy, Spain, Porto Rico, Austria, Mexico, Chile, and Argentina (Sherman, Roman Law in the Modern World, vol. 2, p. 227).

As to testamentary power, from very early times, at Rome, a man's power to will away his property was confined to three-fourths of his estate, each child being entitled, in spite of the provisions of his father's will, to one-fourth of what he would have received on intestacy., unless disinherited on certain specified grounds. In default of children a similar right attached to parents. This was known as the *quarta legitima*. As a recent writer says:—

'Roman law justly and wisely looked upon with disfavour and regarded as pernicious to the welfare of the family, all testamentary dispositions of property which beggar children or parents in favour of strangers to the blood.' Sherman's op. cit. vol. 2, p. 268.

And the Roman rule in this respect lives on in the modern civil law systems of France, Italy, Spain, Germany, Louisiana, and Scotland. In the last two, at all events, it retains the Roman term of "*legitim.*" In Scotland the rule is that a child has a right to succeed to one-third of the whole free movable estate of the last deceasing parent which is called the *legitim*. It is to be noticed that in Scotland the rule does not extend to lands. In France it is more general. Section 913 of the French Civil Code provides:—

'A man can only dispose of a half of his property by gift *inter vivos* or by will if he leaves a legitimate child surviving

him. If he leaves two children he can only dispose of one-third. If he leaves three or more he can only dispose of a quarter.'

The Code of Louisiana, sections 1493, 4, 5, has an almost identical provision; nor does it allow gifts *inter vivos* or *mortis causa* to exceed two-thirds of the property, if the donor, having no children, leave a father, or mother or both. The modern German law is similar. As already stated certain expressly defined grounds will justify disinherison. These in the modern system, as in the old Roman, are such as assaulting the parent or attempting his life; or wilful failure of duty as to the testator's maintenance; or leading an immoral life, Hunter's Roman Law, 4th ed., p. 263; Schuster's Principles of German Civil Law, p. 632.

The next point which I wish to refer to is our persistent refusal to admit the legitimation of children by the subsequent marriage of their parent. Legitimation *per subsequens matrimonium* was always the rule of the Roman law. We have not advanced one whit beyond the position of the Barons of England who, in the Statute of Merton of 1236, pronounced their famous—or should we rather say, infamous—dictum on this very point, "*nolumus leges Angliæ mutari.*" In other words, they rejected it apparently mainly because it was foreign law: Sherman *op. cit.* sec. 493. It is otherwise in France, Italy, Spain, Japan, Louisiana, Scotland, and Germany, while in the United States one-fourth of the States have abrogated the common law rule, and turned by statute to the just and merciful rule of Roman law; namely, New York, Ohio, Pennsylvania, Massachusetts, Alabama, Indiana, Kentucky, Texas, Vermont and Virginia. If you refuse to legitimate children by the subsequent marriage of their parents, you visit the sins of the father upon the children, and take away from the father the chief inducement to do the only thing he can to atone for the wrong he has done by making the mother an honest woman.

I will now proceed to a different field, and I would like to make this preliminary remark. If a special interest attaches to autochthonous systems of law, as I think it does, in this that they indicate deep seated racial characteristics, the common law seems to indicate one British characteristic to be a tendency to run

good principles into the ground. Freedom is a good principle, the very best, for the maintenance of which we are prepared to risk everything we have,—and yet it seems running it into the ground to allow a man, without adequate reason, to leave his children paupers. So *caveat emptor*, let the purchaser look out for himself, is no doubt an excellent general principle, but it is surely carrying it too far to say that if a man sells horses, or cattle, or other goods, which are subject to latent defects, of which he himself is perfectly aware, and of which he knows that the purchaser is not aware, the sale nevertheless holds good, and no liability to damages results, so long as the vendor makes no kind of representation. Such a rule I submit condones what is obviously dishonesty. In the well-known case of *Ward* v. *Hobbs* (1878), 4 App. Cas. 13, 3 Q. B. D. 150, in which the House of Lords unanimously affirmed the decision of the Court of Appeal. Hobbs sent to a public market certain pigs to be sold by auction. True, the conditions of sale provided that the vendor would not warrant them, and that they were open to inspection of intending purchasers, who must take them with all faults. Still Hobbs knew that his pigs were infected with the germs of typhoid, a fact not discoverable on inspection, in other words, a latent defect. Ward bought the pigs, put them with other pigs of his own, which became infected, and the majority both of the pigs bought at the sale, and of the other pigs, died as a result. Ward sued Hobbs to recover damages for the loss sustained, and it was held that he had no remedy under the law. I may take two sentences of Lord Selborne's judgment as stating the law. He says:—

> "The argument which for some time most weighed with me was that for a man to sell to another, without disclosing the fact, an article which he knows to be positively noxious, and which the other man does not know to be so (even though he expressly negatives warranty, and says that the purchaser must take his bargain with all faults) is an actionable wrong. I confess I should not be sorry if the law were so; but I know no authority for the proposition that such is the law, even with respect to the particular case of infectious disease in animals sold."

Roman law from very early times by the edict of the Aediles,

who had charge of the markets and the interpretation given to it by the jurists, was very different: Hunter's R. L., pp. 498-503. It was that a vendor must, at the option of the purchaser, either suffer the sale to be rescinded, or give compensation, if the thing sold had faults (even though unknown to the vendor) that interfered with the possession and enjoyment of it. While if the vendor knew of the faults and concealed them, he was guilty of fraud, and liable even to consequential damages. If action was taken within six months the sale could, even if the vendor did not himself know of the latent defects, be set aside; and if action was taken within twelve months damages could be obtained. Thus in Roman law the seller was held to warrant the thing sold, whether movable or immovable, to be free from latent defects or secret faults. And this Roman implied warranty of quality exists to-day in all the principal systems of modern law, except the English; it is found, for instance, in the law of Austria, France, Germany, Italy, Spain, Argentina, Chile, Quebec, and Louisiana. It will perhaps be sufficient if I quote the provisions in the French Civil Code, and in the Quebec Civil Code. The former provides:—

> 'The vendor warrants a thing he sells against hidden defects which make it unfit for the purpose for which it was intended, or which render it so much less suitable for being used for such purpose that a purchaser, if he had known of them, either would not have purchased the thing at all, or else would have only given a small price for the same. The Quebec Civil Code provides: The seller is obliged by law to warrant the buyer against such latent defects in the thing sold, and its accessories, as render it unfit for the use for which it was intended or so diminish its usefulness that the buyer would not have bought it, or would not have given so large a price, if he had known them.'

Our law, that is, the common law, implies a warranty on the seller's part in, I think, only three cases: (*a*) where the buyer makes known to the seller the particular purpose for which the goods are required; (*b*) where goods are bought by description from a seller who deals in goods of that description; and (*c*) where there is a sale by sample. The consequence is the possibility of such a case as *Ward* v. *Hobbs*.

