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DOWER IN AN EQUITY OF REDEMPTION.

The cases of *Standard Realty Co.* v. *Nicholson* (1911), 24 O.L.R. 46, and *Re Auger* (1912), 26 O.L.R. 492, have re-agitated questions frequently before the courts since 1834, but which, whenever they arise, seem to cause difficulty in spite of repeated earlier judicial consideration. Therefore, some excuse exists for referring to earlier decisions and attempting to trace their effect upon the existing law of dower in a husband's equity of redemption.

Prior to 1834 the question could not arise, because a widow only had dower in the lands of her husband whereof he was *seized* during coverture: 25 Edw. 1, c. 7; see R.S.O. c. 330, s. 6 (1). Seizin implied the possession of a legal estate in lands, and so there was no dower in interests in lands of which courts of equity alone took cognizance. One of the reforms proposed by the Real Property Commissioners in 1829 and 1830 in England was an amendment to the law of dower whereby the widow should under some circumstances have dower out of her husband's equitable estates, and in 1833 an Act was passed, which was adopted in part in Upper Canada as 4 William IV., c. 1, giving a widow dower out of lands of which the "husband *dies* beneficially entitled whether wholly equitable or partly legal and partly equitable," and this enactment is preserved in the present Act respecting Dower, 9 Edw. VII., c. 39, s. 4. This enactment had an important effect upon that species of equitable estate known as the equity of redemption, because it enabled a widow to claim her dower where the equity of redemption subsisted in her husband at his death. He had died beneficially entitled, and so her dower must be assigned to her—subject, of course, to the mortgagee's prior claim. The only question then would be, what proportion of the equity of redemption must be set aside for dower? One-third of the value of the land after deducting the mortgage, or one-third of its value regardless of the incumbrances upon it? Where the husband

purchased the land subject to the mortgage—that is, where he acquired only the equity of redemption—there has been but little difficulty. The widow has been allowed dower out of one-third of the equity only, and not out of one-third of the value of the land regardless of the mortgage. So also the widow takes nothing if the husband assigned his equity of redemption before death. The statute of William gave no dower under such circumstances, and no earlier statute or rule of law was available to assist the widow. Upon this the cases of *Re Luckhardt*, 29 O.R. 111, and *Fitzgerald* v. *Fitzgerald*, 5 O.L.R. 279, may be consulted, and other cases cited hereafter bear this out; so we shall not stop to quote other authorities at present. We are therefore able to formulate two propositions with a fair degree of certainty: *I. Where the husband purchases an equity of redemption the wife only has dower where he dies beneficially entitled. II. Dower is only assigned to her out of one-third of the value of that equity of redemption. The mortgage must be deducted before making any calculation of the widow's interest in the lands.*

Quite other considerations arose, however, where the husband was seized of lands free from mortgage, but executed a mortgage in which the wife joined to bar her dower. Two questions then arose: (1) Did the wife's dower subsist in the equity of redemption whether the husband conveyed it or not during his lifetime? And (2) where dower did attach in the equity of redemption, how much of it must be assigned for that purpose? One-third of the surplus over the mortgage, or one-third of the value of the land payable out of that surplus? It was recognized, of course, that dower having been barred for the benefit of the mortgagee, such questions did not affect him. They were only relevant in considering the claims of the husband's creditors, devisees, assignees of the equity of redemption, or next-of-kin.

Let us take the first of these questions, namely, whether the wife's right to dower was vested in her so that her husband or the mortgagee could not so convey the equity of redemption as to deprive her of it after the mortgagor's death. To answer this inquiry we must consider the law between 1834 and 11th March, 1879, when the Act to Amend the Law of Dower, 42 Vict., c. 22,

was passed. The point came up in 1852 in a case where the mortgagee had sold under power of sale after the mortgagor's death, and it was said that either the husband or the mortgagee could sell free from dower, the husband never having had more than an equitable estate: *Smith* v. *Smith*, 3 Gr. 451. The case is not entirely in point, however, because the husband in his lifetime never had the legal estate. He was merely a purchaser of the lands, and mortgaged his equitable estate as purchaser, giving the mortgagees power to get in the legal estate from the vendor, which they did.

The point, however, never created much difficulty until the enactment of the statute of 1879, and it was laid down by the Court of Appeal in *Martindale* v. *Clarkson* (1880), 6 O.R. 1, that prior to 1879 the wife had no estate in her husband's equity of redemption after a conveyance made in his lifetime, even though he had been seized of the lands, provided he mortgaged them in his lifetime and the wife joined to bar her dower. See also *Beavis* v. *McGuire* (1882), 7 A.R. 704, at p. 713. The same principle had also been adopted in *Black* v. *Fountain* (1876), 23 Gr. 174, and *Fleury* v. *Pringle* (1878), 26 Gr. 67. We can therefore state the following further position with some assurance of being correct.

III. Before March 11th, 1879, where a wife joins with her husband to bar her dower in a mortgage, she may be deprived of her dower if the equity of redemption is conveyed either by the husband during his lifetime or by the mortgagee under his power of sale.

After March 11th, 1879, different considerations arise, based upon the effect of ss. 1 and 2 of 42 Vict., c. 22. Section 1 provided that no bar of dower in a mortgage should operate to bar dower to any greater extent than is necessary to give full effect to the rights of the mortgagee; and s. 2 preserves the wife's dower in any surplus arising where the lands are sold by the mortgagee under his power of sale or where they are sold by any legal process. The question first arises whether the wife by virtue of the statute retains her inchoate right of dower in an equity of redemption after joining in her husband's mortgage to bar her dower. In *Martindale* v. *Clarkson* (1880,) 6 A.R., at pp. 5 and 6, there are *dicta* of Patterson, J.A., to the effect that this Act creates a "new right" in the