And is it not, I would ask, carrying the principle of *caveat*

emptor too far for the law to be as Sir Wm. Anson tells us it is in his Law of Contract, 13th ed., 1912, p. 165:—

> A. sells X. a piece of china. X. thinks it is Dresden china. A. knows that X. thinks so and knows it is not. The contract holds. A. must do nothing to deceive X., but he is not bound to prevent X. from deceiving himself, as to the quality of the article sold.

Is not this, I would ask, plainly condoning downright dishonesty? It requires a far greater capacity for drawing subtle distinctions than I possess to see that A. in such a case is any better than a common thief.

I hesitate to suggest that it is a flaw in the common law, that it repudiates the Roman law doctrine of *læsio enormis* or "gross wrong." That doctrine was that if the seller or purchaser was prejudiced to the extent of more than half the real value the sale could be rescinded, unless the buyer agreed to pay the deficiency in price Yet this rule of Roman law has descended into modern law in France, Italy and Louisiana, among other places. But in France and Louisiana, at all events, the doctrine is confined to sales of land. The French Civil Code, section 1674, provides:—

> 'If the vendor of an immovable object has been damaged by receiving seven-twelfths less than its true price he has the right to demand that the sale should be rescinded even though by the terms of the contract itself, he has renounced any right to ask for rescission, and the contract recites that full value has been given.'

And that:—

> 'An action for rescission must be brought within two years of the sale, counting from the date thereof.'

It is held under these clauses that the action for rescission for undervalue lies although there be no cheating or undue influence proved. The fact of undervalue to the extent of seven-twelfths in the price is held to imply that there is no true consent; and the action for rescission being based on the damage the vendor has suffered, the purchaser can stop the action by indemnifying the vendor for his loss. The true price is held to be that which "*l'opinion publique*" would put upon it, viz., the fair market price, unaffected by any circumstances peculiar to either vendor

or purchaser: Wright's ed. of the French Civil Code p. 317, n. b.; Sherman's Roman Law in the Modern World, II. 343, n. 31.

So by Code of Louisiana, section 2566, 'the contract of sale may be cancelled . . . by the effect of the lesion beyond moiety.' 'If the vendor has been aggrieved for more than half the value of an immovable estate by him sold he has the right to demand the rescission of the sale: section 2589.'

No doubt the doctrine of *læsio enormis*, if applied as Roman law applied it to the sale of goods as well as of land, is hostile to commerce; and no doubt our inclination is to say that if a man sells a thing for less than half its value, or a man buys a thing at a price double its true value, more fools they; why should the law come to their rescue? But what about the case of the supposed piece of Dresden china? Was there not a "gross wrong" done to the purchaser by the seller, amounting to positive fraud? And what about the following case which came to my knowledge recently?

A gentleman with a knowledge of French literature and of the value of books found himself looking at a counter outside a bookseller's shop not a hundred miles from here, covered with old second-hand books, and bearing the superscription "any of these books can be bought for 50c." He picked up a copy of Corneille's poems, and saw it was a fiirst edition, of which he knew the value to be several hundred dollars. As a fact I am told the last copy sold by auction fetched $800. He honestly paid his 50 cents and carried off the book. Was there not "gross wrong" here done to the seller? I submit that the fact that the bookseller may himself have bought the book from some one else *equally ignorant with himself* of the true value is nothing to the point.

Might not the law very well be that if buyer or seller be proved to have known at the time of sale that the other party was ignorant of some essential quality of the thing sold greatly affecting its value, and takes advantage of this ignorance, he shall be compellable either to rescind the sale and refund, or pay compensation?

One more matter I wish to refer to before I close, and one

which, so far as I know, takes us quite outside Roman or civil law. It is no doubt an excellent general principle to regard husband and wife as one; but is it not running it into the ground to hold, as the common law appears to do, that no criminal agreement to which they are the only parties can amount to the crime of conspiracy, 1 Hawk, P.C. c. 72, s. 8; because, forsooth, it takes two to conspire, and husband and wife are one? Is it not running it into the ground to hold, as was held in *Reg.* v. *Lord Mayor of London* (1886), 16 Q.B.D. 772, that because husband and wife are one, a libel on a wife, published by her husband, constitutes no offence; or to hold, as was held in *Wennhak* v. *Morgan* (1888), 20 Q.B.D. 635, that it does not constitute publication for a man to repeat a defamatory statement about another person to his own wife,—when I should imagine any sensible man would admit that in fact it is the worst kind of publication? And it seems especially inexcusable that such should be the law, seeing that it is held also to be the law, in *Wenham* v. *Ash* (1853), 13 C.B. 836, that to communicate to a wife words defamatory of her husband *is* a publication. And what are we to say of the still existing rule of the common law that a husband is liable for his wife's torts? He is jointly responsible with his wife to the person against whom she has committed the tort: *Wainford* v. *Heyl* (1875), L.R. 20 Eq. 321. No doubt there was some good reason for this rule before the Married Women's Property Acts, when a wife's property became on marriage virtually the property of her husband, except her separate estate in equity, her *paraphernalia*, and certain things secured to her under previous statutes. Now that the Married Women's Property Acts secure to a woman on marriage her property as statutory separate estate, what excuse is there for retaining the old rule, which is held nevertheless to be unaffected: *Seroka* v. *Kattenburg* (1886), 17 Q.B.D. 177, 179: *Earle* v. *Kingcote* (1900), L.R. 2 Ch. 585; *Beaumont* v. *Kaye*, [1904] 1 K.B. 292. In *Quenod* v. *Leslie*, [1909] 1 K.B. 880, 889, Fletcher Moulton, L.J., expressed the opinion that the matter should be reviewed by the House of Lords, because, in his lordship's view, the present state of things is highly anomalous. It was different when a husband could say to his

wife: "What is thine is mine, and what is mine is my own;" when, according to the old legal joke, in matters of property, the law regarded husband and wife as one, and the husband that one. In those days, as Earle, C.J., said in *Capel* v. *Powell*, in 1864, 17 C.B.N.S. 743, 748, seeing that all her property was vested in the husband, it would be idle to sue the wife alone—the action would be fruitless.

In conclusion I would submit, with all proper deference, that the Ontario Legislature, relieved as it is of many duties and functions proper to a legislature, by the Dominion Parliament, and of others by the Imperial Parliament, might do worse than appoint a Commission to take evidence and to report whether on these or any other points, our common law ought not to be altered or modified so as to make it even more worthy than it is now, of the respect in which we justly hold it.

Toronto. A. H. F. LEFROY.

NOTES FROM THE ENGLISH INNS OF COURTS.

A PROPOSED MINISTER OF JUSTICE.