wife's favour entitling "her to dower out of that equitable estate notwithstanding that the husband should not die seized of it," and at p. 6 he says, "but it extends the rule to cases not reached by that decision when it recognizes the right of the wife where the sale takes place in the lifetime of the husband." These *dicta*, however, did not summarily dispose of the point. It came up squarely for decision in 1885 in *Smart* v. *Sorenson*, 9 O.R. 640, a judgment of Mr. Justice Ferguson, which, if correctly reported (it was an oral decision at *nisi prius*, and is not verbatim), decided that, notwithstanding 42 Vict., c. 22, the wife took no estate in her husband's equity of redemption during his lifetime. The decision, however, seems to be at variance with certain *dicta* of that very learned judge in *Re Luckhardt* (1898), 29 O.R. 111, at p. 117, where he quotes *Martindale* v. *Clarkson* and speaks of the "new right" conferred by the statute of 1879. He there says, "since the passing of that Act she is entitled to dower out of an equitable estate regardless of the husband's dying seized (*sic*) of it, when the equitable estate comes into existence by the husband being owner of the land, executing a mortgage upon it, in which the wife joins to bar dower." *Smart* v. *Sorenson* was discussed by the Chancellor in *Re Croskery* (1888), 16 O.R. 207, where he says, in what is expressly stated to be a dictum: "Personally I do not see why the wife's claim to dower should in these cases rest in the caprice of her husband. She has foregone her dower for a certain purpose, and that being satisfied, it revives, and all the world has notice of this, so that if the husband assigns or sells the equity the assignee or grantee is not a purchaser for value without notice of her possible rights if the mortgage is more than satisfied out of the land." See also *Ayerst* v. *McClean* (1890), 14 P.R. 15, to the same effect. The point was expressly decided in favour of the wife in *Pratt* v. *Bunnell* (1891), 21 O.R. 1, though that case was disapproved upon another branch of it, namely, the *quantum* of dower assignable. See *Gemmill* v. *Nelligan* (1894), 26 O.R. 307. This brings us down to 1911, when Mr. Justice Riddell, in *Standard Realty Co.* v. *Nicholson*, 240 L.R. 46, following *Pratt* v. *Brunnell* upon the point which was not disapproved in *Gemmill* v. *Nelligan*, reaffirms the principle that after 1879 the

husband cannot convey the wife's inchoate right of dower in an equity of redemption created by his own mortgage in which she has joined to bar her dower. Apparently, apart from this decision he would have been prepared to hold the contrary: see p. 51. In *Re Auger* (1912), 26 O.L.R. 402, at p. 406, Sir William Meredith, sitting in Divisional Court, recognizes the "new right" conferred by Act of 1879, and so it may with some confidence be submitted as a further proposition that: *IV. Where, since March 11th, 1879, a wife joins with her husband in a mortgage and bars her dower in lands of which he was previously seized of a legal estate in fee, her inchoate right to dower subsists and is not lost by the husband's conveyance of the equity of redemption in his lifetime.*

The other questions which arise are even more difficult of solution upon the decisions and statutes, and they yet remain to be considered. They deal with the *quantum* of dower assignable out of the proceeds of the equity of redemption. A simple example will illustrate the problem: A husband owns lands which sell for $3,000. There is a mortgage of $2,000 to be paid, so that the equity of redemption is worth $1,000. Is dower assigned out of the whole value of the lands so that $1,000 must be set aside, or only out of the equity, $1,000, so that $333 must be assigned? This problem is also capable of subdivision: (1) Where the mortgage is to secure purchase money either before or after 1879; (2) Where it is to secure a debt of the husband's and is made before March 11th, 1879; (3) where it is to secure a debt of the husband's and is made after March 11th, 1879. It will be found that in both cases No. (1) forms an exception to the law affecting Nos. (2) and (3), so it will be dealt with only as a branch of the other two problems. Let us first inquire how much of the equity of redemption had to be set aside before March 11th, 1879, out of the proceeds of a sale available for the husband, his assignees, creditors, devisees, or next-of-kin, after satisfying the mortgage. Here we find a striking fluctuation of opinion, and the best way is to consider the cases historically, beginning with the year 1867. In that year *Sheppard* v. *Sheppard*, 14 Gr. 174, was decided, Vankoughnet, C., holding in an administration action that the widow took the whole surplus up to a point sufficient to give her

dower in one-third of the total value of the lands. In 1868, Vankoughnet, C., in *Thorpe* v. *Richards*, 15 Gr. 403, thought he had gone too far, and in a case where lands had been sold by the mortgagee under power of sale he held that the widow had dower in one-third of the surplus only, and this more restricted view was adopted by Mowat, V.-C., in *White* v. *Bastedo*, 15 Gr. 546, in 1869, where the sale had taken place in administration proceedings. It was also followed in favour of creditors by Mowat, V.-C., in 1872, in *Baker* v. *Dawborn*, 19 Gr. 113, though he takes the somewhat peculiar position that it would not be adopted in favour of the heir or next-of-kin, saying that this may be an anomaly, but is not the only anomaly in the law of dower. In the same year (1872) arose the case of *Campbell* v. *Royal Canadian Bank*, 19 Gr. 334, where the mortgage with bar of dower had been given to secure unpaid purchase money. Here Spragge, C., without making any distinction between a mortgage to secure a loan to the husband and one to secure what is in effect a vendor's lien, held that the widow had dower in the surplus only. The case apparently was heard in appeal—see *Re Robertson*, 24 Gr., at p. 445; but there is no report of it. In 1876 were decided *Doan* v. *Davis*, 23 Gr. 207, and *Lindsay* v. *Lindsay*, *ib.* 210, where Spragge, C., and Proudfoot, V.-C., each held that the widow was entitled to dower based on the value of the land, not on the surplus only, and Proudfoot, V.-C., at p. 213, points out the true ground on which *Campbell* v. *Royal Canadian Bank* can be upheld, namely, that the mortgage was to secure unpaid purchase money. Spragge, C., in *Doan* v. *Davis*, makes no reference to the apparent change of view since his decision in the *Campbell* case. Then came *Re Robertson*, 24 Gr. 442, decided by Proudfoot, V.-C., in 1877, and *Robertson* v. *Robertson* (1878), 25 Gr. 276 and 486, decided by the full court upon a re-hearing of the same case. Those judgments decide that even as against creditors the widow is entitled to dower based on the value of the land, though payable out of the surplus only. The lands in that case were sold under an administration decree, the mortgagee was paid, and there was a surplus claimed by creditors. The money had been borrowed by the husband, and was not unpaid purchase money. The principle laid down in

appeal is that when the husband borrows money on his land for his own debt, the wife by barring her dower pledges her inchoate estate in it as surety for her husband's debt, and that, except so far as it is necessary to protect the mortgagee—the principal creditor—she, the surety, cannot be said to have parted with or destroyed her interest in the lands, so that, if the mortgagee realizes upon or is paid out of the lands, she as surety is entitled to the mortgagee's rights to the extent necessary to ensure that her whole interest (or so much of it as is left after satisfying the mortgage) is returned to her. Such reasoning, of course, will not apply to cases of unpaid purchase money, where, owing to the existence of a vendor's lien, she never took any estate at all except in the surplus. These decisions, in spite of their very considerable variance, probably justify the statement of our next proposition, as follows: *V. Prior to March 11th, 1879, where a widow has barred her dower by a mortgage but becomes entitled to dower out of an equity of redemption, the amount assignable is one-third of the total value of the lands except where the mortgage is to secure unpaid purchase money, when she has dower in one-third only of the surplus, and it makes no difference whether the surplus is realized from a sale under power of sale or legal process or whether it is voluntary.*

Having ascertained the law prior to March 11th, 1879, let us now consider what effect (if any) the statute 42 Vict., c. 22, had on the computation of the value of dower. Originally there were only two sections (numbers 1 and 2) bearing on the point. They will be found in an altered condition in 9 Edw. VII., c. 39, s. 10. The effect of the original enactment has been already stated *supra*. Mr. Justice Ferguson, in *Re Luckhardt*, 29 O.R. 111, at p. 117, points out, as already mentioned, that the statute gives a "new right" to dower in an equity of redemption which the husband cannot assign; and then he says: "So far as I am able to see, the right to equitable dower in cases other than the one above described is unaffected by that statute, and stands as it stood before the Act was passed." In other words, if this view is correct, the statute had very little if any effect upon the quantum of dower assignable out of the equity of redemption.