At a special general meeting of the Incorporated Law Society, which was held on January 25, 1918, the President, Mr. Samuel Garrett, took occasion to point out that a Ministry of Justice is much needed in this country. In support of this proposal he brought forward all the old arguments in favour of law reform. The following are some of the most familiar of these:—that the legal profession is out of touch with the public; that our system of legal education is defective; that legal procedure as we know it is old fashioned and cumbersome. As a first step towards the removal of all these great ills a Minister of Justice must be appointed. Such a Minister is to be wholly free from judicial duties, but in him (according to Mr. Garrett) all the patronage now wielded by the Lord Chancellor is to be vested. Space does not admit of a full presentment of the arguments *pro* and *con* this suggestion, but it may at least be pointed out that if one object of having a Ministry of Justice is to get rid of the political

element in the exercise of judicial patronage, it is doomed to failure from the outset. Your Minister of Justice would be a Minister of the Crown, whose office would come to an end with every change of Government; and as duties would be in no sense judicial he would be far more likely to be plunged in the welter of party politics than the Lord Chancellor now is. In another part of his interesting address Mr. Garrett deplores our antiquated circuit system. He is not the first to make a complaint on this head; but the man who can suggest a better system has yet to be born.

Emergency Legislation.

Statutes and orders rendered necessary by the war, which are compendiously described as "emergency legislation" continue to occupy the attention of Parliament and the Government departments. One would have to go back many centuries in order to find in the statute book laws which are anything like as "sumptuary" as those which are now daily coming into force. The most drastic are those which derive their authority from rules made under the Defence of the Realm Acts. Thus it is now a criminal offence merely to have in the house more food than is reasonably necessary for present consumption. Who would have thought five years ago that this would ever become part of the law of England? Yet there it is—and is being daily enforced with the utmost vigour. It is for the local justices of the peace, sitting at petty sessions, to try cases in which people are charged with food hoarding. As might have been expected, the punishment does not always appear to fit the crime; but this may be partly due to the fact that in some parts of the country, notably Yorkshire and Scotland, it has always been the custom for the housewife to have a well filled store-cupboard. In London, on the other hand, the store-cupboard is often non-existent, seldom well charged and very rarely kept locked. So each case in each part of the country must be decided on its own merits. A serious thought arises in many minds concerning this particular law—namely: How long will it remain in force? Will the war and food troubles be co-terminous? These are questions which I

(bearing in mind the egregious efforts of the prophets in the first year of the war) will not attempt to answer.

Relief from Debts.

There is another type of "emergency legislation" which is of more direct interest to lawyers. I refer to those Acts which provide for the suspension of remedies against persons who have got into financial difficulty owing to the war. Broadly speaking, these Acts enable the Court to suspend execution (without which a mere recorded judgment is a vain thing) or to prevent an ejectment or distress for rent, or the foreclosure of a mortgage. But these very wide powers can only be exercised in favour of persons who have suffered in the war—and only then with great caution. Who knows but that the "creditor" seeking the fruits of a judgment has himself suffered? A landlord whose rent is in arrear may be a needy war widow who, if she could only get rid of a bad tenant, might immediately admit a good one. In the recent case of *Re Jobson* (34 T.L.R. 184) Mr. Justice Eve made some useful observations as to the attitude of the Court when a mortgagor is seeking to prevent a mortgagee exercising his right to foreclose. He pointed out that a man may purchase property as an investment, and borrow part of the purchase money on mortgage, or he may raise money on the security of his house or business premises for the purposes of his business. The learned judge intimated that on an application for relief against foreclosure the Court would be bound to consider how in the ordinary course the particular security would be dealt with if the mortgagee was seeking foreclosure, and that, in granting relief, the Court must enquire somewhat closely into the reasons why the creditor cannot avail himself of the ordinary means of getting rid of his liability.

Venire de Novo.

The Court of Criminal Appeal have recently heard and given effect to a somewhat unusual plea on behalf of a prisoner. It was alleged by counsel that there had been a mis-trial, and that the verdict and sentence were a mere nullity. The grounds for

the application were that one of the jurors summoned to attend that particular assize sent his farm-bailiff to personate him. Nor did he even take the trouble to see that the bailiff was qualified to serve. This deputy juror could never have served. In these circumstances the Court of Criminal Appeal held that there had been a mis-trial and ordered a *venire de novo*. This is the only form of a new trial for a felony known to our criminal law, and it is only granted when there has been an irregularity in the rial, as where, for instance, the jury were not *all* present where at verdict of guilty was pronounced by their foreman. The case under notice is not unlike that of *Rex* v. *Tremaine* (7 D. & R. 684) where, a *tales* having been prayed, one J. Williams was called in court to serve on a jury. He requested his son R. H. Williams to appear for him. The son did so, and was sworn and served on the jury although he had no qualification to serve. It was held that there had been a mis-trial, and a *venire de novo* was granted.

New Trial in Criminal Cases.

What has been said above shews that it is a mistake to say there is *no* procedure for a new trial in cases of felony. In misdemeanour (according to *Rex* v. *Mawley*, 6 T.R. 638) a new trial may be granted in the discretion of the Court where the defendant is convicted, but not when he is acquitted, even if there has been a misdirection. It is interesting to notice that the question of new trial for misdemeanour has scarcely ever arisen except in cases of *quasi*-civil character such as non-repair of a highway. In the view of many law reformers, the Court of Criminal Appeal ought to have power to order a new trial in all cases whether there has been a conviction or an acquittal. The knowledge that there was such a power would certainly have effect to diminish the number of appeals by prisoners, because a second trial is an ordeal which a guilty man is not likely to face with equanimity. It is sometimes forgotten that in criminal cases there is no discovery. Those conducting the prosecution know but little of the prisoner's case. They cannot interrogate as the plaintiff can in a civil action, nor can the prisoner be compelled to file an affidavit of documents. A first trial, however, would have effect to give

"discovery" of a kind which might be very valuable to the prosecution at the second hearing.

The Quotation of Authorities.

In Mews Digest (Vol. V. p. 338) the curious will find under the heading "Decided Cases," a number of useful *dicta* in which the binding character of decisions in various Courts is discussed. There being no end to the making of Law Reports it is well for the practitioner to have some idea how far the decisions of a Court are binding (a) on that Court itself; (b) on other Courts. And first as to decisions of the House of Lords. "A decision of the House of Lords once pronounced in a particular case is conclusive in that case, and cannot be reversed except by Act of Parliament; but if the House should afterwards be of opinion that an erroneous principle had been adopted in the first case, the House would not be bound to adhere to such principle (*Wilson* v. *Wilson*, Sh. L. C. 40). "If two cases in the House of Lords cannot be reconciled" said Lord Selborne in *Campbell* v. *Campbell*, 5 A.C. 798, "I apprehend that the authority which is at once the more recent and the more consistent with general principles ought to prevail."

Decisions of the Judicial Committee of the Privy Council are not binding on the High Court, nor, apparently, is any decision of the Privy Council binding on that body for all time. Each case is considered by itself (*Clifton* v. *Ridsdale*, 2 P.D. 276).