Notwithstanding this view, the Act gave rise again to a good deal of discussion, and there was a marked difference of opinion

amongst the judges. Let us again consider some of the more important cases historically. The first of these is *Re Hague* (1887), 14 O.R. 660, where it was held by Mr. Justice Ferguson, in an administration action, that the widow was entitled to dower according to the full value of the lands, assignable out of the balance of purchase money left after satisfying the mortgage, and speaking of s. 1, that learned judge says, at p. 666, "whatever may be the full meaning of the section it seems clear to me that it cannot be held to have the effect of making the rights of a doweress less than they were held to be in the case of *Re Robertson*." This view was accepted by the Chancellor in *Re Croskery* (1888), 16 O.R. 207, at p. 209, though it was not there necessary for the decision of the case. In *Pratt* v. *Bunnell* (1891), 21 O.R. 1, it was held on the contrary by a Divisional Court that the widow could only claim dower based upon the value of the equity of redemption. The mortgage there was to secure unpaid purchase money, and while there was then no exception in the statute in such a case, the principle of *Campbell* v. *Royal Canadian Bank* and *Re Robertson*, *supra*, might well have been applied in support of the decision, but no such distinction was made, and it was said that, having barred her dower in the mortgage, the widow barred it for all purposes to the extent of the mortgage money; and as against her husband's representatives she could claim only an assignment of one-third of the surplus for dower. In *Gemmill* v. *Nelligan* (1894), 26 O.R. 307, the point again came before a Divisional Court. There the mortgage was not for unpaid purchase money, but to secure a debt of the husband's (see *per* Robertson, J., p. 314), and the court declined to follow *Pratt* v. *Bunnell*, holding that dower was payable on the basis of the total value of the land. It was with these conflicting decisions before it that the Legislature passed the statute 58 Vict., c. 25, s. 3 (Ont.), which annulled the effect of *Pratt* v. *Bunnell*, and by statute placed the law upon the footing of *Gemmill* v. *Nelligan*, expressly making an exception in the case of a mortgage for unpaid purchase money. This enactment forms part of 9 Edw. VII., c. 39, s. 10 (2), and is the part of the section under review in *Re Augur* (1912), 26 O.L.R. 402, where the subject is again learnedly reviewed, and it is laid

down that neither under the amendment of 1895 in cases where there is a sale by legal process or under power of sale, nor in cases of voluntary sale apart from that amendment, can a widow claim dower out of more than one-third of the surplus where the mortgage is to secure unpaid purchase money. This brings us, therefore, to our last proposition, namely: *VI. Since March 11th, 1879 (as before), the widow is entitled to dower based on the total value of the land except where the mortgage is for unpaid purchase money, when her dower is based upon the value of the surplus after deducting the mortgage, whether that surplus is realized from power of sale, legal process, or by payment of the mortgage by voluntary sale or otherwise.*

SHIRLEY DENISON.

THE COURT OF KING'S BENCH IN UPPER CANADA, 1824-1827.

BY THE HONOURABLE MR. JUSTICE RIDDELL, L.H.D., LL.D.

(*Fourth Paper.*)

Many of the motions made before the court are such as have recently been made in the Divisional Court, e.g., motions for a new trial on the ground that the verdict is against evidence, or against the weight of evidence, or for wrongful rejection or admission of evidence, the verdict excessive, etc. There was a difference in the manner of making such motions, indeed; the complaining party would move for a Rule Nisi to set aside the verdict, etc.; if a primâ facie case was made, a Rule Nisi would be granted. This would be served upon the other side, and counsel appeared on the day fixed and argued the matter. If the appeal was allowed, the rule was made absolute; if dismissed, the rule was discharged.

But there were many matters which are no longer heard of in "Full Court." Submissions to arbitration were made Rules of Court in order to enable one who was not satisfied to move against the award; actions were stayed until the attorney for the plaintiff should produce his warrant and authority for bringing the action; sci. fa. obtained to revive judgments; rules granted

to the sheriff to return writs of fieri facias; to set aside cognovits; attachment for non-performance of award and appointment of a guardian to sue for an infant, etc., etc. None of these do we find in the court at all at the present time. But there are other matters which were in those days solemnly passed upon by the full court, which are now disposed of in Chambers, by a judge or the Master; e.g., leave to discontinue; change of venue, order for security for costs, the plaintiff being out of the jurisdiction; entering up satisfaction; leave to amend pleadings; leave to have further time to plead; to amend writs of execution; particulars of demand, etc., etc.

There are a few matters to which particular reference may be made. The plaintiff might give notice of trial and fail to go to trial at the assizes for which notice was given. In that case, the court might, and generally did, order him to pay the defendant's costs as a punishment for not going to trial; but the defendant could not give notice of trial, himself.

Demurrers were not uncommon, due chiefly to the strictness with which pleadings were construed. In those days the court did not call upon the plaintiff to set out the facts upon which he relied so much as the legal consequences of the facts. If the declaration (statement of claim) did not disclose a cause of action, the proper and usual course was for the defendant to demur, i.e., to say in effect that granting all that is alleged to be true, the plaintiff has no legal right to relief. Nowadays we should raise a point of law and have it decided under C. R. 259; but in those days counsel would demur and then apply for a "dies concilii," "dies consilii" or "concilium," i.e., for a day upon which the court would hear argument upon the demurrer; and upon the day so fixed, counsel on both sides would be heard and the question decided, the demurrer being "allowed" or "overruled," as the case might be. Demurrers were abolished by Rule 1322 in 1894.* (See 16 P.R., p. xv.)

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*I believe I argued the last demurrer at Osgoode Hall; it was before Galt, C.J., just before the rule came in force. What has been so far spoken of was the general demurrer. In addition, there were special demurrers of all kinds. For example, I remember while a student drawing

Perhaps what would strike the modern practitioner most forcibly was the practice in ejectment. To anyone ignorant of the history of the English law, the old action of ejectment would seem a monument of wrongheadedness and technicality; but the history discloses that this form of action was in reality an ingenious device for doing justice without altering the old forms of law. The late Goldwin Smith was wont to remark that to expect lawyers to reform legal procedure was to expect the tiger to abolish the jungle. This gibe is repeated from time to time by those who should know better. Nothing is more false than what is suggested; all the improvements and reforms which have ever been made in legal procedure have been made by lawyers—the old technicalities were not the work of lawyers—primitive law had no lawyers.

And accordingly the action of ejectment, odd as it now seems by reason of improvements brought about by lawyers, was a distinct advance on the previous practice.

When A. is in possession of land to which B. claims to be entitled, the modern practice is for B. to issue a writ against A.; but it took many centuries for our simple and direct method to be adopted. The course pursued at the time we are speaking of was this:—

B. pretended to make a lease to John Doe, or Henry Goodtitle, or James Righteous—the name was immaterial, there was no such person—then it was pretended that John Doe, etc., went into possession of the land under the lease and that one Richard Roe, or William Badtitle, or Nicholas Badman—again the name was immaterial—and put the tenant off. Then John Doe, etc., sued for damages for trespass this Richard Roe, etc., the Casual Ejector. He might get judgment against casual ejectors by the

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a declaration and in it laying the venue, "The County of Lennox and Addington." The solicitor for the defence had been brought up in Cobourg in the United Counties of Northumberland and Durham; and he supposed that Lennox and Addington were in the same condition. He accordingly filed a special demurrer, saying that the venue should have been "The United Counties of Lennox and Addington." I had an easy triumph by referring to the Statute R.S.O. 1877, c. 5, s. 1, ss. 20, p. 22. We have had no special demurrers since the Judicature Act, and get along very comfortably without them.

dozen without doing himself any good, so long as the real occupant A. was not notified or before the court. But the courts evolved a practice said to be the device of Rolle, C.J., in the time of the Commonwealth, that if the actual tenant on being notified did not apply to the court to be admitted defendant in the room and stead of the Casual Ejector, he was to be held to have no right at all. The practice was to draw a declaration in "John Doe, on the demise of B. v. Richard Roe," setting out (1) title in B., (2) lease by him to John Doe, (3) entry by John Doe under the lease, and (4) ouster by Richard Roe; serve this on A. with a notice, as from Richard Roe, that he has no title at all to the land and shall make no defence, advising A. to appear in court and defend his own title otherwise he, the Casual Ejector, will suffer judgment to go against him, and A. will be turned out of possession. If A. does not appear in court, judgment will be given against the Casual Ejector and possession will be given to B. If A. desires to defend his title, then he will appear in court by his counsel, and apply to be admitted to defend in the place of the Casual Ejector. He will be permitted to do so only on condition that he will confess lease, entry and ouster, so that the only question to be tried will be the title of B. Thus a string of legal fictions was invented, so that the title of the claimant B. should alone come in question at the trial.

There were many cases of motion for judgment against the Casual Ejector and some of motion to be allowed in to defend in the place of the Casual Ejector. Defendants were held to their undertaking; in an Assize book of Mr. Justice Macaulay (still extant and at Osgoode Hall) in 1827, there are contained the judge's notes of a case in the Western District at Sandwich, in which Dr. Rolph, counsel for the defendant allowed in to defend, refused to make the admissions required. The judge held that, having taking out the "common rule" he was bound to make the admissions; he proceeded to try the case, although the admissions had been made. See Blackstone, Comm., Book 3, pp. 204, 205.

Questions of law were frequently reserved at the trial for the

decision of the court; for the argument of these a dies concilii had to be moved for.

In those days, in many actions the defendant could be compelled to give special bail or remain in custody until the trial of his action, etc., etc. What was done was for the plaintiff to issue a writ of capias ad respondendum and place it in the hands of the sheriff. The sheriff was bound to execute the writ by arresting the defendant. The theoretically regular practice was then for the sheriff to produce the defendant in the Court of King's Bench, with a return "cepi corpus," i.e., "I have seized the body of the defendant and have it ready." The defendant will have present two sureties and they enter into a recognizance that if the defendant be condemned in the action he will pay the amount and costs, or render himself a prisoner, or they will pay for him. If he did not pay, they could deliver him into custody and for that purpose were entitled to a warrant for his arrest.

Wednesday, November 9, 1825, Michaelmas Term, 6 George IV. (Præs. Campbell, C.J., and Sherwood, J.), "John Donaghue delivered to bail upon a Cepi Corpus to Matthew Donaghue, of the Home District, Yeoman and David Bates of the same place, yeoman, at the suit of Israel Ransome." This tells the story.

There were still echoes of the war of 1812. Wednesday, April 26th, 1826. Easter Term, 7 George IV. (Præs. Campbell, C.J., and Sherwood, J.), "*Rex* v. *John McDonell.* Motion for leave to take a certified copy of the indictment for high treason filed in the crown office against the above defendant John McDonell, James E. Small, Esq., for defendant, Granted." In the previous Term Book are several instances of motions made by the Solicitor-General, for copy of jury panel to give to prisoners about to be tried for high treason—those curious about the existence of treason at that time may look at the Provincial Statute, (1828), 9 George IV., c. 18.

The last matter I shall notice is proceedings taken in cases of alleged smuggling. The court was given the power of the Court of Exchequer in England in revenue cases, in cases of goods seized or contraband, in 1795 by 35 George III., c. 4—and it was

kept pretty busy in such cases. There will be found a long list of entries such as this which appears in Hilary Term, 6 George IV., December 28, 1825 (Prss. Campbell, C.J., and Sherwood, J.), "*The King* v. *Persons unknown.* Information on seizure at Chippewa, of sundry articles of merchandise on 1st December, 1825; 1st. Proclamation made. *The King* v. *Ditto.* Information on seizure by Collector of Dover on 27th September, 1825; 2nd. Proclamation made." Sometimes the kind of merchandise is mentioned, from which it would appear that what was generally smuggled was liquors of various kinds, tobacco and tea.

No one can say that the court in those days was not kept busy. The main difference in our present practice is simplification, decision of minor matters by a master or a single judge and disregard of petty technicalities—no slight gain.

WILLIAM RENWICK RIDDELL.

CONTRACTS IN RESTRAINT OF TRADE.