The English lawyer unable to find a "case in point" sometimes turns to the Scotch and Irish reports. But they are not of great value because Lord Usher once said, "While the English Courts carefully consider decisions of the Scotch and Irish Courts they are not binding in any English Courts." An exception to this rule has recently been made by Lord Justice Swinfen Eady, who said that when the Full Court of Session (in Scotland) had interpreted a statute applicable to the United Kingdom in a particular way, the English Court of Appeal would follow it. Mews Digest is silent as to the authority of reports of cases from the Dominion or the Commonwealth of Australia. It may be taken, however, that they are treated with considerable respect in English Courts.

Law Reports and Textbooks.

As to the reports themselves, the question whether they are to be received as accurate depends upon whether they are or are not reported by a member of the Bar. The Times Law Reports are now recognized as authorities by the Courts, being all the admitted work of learned counsel. This is now generally known, but in former days before the "T.L.R." were a separate publication a report from the *Times* was only allowed to be read in the Court of Appeal after it had been verified by an affidavit of the barrister who had acted as reporter (*Walker* v. *Emmott*, 54 L.T. 106 *n*). Textbooks by living authors are not in theory allowed to be cited. This is an admirable rule, but it can be and frequently is got over. For instance, "Halsbury's Laws of England" is often referred to. If the judge objects to the volume being quoted as an authority, counsel says: "Well, my lord, I desire to cite this passage, and adopt it as part of my argument."

Some dicta relating to certain old textbooks and reports are not uninteresting. As to "Barnardiston" Lord Mansfield (according to the case of *Woolston* v. *Woolston*, 2 Burr. 1142) absolutely forbade this book being used. "For," said he, "it would be only misleading to students to put them upon reading it." It is interesting to know, however, that the marginal notes in "Dyer" are good authority, and that "Moseley" is a book possessing a very considerable degree of accuracy (*Mills* v. *Farmer*, 19 Ves 487 *n*).

W. Valentine Ball.

Temple, London.

SASKATCHEWAN COURTS.

On March 1, 1918, the Supreme Court of Saskatchewan was abolished and the Court of Appeal Act, being chapter 9 of the Statutes of Saskatchewan, 1915, and the King's Bench Act, being chapter 10 of the said statutes, were brought into force by proclamation of the Lieutenant-Governor of the Province. The new Courts are termed the "Court of Appeal" and the "Court of King's Bench," thus having now the same nomenclature as Manitoba.

The Judges of the late Supreme Court allocated to positions in the two new Courts of the Province are as follows:—

COURT OF APPEAL.

Chief Justice: Hon. Sir Frederick William Gordon Haultain, Kt.
Puisne Judges of Appeal: Hon. Henry William Newlands, Hon. John Henderson Lamont and Hon. Edward Lindsay Elwood.

COURT OF KING'S BENCH.

Chief Justice: Hon. James Thomas Brown.
Puisne Judges: Hon. James McKay, Hon. Hector Y. MacDonald, Hon. Henry V. Bigelow, Hon. John Fletcher Leopold Embury and Hon. George Edward Taylor.

The changes in the nomenclature and the constitution of the Courts has also necessitated other alterations. A new District Judge has been appointed at Battleford and also at Melville. Some changes have also been made in connection with the sheriffs and registrars.

THE RECKONING OF AGE.

In the case of *Re Shurey* (*Times*, 20th Dec., 1917) Mr. Justice Sargant had to deal with one of those puzzles which occasionally the awkwardness of facts presents. Under the will of their father, who died in 1906, Captain Charles Shurey and his two younger brothers, Mr. H. R. Shurey and Mr. Gordon L. Shurey, were to take vested interests in the residuary estate on attaining the age of twenty-five years. Captain Shurey was born on 22nd July, 1891, and died in France on 21st July, 1916, of wounds received in action. Had he under those circumstances "attained the age of twenty-five years" at the time of his death, so as to have acquired a vested interest; or had he just failed to attain the age, with the result that his estate would lose the benefit of his share?

It is probably correct to say that, in popular language, a man does not attain a fifth natal year until he reaches the anniversary of his birthday. A man born on 22nd July is said to attain

his majority on the 21st anniversary of that day. But the legal mode of reckoning is different, and the old cases contain examples of the nicety with which the law was able to accelerate the date, and fix it at what is usually regarded as the last day of the twentieth year. "If," said Holt, C.J., in *Fitzhugh* v. *Dennington* (2 Ld. Raym. 1094), "a man were born on the 1st February and lived to 31st January twenty-one years after, and at five o'clock in the morning makes his will and dies by six at night, that will is good and the devisor is of age." This, of course, referred to a will of lands, for at that time a will of personalty could be made by a person under twenty-one. And the reason the Chief Justice gave is that there is no fraction of a day, and, in the case put, the 1st February would be, not the end of the twenty-one years required for majority, but after the expiration of the twenty-one years. Apparently this is the same case as that given as *Anon* in 1 Salk. 44, where Holt, C.J., is reported to have said: "It has been adjudged that if one be born the 1st February at eleven at night, and the last of January in the twenty-first year of his age, at one of the clock in the morning, he makes his will of lands and dies, it is a good will, for he was then of age." And for the case where it had been so previously adjudged we must go back to *Herbert* v. *Turbell* (1 Keb. 589), where "it was said by Keeling and Hyde, and not denied, that H., born 16th February, 1608, [is] on the 15th February, (1629) twenty-one years after of full age, and whatever hour he were born is not material, there being no fraction of days."

Holt, C.J., who doubtless had an ingenious and subtle mind, had a somewhat similar question before him in *Sir Robert Howard's case* (2 Salk., p. 25), where a policy of assurance was made to insure the life of Sir Robert Howard for one year from the day of the date thereof. The policy was dated 3rd September, 1697, and Sir Robert died on 3rd September, 1698, about one o'clock in the morning. There appears at that time to have been a distinction between "from the day of the date," which excluded the day, and "from the date" which included it—the sort of distinction which in *Sidebotham* v. *Holland* (1895, 1 Q.B. 378), Lindley, L.J., in a very similar connection, called "splitting a straw."

However, the first 3rd September was excluded, and since the law makes no fraction of a day, Sir Robert had the whole of the anniversary day to die in, and consequently the insurer was liable. This seems fairly obvious, but the Chief Justice recurred to the question of full age and testamentary capacity: "If he be born on the 3rd day of September, and on the 2nd day of September, twenty-one years afterwards, he makes his will, this is a good will; for the law will make no fraction of a day, and by consequence he was of age."

The point occurred again in *Toder* v. *Sansam* (1 Bro. Parl. Cas. 468) where Thomas Sansam was to take an estate under a will "as soon as he shall accomplish his full age of twenty-one years." Now, Thomas was born between the hours of five and six o'clock in the morning of the 16th August, 1725, and he died about eleven o'clock in the forenoon of 15th August, 1746, when he was killed by a fall from a waggon. It seems to have been assumed that he had lived to attain his full age of twenty-one years.

There appears to have been a departure from this mode of reckoning in the statement made by Lord Blackburn in delivering the judgment of the Judicial Committee in *Letterstedt* v. *Broers* (9 App. Cas., p. 372). The appellant, he said, "was born on the 13th of May, 1853, and consequently attained the age of twenty-one on the 13th of May, 1874, and the age of twenty-five on the 13thday of May, 1878." But the exact date of attaining these ages was not there material, and Lord Blackburn no doubt was using the popular mode of reckoning, as indeed anyone would do whose attention was not called to the legal subtlety involved. However, there seems to be no reason for ascribing to the words of the will the popular rather than the technical sense; and accordingly in the present case Sargant, J., held, in accordance with the above authorities, that Captain Shurey attained the age of twenty-five on the day preceding his twenty-fifth birthday, and accordingly his share of the residuary estate under his father's will had vested in him.—*Solicitors' Journal.*

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

SUMMARY JURISDICTION—SUMMONS—SERVICE OF SUMMONS—"USUAL PLACE OF ABODE"—PLACE OF BUSINESS—(CR. CODE S. 789).

Rex v. *Braithwaite* (1918) 1 K.B. 1. The question decided in this case appears to throw light on the construction of Cr. Code s. 789. By the English Public Health Act 1875, a person assessed under the Act may be summoned before a court of summary jurisdiction if he fail to pay—and the Act provides that notices, orders and any other documents may be served by delivering the same at "the residence" of the person to whom they are addressed. The Summary Jurisdiction Act provides that every summons issued by a justice is to be served by delivering the same personally, or by delivering the same with a person for him "at his last or most usual place of abode" (see Cr. Code s. 789.)

In this case a summons for non-payment of an assessment was served on a clerk at the defendant's place of business; the defendant having joined His Majesty's forces, and closed his place of abode. The question was raised whether, under the Act above referred to, this was a sufficient service. A Divisional Court (Darling, Avory, and Sankey, JJ.) held that the summons was another document within the meaning of the Public Health Act, and that for the purposes of the service of such a summons the ratepayer's place of business is to be treated as his "residence" within the meaning of that section although he does not sleep there—and that the service of such a summons at his place of business is good notwithstanding that, under the Summary Jurisdiction Act, it has been held that a man's place of business at which he does not sleep is not "his place of abode."

ENTERTAINMENT—DINNER AND CONCERT—TAX ON ENTERTAINMENT.

Attorney-General v. *McLeod* (1918) 1 K.B. 13. This was an information on behalf of the Crown to recover a tax on an entertainment. The defendants, who were the officers of a Freemasons' Society, had given a dinner, which was followed by a concert for the purpose of raising funds for the support of a school for

the sons of Freemasons. Subscribers paid for tickets a lump sum, which gave them the right to attend both the dinner and the concert. It was conceded that the dinner was not an "entertainment" within the meaning of the Act; but Roche, J., held that the concert was a distinct affair and was an "entertainment" and that a tax on a proportionate part of the total sum paid for tickets to be determined by the Crown was attributable to the concert, and was liable to the tax.

ANIMALS—MALICIOUS KILLING OF ANIMALS—ANIMALS "ORDINARILY KEPT FOR A DOMESTIC PURPOSE"—KILLING CAT—EVIDENCE—MALICIOUS DAMAGE ACT., 1861 (24-25 VICT. c. 97) s. 41—(CR. CODE s. 537).

Nye v. *Niblett* (1918) 1 K.B. 23. This was a prosecution for killing two cats. The wanton killing of the cats was clearly proved, but no evidence was adduced to prove who owned them, or that they were in fact kept by anyone for domestic purposes. On a case stated by justices, a Divisional Court (Darling, Avory, and Sankey, JJ.) held that it was not necessary to shew who was the owner, or that the cats were actually kept for domestic purposes. It was shewn that the cats were haunting farm premises, and it was not shewn that they had become wild. See Cr. Code s. 537.

BILL OF EXCHANGE—FOREIGN BILL—"ENFORCING PAYMENT OF BILL"—BILL ACCEPTED WITH BILL OF LADING ATTACHED—BILL OF LADING FORGED—INNOCENT HOLDER—CONFLICT OF LAWS—BILLS OF EXCHANGE ACT, 1882 (45-46 VICT. c. 61) s. 72 (1) (*b*)—(R.S.C. c. 119, ss. 160, 161.)

Guaranty Trust Co. v. *Hannay* (1918) 1 K.B. 43. This is a somewhat curious case, arising out of a fraudulent act of third parties. The defendants were dealers in cotton, and purchased 100 bales from a firm of Knight Yancey & Co. in the United States for the sum of £1,464 9s—and in payment of the price delivered to the sellers in the United States a bill of exchange drawn on a Liverpool bank for the amount of the price. The plaintiffs, who were dealers in foreign bills of exchange, purchased this bill in good faith having a bill of lading attached. The bill of exchange on its face shewed that it was given for $\frac{100}{\text{R.S.M.T.}}$ bales of cotton, which were the bales referred to in the bill of lading. The bill was sent by the plaintiffs to England with the bill of lading attached, and was there paid by the drawees, after the defendants' agent had inspected the bill of exchange and

bill of lading, and expressed himself satisfied therewith. It subsequently turned out that the bill of lading had been forged by the vendors, and that no cotton had been shipped by them; whereupon the defendants commenced an action in New York to recover from the plaintiffs the amount paid on the bill of exchange. In that action the Court held that according to American law the bill of exchange was not an unconditional undertaking to pay, but was contingent on the bill of lading being genuine; but it was ultimately decided in that action that the case was governed by the law of England. In order to save the expense of obtaining expert evidence as to the English law, the defendants in the New York action brought the present action in order to obtain a declaration as to their rights in the premises, and the defendants counterclaimed for the relief which they had sought in the New York action. The action was tried before Bailhache, J., and the learned judge holds that according to English law the rights of the parties must in the circumstances, under the Bills of Exchange Act, 1882, s. 72 (1) (*b*) (R.S.C. c. 119, ss. 160, 161) be determined by American law, and applying that law as laid down in the New York action, he dismissed the plaintiffs' action, and gave judgment for the defendants on their counterclaim—at the same time expressing the opinion that if the case had had to be determined under English law the defendants must have failed.

SUNDAY OBSERVANCE—AMUSEMENT CATERER—SALE OF GOODS—TRADESMAN—SUNDAY OBSERVANCE ACT (29 CAR. 2 c. 7), s. 1.