In the sale of the good will of a semi-professional establishment, it was recently decided that the vendor impliedly covenants not to re-enter or compete in any way with the vendee in the territory which his business previously covered. For the purposes of this discussion, it is sufficient to state that the Court based its decision on the distinction between the sale of the good will of a commercial enterprise and that of a professional concern, holding that in the latter instance the vendor tacitly consents not to re-establish himself in the vicinity of the old business, for to do otherwise would be in derogation of the vendee's rights.

Contracts in total or partial restraint of trade were originally held void as against public policy. This was based on the theory that no man could bind himself so as to deprive the Sovereign of his services. Subsequently, the Courts recognized the validity of such agreements when the restraint was only partial, the party being bound as to such stipulations of time and space reasonable in their nature and founded upon adequate consideration. To-

day the Courts freely extend relief by injunction where the restriction as to time or place is no more than is fairly and reasonably necessary for the proper protection of the covenantee. This principle applies with the same force when the transaction is for the sale of a professional business as distinguished from one in the nature of a trade.

Good will in general means that reputation which attaches to a man's business and may be the subject of a sale. True, the vendor cannot derogate from his own grant, yet there is nothing to prevent him from re-entering the field of competition unless the agreement stipulates otherwise. In all such instances, however, the vendor must act bona fide and must not wilfully injure or, by personal solicitation, defeat the rights of his vendee.

The question then arises, to what extent the vendor may re-establish himself in the community without interfering with the vendee to whom he has assigned the good will of his prior business. It is at this point that some Courts have drawn a distinction between the good will of a trade and that of a profession, alleging that in the former the good will attaches more to the nature of the business itself, while in the latter it adheres to and follows the person. But injunctions were granted either because the vendors had agreed to leave the field of their practice, the natural inference from which being they would not return, or because the vendors had been guilty of such wilful acts that the contract between the parties would have been rendered worthless without some interference by equity. In the principal case there was an agreement to sell the business, personal effects and good will of a chiropodist's establishment and nothing was said one way or the other about the vendor returning to the neighbourhood and re-entering the field. The vendor did come back, but in starting a new business conducted himself in such a manner as to destroy any good will which the vendee may have purchased. Yet the Court seemed to take the attitude that the mere act of returning was sufficient ground for their interference. It is submitted that the authorities upon which they base their decision do not warrant such a conclusion.

Whether or not a man engaged in the occupation of a chirop-

odist can be said to be pursuing a profession seems of little importance, since the Court assumed for the purposes of the decision that there were sufficient characteristics and features involved in the work to warrant the distinction from a trade.

The decisions in direct point are few, and though the relief granted here is in accordance with the result in similar cases, it is submitted that the reasoning of the Court is not borne out by the weight of opinion. The result, though a just and equitable one, opens up a wide latitude in which unwarranted conclusions may often be reached.—*University of Pennsylvania Law Review.*

APPAREL LOST AT RESTAURANTS OR ENTERTAINMENTS.

When seeking to ascertain the incidence of the damage to, or loss of, any apparel at a restaurant or other place of entertainment, it is very interesting, and quite as important, to note incidents which a layman may consider quite immaterial; in other words, to discover whether the customary liability of an innkeeper for the safe custody of a guest's goods, or a contract of bailment (gratuitous or for reward), or any other contract *inter vivos* is, in truth, at issue. It is scarcely necessary to remind the reader that one of the few positive duties known to English law is that, arising by the custom of the realm quite independently of any contract between the parties, whereby an innkeeper insures the safety of his guest's chattels left within his inn (even against injury or theft by a burglar, by his servant, or by another guest), in the absence of any act of God or of the King's enemies, or of any negligence of the owner: *Robins* v. *Gray*, 73 L.T. Rep. 252; (1895) 2 Q.B. 501). And for our present purpose it is material to remember that this duty, onerous and extraordinary as it is, attaches notwithstanding there has been no delivery of the chattels to the innkeeper or his servants, and no food or lodging having been supplied or found at the time of the loss (*Wright* v. *Anderton*, 100 L.T. Rep. 123; (1909) 1 K.B. 209), and notwithstanding the true owner of the chattels does not pay for the food or lodging supplied (*Gordon* v. *Silber*, 63 L.T. Rep. 283; 25 Q.B. Div. 491;

Wright v. *Anderton, ubi. sup.* And the innkeeper's pecuniary liability is only limited by the Innkeepers' Liability Act, 1863 (26 & 27 Vict. c. 41), which legislation, as it affects the present inquiry, amounts to this, that where the innkeeper can prove that a complete (*Spice* v. *Bacon*, 36 L.T. Rep. 896; 2 Ex. Div. 463) print in plain type of the exempting section of the Act was exhibited "in a conspicuous part of the hall or entrance of the inn," and neither the innkeeper nor the guest proves that the injury or loss was due to negligence for which the other is responsible, then, although the value of the article or articles of apparel lost be more than £30, the guest can recover no more than that sum: (*Medawar* v. *Grand Hotel Company*, 64 L.T. Rep. 851; (1891) 2 Q.B. 11).

It is, we think so extremely important in the case of a damage or loss to discern, in the very first place, whether the remedy arises from the owner being a guest at an inn, or from a liability as bailee either gratuitous or for reward, or for some other relationship existing between the owner and another person, and then, having done so, to keep the fact ever in mind, that we will select four suggestive and typical illustrations which may further elucidate the problem, and exhibit its many undecided difficulties.

1. Suppose that a wayfarer or traveller goes to an hotel to get a meal, and on entering the dining room hangs an overcoat on a peg; and that when he finished his repast, the coat is missing. Here there is sufficient evidence to establish the relation of innkeeper and guest, so as to make the hotel proprietor liable for the loss—subject, of course, to the limitation imposed by the Innkeepers' Liability Act—without proof of negligence on his or his servant's part, unless he can prove the loss arose from the negligence of the guest: *Orchard* v. *Bush and Co.*, 78 L.T. Rep. 557; (1898) 2 Q.B. 285. And if, instead of being missing, the coat were found to have been injured, the innkeeper would be liable for the injury, subject to the like limitation, as it seems clear that no just distinction as regards responsibility can be established between injury and loss: *Day* v. *Bather*, 2 H. & N. 14.

2. Again, take the case of a man, whether a traveller or not, entering a restaurant, not attached to or part of an hotel, who

finds a waiter in the vestibule or at the door of the dining room taking the customers' coats, sticks, etc. The mere fact that this waiter took the man's chattels, and disposed of them where he (the waiter) chose, would be evidence upon which a jury might properly find that the restaurant-keeper was a bailee of the chattels, and, accordingly, liable as a bailee should injury or loss occur; and this because such a practice does, or even might, add to the popularity and distinction of the establishment, and was probably adopted by the proprietor or manager with that very object in view: *per* Mr. Justice Charles in *Ultzen* v. *Nicols*, 70 L.T. Rep. 140; (1894) 1 Q.B. 92.