Hawkey v. *Stirling* (1918) 1 K.B. 63. This was a case stated by a magistrate. Hawkey was convicted of committing a breach of the Sunday Observance Act (29 Car. 2 c. 7) s. 1. He carried on on weekdays and Sundays a place of amusement, where anyone who chose might play at certain games, paying him for the use of the implements. In the event of the player achieving a certain result, Hawkey gave him some article. Shooting at targets also took place, Hawkey supplying guns and cartridges for money payments. It was contended that nothing was sold as nothing was taken away except the rewards for success, which were gifts. A Divisional Court (Darling, Avory, and Sankey, JJ.) however, held that the accused was a "tradesman" within the meaning of the Act and was carrying on his ordinary calling on a Sunday, and therefore, rightly convicted.

PUBLIC PARK—SALE OF LITERATURE IN PUBLIC PARK—POWER OF COUNTY COUNCIL TO MAKE BY-LAWS RELATING TO SELLING OF ANY ARTICLE WITHOUT THEIR WRITTEN CONSENT—GENERAL BY-LAW PROHIBITING ALL SALES—MANDAMUS.

The King v. *London County Council* (1918) 1 K.B. 68. By statute the London County Council is empowered to make by-laws relating to the sale of articles in parks under its control. It passed a general by-law prohibiting all sales. The applicant in the present proceedings applied to the council for leave to sell certain literature in connection with a public meeting to be held in a park in aid of the blind. The Council relying on the by-law refused to consider the application whereupon the present proceedings for a mandamus to compel the Council to consider the application. A Divisional Court (Darling, Avory, and Sankey, JJ.) considered that the application was like an application for a license to sell liquor and must be governed by the like principle; that the Council had no power to pass a general law forbidding all sales, but was bound judicially to consider all applications that might be made for leave to sell articles. Considering the proneness of the G.P. to cast its literature to the dogs in parks and other public places and the consequent litter thereby produced, as anyone may see on a visit to the Queen's Park, Toronto, on a summer day, it is almost to be regretted that park authorities have not the general power that is denied them by this case.

PRACTICE—APPEAL—TIME FOR SETTING DOWN—PRODUCTION OF ORDER APPEALED FROM A CONDITION PRECEDENT TO ENTRY—RULE 872—(ONT. RULE 494).

Lawson v. *Financial News* (1918) 1 Ch. 1. The English Rule 872 (Ont. Rule 494), requires an appellant when entering an appeal to produce the judgment or order appealed from. The Registrar of the Court had, in pursuance of a custom which had prevailed, entered the appeal in this case without requiring the production of the order appealed from. On the appeal coming on for argument it was objected then the appeal was out of time by reason of the appellant's failure to comply with Rule 872 and the Court of Appeal (Eady, Warrington and Scrutton, L.JJ.) gave effect to the objection—but special leave was given.

COMPANY—MANAGING DIRECTOR'S REMUNERATION—COMMISSION ON NET PROFITS—EXCESS PROFITS TAX NOT TO BE DEDUCTED IN ASCERTAINING NET PROFITS.

Fellows v. *Corker* (1918) 1 Ch. 9. In this case the question at issue was the method to be pursued in calculating net profits

for the purpose of fixing the remuneration of the managing director of the plaintiff company. By a pre-war arrangement his salary was fixed at a specified sum, and also a commission on the "net profit" of the company. Subsequently a tax on "excess profits" was imposed by Parliament, and the question was whether this excess profits tax must be deducted in estimating the "net profits" for the purpose of calculating the commission of the director, and Neville, J., answered that question in the negative. He held that the excess profits duty is not a deduction that can properly be made in order to ascertain the profits, but is a part of the profits themselves.

TRUSTEE—COSTS OF UNSUCCESSFUL ACTION—CO-TRUSTEE AND BENEFICIARIES NOT CONSULTED—UNREASONABLE AND IMPROPER CONDUCT—RIGHT OF TRUSTEE TO BE RECOUPED BY TRUST ESTATE.

In re England, Dobb v. *England* (1918) 1 Ch. 24. This was an application by a trustee claiming to be entitled to be recouped out of the trust estate for certain costs incurred by him in the prosecution of an unsuccessful action in reference to the trust estate. It appeared that the litigation in question had been undertaken by the applicant without consulting his co-trustee, or the beneficiaries of the estate, and that it was without any reasonable foundation and had failed. The action in question was brought against the tenants of the trust estate to recover damages for delapidations, to the amount of £193 18s. The defendants in the action paid into Court £110; but the trustee on the advice of counsel obtained a surveyor's report which estimated the damages at from £168 to £175, and on the advice of counsel the trustee continued the action, and failed to recover more than the sum paid into Court, with the result that he was allowed only the costs of the action up to the payment in, and was ordered to pay the defendant subsequent costs of the action. His own costs of the litigation amounting to between £500 and £600: Eve, J., held that the applicant was entitled to be recouped the difference between his party and party and solicitor and client costs up to the payment in, but held that he was not entitled to be any further recouped out of the trust estate.

WILL—CONSTRUCTION—"ANY OTHER MONEYS"—RESIDUARY BEQUEST—REVERSIONARY INTEREST IN PERSONALTY.

In re Wooley Cathcart v. *Eyskens* (1918) 1 Ch. 33. In this case the construction of a will was in question. By his will

the testator bequeathed to his niece moneys invested in two specified companies "and any other moneys which I may possess, and not mentioned in this will, and not herein otherwise disposed of." The gift was followed by other specific bequests. The testator was entitled to a reversionary interest in personalty which was not specifically mentioned in his will; and the question was whether this interest passed under the gift of any other moneys"—Eve, J., held that the context shewed that the testator had used the word "moneys" in a sense that included investments, and that the clause in which the word occurred had the characteristics of a residiary clause, and was intended by the testator to be a bequest of the whole of his personal estate not specifically bequeathed, including the reversionary interest.

EXECUTOR—RETAINER—TESTATOR SURETY FOR RESIDUARY LEGATEE—MORTGAGE OF LEGATEE'S LEGACY—BANKRUPTCY OF LEGATEE—PAYMENT BY EXECUTORS OF TESTATOR OF HIS LIABILITY AS SURETY FOR LEGATEE—RIGHT OF EXECUTOR TO DEDUCT AMOUNT SO PAID FROM LEGACY AS AGAINST ASSIGNEE THEREOF.

In re Melton, Milk v. *Towers* (1918) 1 Ch. 37. In this case a testator was surety for one of the legatees named in his will. After the testator's death the legatee assigned his legacy by way of mortgage to secure the debt for which the testator was surety, the legatee subsequently became bankrupt and the assignee valued his security and proved for the balance of his claim for which he received 10s. in the pound and no more. The executors of the testator then paid £313 the amount for which the testator was liable as surety for the legatee; and the interest of the legatee was subsequently sold by the mortgagee with the concurrence of the legatee's trustee in bankruptcy. The legacy was a reversionary interest and on its falling into possession the estate became divisible, and the question was whether in administering the estate the executors were entitled, as against the purchaser of the legatee's interest, to deduct the £313 paid by them in satisfaction of the testator's liability as surety for the legatee. Astbury, J., held that they were; and the Court of Appeal (Eady, Warrington, and Scrutton, L.JJ.) affirmed his decision, holding that the £313 was no part of the bankrupt's estate at the time of his bankruptcy, and therfore must be brought into hotchpot in administering the estate of the testator. The case is summed up in a nut-shell by Scrutton, L.J.: "You want the share of this beneficiary in the estate, but we must find out what the whole is of which you claim a share, and the whole includes the debt owing from the beneficiary to this estate."