3. Thirdly, suppose that a man (traveller or not) enter a restaurant, or a "tea shop," and a waiter, without being asked, takes his hat and hangs it upon a hook behind him, and suppose that, while he is enjoying his meal, the hat disappears. Now, a person cannot be made liable as a bailee without his consent; and it has to be confessed that these assumptions present a vexatious and troublesome question whether they show a bailment of the hat, or merely a taking of the hat as an act of good nature, or an act of service, and without any intention of taking charge of it. Still, on the whole, they present evidence upon which a jury might find a bailment, and, if so, more assuredly, that the restaurant-keeper was guilty of negligence while the hat was in his custody, owing to want of reasonable care on his part: *Ultzen* v. *Nicols*, *ubi sup.*; and cf., as to the negligence, *Phipps* v. *New Claridge Hotel*, 22 Times L. Rep. 49; *Bullen* v. *Swan*, 23 Times L. Rep. 258; *Giblin* v. *M'Mullen*, L. Rep. 2 P.C. 317).

4. Lastly, at a subscription dance or concert held in a country institute or assembly room, a subscriber leaves his overcoat in the cloak room, and it is afterwards found missing. The evidence may negative a bailment with the entertainment committee, and as to any breach of an implied contract by the committee to take proper care of any chattels so deposited, it may be negative by the low price of the tickets: *Baker* v. *Cain*, *Times*, 23rd Nov., 1812, p. 3.

It is evident, therefore, that if the place visited be not an inn, the customer must show some express or implied contractual

obligation, or a bailment. And the reader may have concluded, and we think correctly, that the traveller in the first case would have had to suffer the loss if the place he had gone to had not been an inn, because he did not deliver his overcoat to the innkeeper or one of the servants, and, as every lawyer knows, and the derivation of the word "bailment" suggests, delivery of the chattel in trust is essential to a bailment of it. In the second case a small cloak-room charge might have been demanded and paid; and, therefore, it will be useful to recall that a bailment may be either for reward or gratuitous, and that this distinction affects, and very reasonably so, the degree of diligence which is expected of the bailee. And whenever the place is not an inn, it may be worth considering whether the responsibilities of a boarding-house keeper, or at least some of them, which were a few years ago discussed and enunciated in a case in the Court of Appeal *Scarborough* v. *Cosgrave*, 93 L.T. Rep. 530; (1905) 2 K.B. 805), do not also attach to the proprietor of the establishment in question; and further to bear in mind that if liability for injury or loss exist, it would not be limited to £30.

It appears, then, that in a case of customary liability, a plaintiff has to, if it be possible, prove he visited an inn (see *Thompson* v. *Lacy*, 3 B. & Ald. 286), and that the relationship of innkeeper and guest, in the legal sense of these terms, arose. In this connection we would point out that when Mr. Justice Wills stated (*Orchard* v. *Bush and Co.*, *ubi sup.*) that, from the point of authority, he did not think that there was much to be said for the proposition that the term "guest" is to be limited to a wayfarer, and that the liability of an innkeeper arises whenever he receives a person *causâ hospitandi* or *hospitii*, it was *obiter*, as the plaintiff in the case was held to be, and clearly was, a traveller; and, with great respect for that learned judge, we must add that this dictum appears to be inconsistent with other cases (*e.g.*, *Burgess* v. *Clements*, 4 M. & S. 306; *Reg.* v. *Rymer*, 35 L.T. Rep. 774; 2 Q.B. Div. 136; *Lamond* v. *Richards*, 76 L.T. Rep. 141; (1897) 1 Q.B. 541). We should be glad if the meaning of the term came again shortly for consideration and judgment; as we are inclined to think it is still arguable that a person who dines at an inn

in his town, and then returns home, or goes on to the play or a ball, is not a "guest," and must, accordingly, frame his case irrespective of the fact that the place he visited was an inn.

The conclusion we must reach is that there are several nice points in this very everyday subject which, it may fairly be said, are as yet uncovered by decision, and remain of a very difficult and somewhat controversial nature. Each adviser will doubtless have, now and again, to make inferences which do not admit of rigid proof by precedent, or of support by *obiter dictum*. And there is, perhaps, an advantage in this state of things. For elasticity enables those who have to administer a law to adapt it the more readily to the modern requirements of the age.—*Law Times*.

BONUS DIVIDEND, WHETHER CAPITAL OR INCOME.

Turning to *Re Evans; Jones* v. *Evans* (107 L.T. Rep. 604)—that being the second case to which we are now calling attention—the distribution of a portion of the accumulated profits of a company among its shareholders, in the shape of a bonus dividend, led to the question there discussed: Was such a dividend to be treated as forming part of the income or of the capital of the trust estate of a deceased shareholder? In other words, was the tenant for life to be the recipient or the remaindermen? Mr. W. H. Gover, in his able Treatise on the Law of Capital and Income (2nd ed., p. 12), states with much conciseness, but none the less with absolute lucidity, the result of the various decisions that have from time to time been pronounced on this subject. It is a question of the intention that is manifested in each case. Thus, as the learned author points out, if a company resolves to divide its accumulated profits as dividends, any dividend so allotted in respect of settled shares belongs to the life-tenant as income, whether described as "bonus dividend" (*Re Northgate; Ellis* v. *Barfield*, 64 L.T. Rep. 625; (1891) W.N. 84), or "special bonus": (*Re Alsbury; Sugden* v. *Alsbury*, 63 L.T. Rep. 576; 45 Ch. Div. 237). On the other hand, if a company resolves to appropriate accumulated profits to

increase its capital, and issues new shares rateably to its members to represent the same, any shares so issued in respect of settled shares become part of the capital fund under the settlement: (*Bouch* v. *Sproule*, 57 L.T. Rep. 345; 12 App. Cas. 385; *Baring* v. *Ashburton*, 16 W.R. 452). What Mr. Justice Neville had, therefore, to satisfy himself was as to the precise character of that which the company had resolved to do. Was it the intention of the company to capitalize that portion of its accumulated profits which it was distributing? If that was the actual nature of the scheme, then the decision of the House of Lords in *Bouch* v. *Sproule* (*ubi sup.*) clearly governed the present case. In the absence of some special provision in the constitution of a company, it cannot, of course, authoritatively convert a portion of its accumulated profits into new capital against the wish of any individual shareholder. But Mr. Justice Neville was of opinion that, in the present case, the company had successfully done so by offering such inducements to the shareholders as prompted them to avail themselves of the scheme. By shewing that it was seeking to induce the shareholders to apply the bonus dividend in taking up further shares, the principle of *Bouch* v. *Sproule* (*ubi sup.*) became applicable. True it is that the shareholders were given an option to take the bonus allotted to them either as a dividend or to return it to the company as a payment in respect of new shares. And there are authorities which shew what the effect of that may be: (see, *inter alia, Re Malam; Malam* v. *Hitchens*, 71 L.T. Rep. 655; (1894) 3 Ch. 578; and *Re Despard; Hancock* v. *Despard*, 17 Times L. Rep. 478). But the learned judge did not think that in the present case there was enough in that to rebut the presumption which, according to *Bouch* v. *Sproule* (*ubi sup.*), ought to be regarded. Moreover, as his Lordship remarked, he had to deal with a case of trustees who, as between themselves and their beneficiaries, had no right of election, whatever they might have as between them and the company. This latter consideration, indeed, seems quite to dispose of any argument founded on the option point.—*Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

ADMINISTRATION—OUTSTANDING GRANT—LETTERS OF ADMINISTRATION MISLAID—RETRACTATION OF RENUNCIATION—FIRST GRANT.

Re Heathcote (1913) P. 42. In this case letters of administration had been granted twenty years ago to the estate of a deceased married woman to her husband's trustee in bankruptcy, the husband having renounced his right. Subsequently the bankruptcy was annulled on payment by the bankrupt of 20s. in the pound, and the trustee in bankruptcy had obtained his release as trustee. Recently a sum of £700 became payable to the legal personal representative of the deceased, and the husband applied for leave to retract his renunciation, for revocation of the outstanding grant, and for a fresh grant to himself. The former grant had been lost and could not be produced. Deane, J., granted the order, and directed that in future all grants to whomsoever made should contain a personal undertaking by the grantee that he will deposit the document with the Principal Registry if and whenever he shall receive a formal notification requiring him to do so. It may be observed that a similar undertaking would seem equally necessary in Ontario, to avoid the obvious inconvenience of having two outstanding grants to different persons. It is also to be noticed that the fresh grant in this case was general in its terms and not merely de bonis non.

MARRIAGE—ENGLISH MARRIAGE—ANNULMENT OF ENGLISH MARRIAGE BY FOREIGN COURT.

Stathatos v. *Stathatos* (1913) P. 46. This case although a divorce case is deserving of careful attention, not so much for the point of law, which is actually decided, as for the state of facts which it discloses, and the perils which it shews are incurred by English people marrying Greeks. In this case the plaintiff though born in France was domiciled in England and in 1904 was married in a registry office to the defendant a Greek and lived with him in England 3 years as his wife. She then went to Greece with the defendant, but when they got there he refused to introduce her to his relatives, or treat her as his wife and finally told her to go back to her relatives

in England. He then applied to a Greek court to annul the marriage and it was annulled on the ground that by the law of Greece the English marriage was void, because it had not been solemnized in the presence of a Greek priest. The defendant subsequently married again and the plaintiff brought the present writ for a divorce on the ground of his adultery, which was granted. In the interests of religion and morality it would seem that some effort ought to be made to secure international comity on the subject of marriage. As the law at present stands it affords scoundrels an excuse for their immoralities.

PRINCIPAL AND AGENT—STOCKBROKER—SPECULATIVE TRANSACTION—DEATH OF PRINCIPAL—CLOSING ACCOUNT—DUTY OF BROKER—TAKING OVER STOCKS BY BROKER.

In re Finlay, Wilson v. *Finlay* (1913) 1 Ch. 247. In this case the plaintiffs were stockbrokers and were employed by one Finlay to purchase shares of a speculative character on his account. The plaintiffs entered into contracts to buy shares on his account and before settling day Finlay died. Finlay had previously given the plaintiffs authority to sell the shares and also any shares of his held by them as security. The plaintiffs closed the account and took over the shares contracted to be purchased for Finlay themselves, at what the Master found was their fair value at the time. This action having been brought for the administration of Finlay's estate, the claim of the plaintiffs was disputed because there had been no actual sale of the deceased's shares, and Warrington, J., held that the plaintiff's duty on the death of Finlay was to close the account and to minimize the loss to their client in respect of his indemnity to them, to the utmost extent, but that for this purpose it was not absolutely necessary for them to sell the shares, as their doing so might create a slump in the market, but that it was competent for them to take over the shares as they had done at their true value.

MORTGAGOR AND MORTGAGEE—FORECLOSURE—"ACTION FOUNDED ON BREACH OF CONTRACT"—ORIGINATING SUMMONS—SERVICE OUT OF JURISDICTION—RULE 64(*e*)—ONT. RULE 162(*a*).

Hughes v. *Ovenham* (1913) 1 Ch. 254. This is an appeal from the decision of Neville, J. (ante p. 1 5). The Court

of Appeal (Cozens-Hardy, M.R., and Farwell, and Hamilton, L.JJ.) as we previously intimated reversed his decision. The question in issue being whether an originating summons for the foreclosure of a mortgage of personalty can be properly ordered to be served on a defendant out of the jurisdiction. Neville, J., thought it was an action founded on breach of contract and therefore was within the Rule 64(*c*), but the Court of Appeal held that it was not, because on an originating summons the court has no jurisdiction to give any relief on the contract, but the only relief which could be given on such a proceeding was to foreclose the defendant's equity of redemption. Proceedings by way of originating summons do not in Ontario include foreclosure of mortgages, and therefore the point actually decided can hardly arise in Ontario; yet in view of this decision it may be doubted whether a writ for foreclosure of the equity of redemption in personalty, in which a claim for relief on a covenant is also joined, could be authorized to be served out of the jurisdiction, except on the terms of first striking out the claim for foreclosure. With regard to actions to foreclose mortgages of land, they would appear to come within Ont. Rule 162 (*a*).

MAINTENANCE OF SUIT—COMMON INTEREST—ACTION BY OFFICERS OF TRADE UNION FOR SLANDER—"INDEMNITY BY UNION AGAINST COSTS"—ULTRA VIRES.

Oram v. *Hutt* (1913) 1 Ch. 259. The plaintiff in this case was a member of a trade union, and the object of the action was to compel the refunding of funds of the union which had been paid for the indemnification of some of the officers of the union, against the costs of actions brought by them for slanders uttered in their official capacity. A judgment had been recovered by the officers in the actions for £1,000 and costs and £25 respectively, but no part of the damages or costs could be collected from the defendant; and the plaintiffs' costs in the actions amounting to £949 had been paid out of the funds of the union. The plaintiff claimed that such payment was ultra vires and should be refunded. Eady, J., who tried the action held that the union had not a common interest with its officers in bringing the action and that the payments in question was ultra vires and must be refunded.