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Alta.] [MARCH. 5, 1918.

MCKILLOP & CO. v. ROYAL BANK OF CANADA.

Debtor and Creditor—Security on crop—Lease of homestead—Family arrangement—Bills of Sale Ordinance, Cons. Ord. N.W.T. c. 43, s. 15.

G., an insolvent owing a considerable sum to the Royal Bank, leased his homestead to his son, a minor, at a rental of half the crop to be grown thereon. The son took a lease of another farm on similar terms and, though not personally its debtor, assigned both leases and his interest in the crops to the bank, which agreed to advance money for putting in and harvesting the crops, the father and son undertaking that the proceeds from their sale would be applied first to payment of the advances and next of the father's original debt. Later, under a covenant for farther assurance in the assignments, a bill of sale of the severed crops was given the bank as additional security. Under executions against G. which, to the knowledge of the bank, were in his hands when the lease was given to the son, the sheriff seized the two crops. On appeal from the judgment of the Appellate Division in favour of the bank on an interpleader issue:—

Held, per Fitzpatrick, C.J., that the transactions with the bank were not fraudulent as against the creditors of G.; that as the bank had notice, before entering into these transactions, of the executions out against G. the creditors were entitled to his share of the crop grown on the homestead; but the rest of the grain, in which G. had no interest, remained as security to the bank under the above mentioned agreements.

Per Idington and Anglin, JJ., that the son, to the knowledge of the bank, was acting throughout for his father with whom the bank was really dealing in taking security for its debt; that so far as the bills of sale of the crops were intended to secure the past debt to the bank they were fraudulent as against creditors and void; and the assignments to the bank were void under sec. 15 of the Bills of Sale Ordinance (Cons. Ord. N.W.T. ch. 43)

which makes invalid any security not given for the purchase price of seed grain, which assumes to bind or affect a crop. There was a lawful seizure, therefore, of all the grain grown on the two farms.

Per Idington, J. The security taken by the bank was a violation of the provisions of sec. 76 ss. 2 (*e*) of The Bank Act.

Per Davies and Duff, JJ., dissenting. The appeal should be dismissed.

Judgment of the Appellate Division (10 Alta. L.R. 304), reversed in part.

Appeal allowed in part.

Nesbitt, K.C., for appellants; *Geo. H. Montgomery*, K.C., and *R. A. Smith*, for respondent.

Ont.] [March 5, 1918.

ACTON TANNING CO. v. TORONTO SUBURBAN RY. CO.

Railway—Permission to enter land—Oral agreement—Statute of Frauds—Compensation—Company—Authority of president.

A railway company, without expropriating, ran its line through the yards of a tanning company, and did work improving the yards and other work beyond the ordinary scope of a railway project. Four years later the tanning company applied to a judge for the appointment of arbitrators under the Railway Act to determine the compensation for the right of way which the railway company, opposing the application, claimed to be entitled to without payment under an oral agreement with the president of the tanning company since deceased. The judge ordered the trial of an issue, with the railway company as plaintiff, to determine the rights of the parties and on appeal from the judgment of the Appellate Division in such action:—

Held, that the evidence established that such an agreement was entered into.

Held also, Idington and Duff, JJ., dissenting, that the agreement was binding on the tanning company; that said company was owned and controlled by commercial firm of which the president was the head and the partnership articles and evidence at the trial shewed that he had authority to bind the company; and that the Statute of Frauds could not be relied on to defeat the action as it was not brought to charge the defendants on a contract for the sale of land or of an interest in land. If it was applicable it is taken out of the statute by part performance.

Appeal dismissed with costs.

H. J. Scott, K.C., for appellant; *Nesbitt*, K.C., and *Christopher Robinson*, for respondent.

Province of Nova Scotia.

SUPREME COURT.

Russell, J.] THE KING v. DRAKE [March 14, 1918.

Habeas Corpus—Bail—Bail on concurrent charges.

The prisoner, James Drake, was committed on March 13th, 1918, by the Stipendiary Magistrate of the City of Halifax, to jail and refused bail, on charges of theft on March 3rd, 1918, of five dollars, and escaping from custody from the City Prison on December 6th, 1917, under section 185 of the Criminal Code, to take his trial on any indictment found against him, at the March term of the Supreme Court at Halifax, sitting for criminal business on March 19th, 1918.

A prosecution was also commenced against him on March 4th, 1918, and was now tried and awaiting judgment before the same Justice for a second offence against the N.S. Temperance Act, on which the same Stipendiary Magistrate remanded him to jail and refused bail. The Chief of Police at Halifax and keeper of the City Prison held a warrant of August 20th, 1917, to collect a penalty of $50.00 &c. on a conviction of that date for a violation of the N.S. Temperance Act, which Drake alleged was satisfied by imprisonment in default of payment of the penalty. The accused applied to Russell, J., for writs of *habeas corpus* and *certiorari* in aid under the Provincial Liberty of the Subject Act, addressed to the Goaler, Keeper and Chief of Police, to be admitted to bail, etc., and after a return to these writs:—

Held, as the applicant could be bailed, bail was allowed him on the charges of theft and escaping, conditioned to appear and take his trial, etc., at the March term, 1918, at Halifax, and also, following *R.* v. *Vincent*, 22 Can. Cr. Cas. 98, he should be bailed to appear on a subsequent date (April 8th, 1918), which would not interfere with his trial on the indictments, if found, conditioned to appear, receive and submit to judgment, before the Stipendiary Magistrate, in respect of the prosecution then pending under the Nova Scotia Temperance Act, and also to surrender into the custody of the Keeper and Chief of Police, on the last mentioned date, if so notified, if it was desired to enforce the warrant of August 20th, 1917, for the penalty against him.

Power, K.C., for the prisoner; *Cluney*, K.C., for the Crown.

Ex. Ct.] GAUTHIER v. THE KING. [March 5, 1918.

Constitutional law—Provincial statute—Application to Crown in right of Dominion—Arbitration—Revocation of submission—Ontario Arbitration Act (R.S.O. [1914] c. 65, ss. 3 and 5).

A reference to the Crown, without more, in a provincial statute means the Crown in right of the Province only.

Where a liability is imposed on the Crown in right of the Dominion it must be ascertained according to the laws of the Province in which the cause of action arose in force at the time it was so imposed and cannot be added to by subsequent provincial legislation.

Section 5 of the Ontario Arbitration Act, making a submission to arbitration irrevocable except by leave of the Court, does not apply to a submission by the Crown in right of the Dominion notwithstanding sec. 3 provides that the Act shall apply to an arbitration to which His Majesty is a party.

Judgment of the Exchequer Court of Canada (15 Ex. C.R. 444) affirmed.

Appeal dismissed with costs.

McGregor Young, K.C., for appellant.

Bench and Bar

THE JUDGES AND JUDGMENTS OF THE SUPREME COURT OF CANADA.

Mr. H. M. Mowat, K.C., one of the members of the House of Commons for Toronto, when speaking on the second reading of the Supreme Court Amendment Act, made the following pertinent observations:

"I might suggest here, what has been in my mind for a long time, and that is that there is no reason why there should be six judges sitting in the Supreme Court of Canada all the time. In the greatest court in the Empire, the Judicial Committee of the Privy Council, composed of the hardest-headed and best lawyers that ever existed in any country, it does not matter how many judges sit; whether it is seven or only three, the opinion or advice of that tribunal is effective and is held in equal respect. I do not see why there should not be some such system here, whereby, say, four judges could sit equally as well as six. Furthermore, I think I represent the opinion of the vast majority of the

Bar of all the provinces .. hen I say there are too many individual judgments given in the Supreme Court of Canada. The number of separate ju gments given in all our courts is getting to be intolerable, when one has to read through them all to see the small points on which the judges may agree or disagree. It would be far better if the judges would adopt the practice of deputing to one of their number the task of reading the opinion of the majority and, f necessary, the opinion of the dissenting judges, so that we could have a clear-cut statement of the view the majority of the judges took, as well as the view taken by the minority. In the Judicial Committee of the Privy Council, we lawyers all know that it is a great advantage to get only one judgment; we do not have dissenting judgments there; we have but one judgment, or opinion, or advice, as you may call it, which is the judgment of the whole court. That judgment obtains, no matter how many or what judges sat. That judgment carries to the people in every corner of the British Empire the conclusive opinion of the Privy Council as to what is the law by which they are to be governed. I think it would be an excellent thing, and it would relieve the Supreme Court and the country of the great expense which is now proposed by providing for an *ad hoc* judge, if the court were to give two opinions, one declaratory of the law, the other of dissent, and then it would not matter how many judges sat. It would avoid the necessity of bringing in an *ad hoc* judge with all its attendant embarrassmer .s."

War Notes.

The attention of Editors and Publishers has been drawn by the Chief Press Censor of Canada to the following extra of the *Canada Gazette* containing Order in Council No. 915 assented to by His Excellency the Governor General on April 16, 1918.

We are informed that it is the intention to insist upon a strict observance of the provisions of this Order in Council and those of the Consolidated Orders Respecting Censorship and we gladly give this order a place in our column. It reads as follows:—

Cttawa, Tuesday, the 16th day of April, 1918.

PRESENT:

His Excellency The Governor General In Council.

Whereas the ultimate constitutional authority the People of Canada have determined that the present war in which Canada with Great Britain and her Allies is engaged, is a just war entered

upon for just cause and from the highest motives, and one that should be prosecuted without faltering to a conclusion which shall ensure the attainment of the purposes for which it was so entered upon;

And whereas the mind of the entire people should be centered upon the proper carrying out in the most effective manner of that final decision, and that all questioning in the press or otherwise of the causes of that war, the motives of Canada, Great Britain or the allies, in entering upon and carrying on the same and the policies by them adopted for its prosecution, must necessarily divert attention from the one great object on which it should be so centered and tend to defeat or impede the effective carrying out of that decision;

And whereas the day for consideration and discussion has passed, and the day for united action in execution of an unchangeable decision has come, and it is therefore necessary to remove every obstacle and hindrance to such united action;

And whereas it is desirable to prohibit the publication of secret and confidential information as hereinafter set forth;

Therefore His Excellency the Governor General in Council, on the recommendation of the Minister of Justice, under and in virtue of the powers conferred upon the Governor in Council by the War Measures Act, 1914, is pleased to order and enact an Order and Regulation and the same is hereby ordered and enacted in the terms following, to wit:

Order and Regulation.

1. It shall be an offence:—

(*a*) To print, publish or publicly express any adverse or unfavourable statement, report or opinion concerning the causes of the present war or the motives or purposes for which Canada or the United Kingdom of Great Britain and Ireland or any of the allied nations entered upon or prosecutes the same, which may tend to arouse hostile feeling, create unrest or unsettle or inflame public opinion;

(*b*) To print, publish or publicly express any adverse or unfavourable statement, report or opinion concerning the action of Canada, the United Kingdom of Great Britain and Ireland or any allied nation in prosecuting the war;

(*c*) To print or give public expression or circulation to any false statement or report respecting the work or activities of any department, branch or officer of the Public Service or the service or activities of Canada's Military or Naval Forces, which may tend to inflame public opinion and thereby hamper the Government of Canada or prejudicially affect its Military or Naval Forces in the prosecution of the war;

(*d*) To print, publish or publicly express any statement, report or opinion which may tend to weaken or in any way detract from the united effort of the people of Canada in the prosecution of the war;

(*e*) To print, publish or publicly express any report of, or to purport to describe or to refer to the proceedings at any secret session of the House of Commons or Senate held in pursuance of a resolution passed by the said House or Senate, except such report thereof as may be officially communicated through the Director of Public Information.

(*f*) Without lawful authority to publish the contents of any confidential document belonging to, or any confidential information obtained from, any Government Department or any person in the service of His Majesty.

2. Any person found guilty of an offence hereunder shall upon summary conviction be liable to a fine not exceeding five thousand dollars ($5,000.00) or to imprisonment for not more than five years or to both fine and imprisonment.

3. If the Governor in Council upon the report of the Secretary of State of Canada so directs, all copies of any publication which has been in his judgment, printed, issued, circulated or published in contravention hereof, shall be seized and destroyed by any person authorized so to do by the Secretary of State, and the presses, plant, machinery and material used or to be used in the printing, publication or circulation of any such publication containing matter in the judgment of the Secretary of State of Canada printed or published in contravention hereof, shall be seized and the premises where the same are printed or published may be closed indefinitely or for such period as the Secretary of State of Canada may direct.

4. For the purpose of carrying the above provision into effect the Secretary of State of Canada may issue his warrant to any such person under his hand and seal of office, directing any such publication to be seized or destroyed and any such presses, plant, machinery and material to be seized and the premises wherein the same are printed or published to be closed.

5. Any person so authorized as hereinbefore provided, may require the assistance of such persons and make use of such force as he may deem necessary for the execution of such warrant.

6. Nothing in the present Order and Regulation shall be deemed to affect the absolute privilege of members of Parliament or any statement made by any such member as such in the Senate or House of Commons of Canada.

RUDOLPHE BOUDREAU,
Clerk of the Privy Council.