NUISANCE—INJUNCTION—FRIED FISH SHOP.

Adams v. *Ursell* (1913), 1 Ch. 269. The plaintiff in this case claimed that a fried fish shop carried on by the defendant in a house adjoining the plaintiffs' house was a nuisance and he claimed an injunction to restrain the defendant from continuing it. The evidence established that the defendant supplied fresh fish and had the most approved appliances, but that the odour caused by the frying fish was an inconvenience, materially interfering with the ordinary comfort physically of human existence, and therefore granted the injunction.

LEGACY—DISCLAIMER—RIGHT TO RETRACT DISCLAIMER—REFUSAL OF TENANT FOR LIFE TO RECEIVE INCOME—PAYMENT TO SECOND LIFE TENANT—DEATH OF SECOND LIFE TENANT—RIGHT OF FIRST LIFE TENANT TO RETRACT REFUSAL AS TO FUTURE INCOME.

In re Young Fraser v. *Young* (1913) 1 Ch. 272. In this case the facts were that trustees accepted and held a legacy in trust for the plaintiff for life, and after her death for her son for life and after his death for the residuary legatees, but the plaintiff being annoyed at the terms of the will refused to receive the income and with her consent it was paid to her son. The son having died she desired to retract her refusal quoad the future income and the question was whether she could do so as against the residuary legatees who contended that her refusal was absolute and could not be retracted. Eady, J., who tried the action came to the conclusion that the plaintiff's refusal to receive the income could not be treated as the disclaimer of a legacy and that as neither the trustees nor the residuary legatees had changed their position on the faith of that refusal, it could be retracted as far as the future income was concerned.

SETTLED ESTATE—LEASEHOLD—SPECIFIC BEQUEST—RENT AND OUTGOINGS TO BE PAID OUT OF GENERAL ESTATE—SALE BY LIFE TENANT—APPLICATION OF PROCEEDS OF SALE OF TRUST LEASEHOLD.

In re Simpson Clarke v. *Simpson* (1913) 1 Ch. 277. A testator bequeathed a leasehold to his executors and trustees in trust to permit his wife to occupy the same during her widowhood, and provided that the ground rent, rates, taxes and out-

goings, etc., of the property should be paid out of his general estate and his widow relieved therefrom: the widow occupied the premises for fourteen years and then sold the premises under the Settled Land Act and the question then arose as to the proper application of the proceeds. During the widow's occupancy of the premises the outgoings had amounted to £160 a year, which had been paid by the trustees out of the general estate.

The widow claimed that out of the general estate, the trustees should continue to pay her a similar amount; but Eady, J., was of the opinion that she was not entitled to anything in respect of the provision for payment of rent, and outgoings which he regarded as an extra benefit conferred on her to enable her to reside in the house, and was not a provision tending to induce her to abstain from exercising her statutory power of sale within the meaning of s. 51 of the Settled Land Act 1882—and he held that under s. 34 of the Act the proceeds of the sale must be applied in paying to the widow during her widowhood such an annuity as would exhaust the proceeds, capital and income, during the remaining eleven years of the lease.

SOLICITOR AND CLIENT—AGREEMENT AS TO COSTS—BILL OF EXCHANGE GIVEN FOR COSTS—BILL TAKEN AS PAYMENT—DELIVERY OF BILL OF COSTS—"FAIR AND REASONABLE"—ATTORNEYS AND SOLICITORS ACT 1870 (33-34 VICT. C. 28), S. 4—SOLICITORS REMUNERATION ACT 1881 (44-45 VICT. C. 44), S. 8 (1, 4)—(2 GEO. V. C. 28, SS. 49, 50, 56, 57, 58, ONT.).

Ray v. *Newton* (1913) 1 K.B. 249, was an action to enforce a bill of exchange given in payment of a sum agreed on between solicitor and client for costs. No bill had ever been delivered, and the defendant obtained leave to defend, but, without delivering a defence, made an application for the delivery of a bill of costs under the Solicitors Acts, and for an inquiry into the agreement as to whether it was fair and reasonable—The bill of exchange, which was not payable until two years from date, had been accepted by the solicitors as payment and had been dishonoured. The application was made in the action and without being entitled in the Solicitors Acts which the Court of Appeal held to be irregular, and directed to be amended. On the merits, the Court of Appeal (Farwell, and Hamilton, L.JJ.) disagreed with Rowlatt, J., that the making of the agreement and the

acceptance of the bill in payment, barred the client of his right to the delivery of a detailed bill of costs: and the court while allowing the appeal directed a delivery of the bill of costs as claimed.

APPEAL—"FINAL ORDER IN ACTION"—RULE 879—(ONT. JUD. ACT, S. 73).

Johnson v. *Refuge Assurance Co.* (1913) 1 K.B. 259, may be briefly noticed for the fact that the Court of Appeal (Buckley, and Kennedy, L.JJ.) held that an order of a Divisional Court dismissing an appeal from a final judgment in a County Court action, is, for the purpose of appeal "a final order" in an action within the meaning of Rule 879, (see Ont. Jud. Act, s. 73).

CRIMINAL LAW—INDICTMENT—JOINDER OF SEVERAL CHARGES AGAINST DIFFERENT DEFENDANTS—LARCENY ACT, 1861 (24-25 VICT. C. 96, S. 5)—(CR. CODE SS. 856, 857).

The King v. *Edwards* (1913) 1 K.B. 287. This was an application to quash an indictment after verdict. The English Larceny Act, 1861, s. 5, provides that several courts may be included in an indictment for any number of distinct acts of stealing, not exceeding three, committed against the same person within the space of six months from the first to the last of such acts (see Cr. Code ss. 856, 857). In the present case the indictment included one count for larceny against one defendant and also another count for larceny against the same defendant and another person jointly. This the Court of Criminal Appeal, (Ridley, Phillimore and Bankes, JJ.) held was not warranted by the Act, and the indictment was quashed, notwithstanding it was urged upon the part of the Crown that the defendant's case was devoid of merits, the court being of the opinion that some degree of prejudice had resulted to the defendants from the joinder of the counts.

PRINCIPAL AND AGENT—AGENT BORROWING WITHOUT AUTHORITY—UNAUTHORIZED LOAN TO AGENT APPLIED IN PAYMENT OF PRINCIPAL'S DEBTS—LIABILITY OF PRINCIPAL—NOTICE TO LENDER OF LIMIT OF AUTHORITY OF AGENT—EQUITABLE RIGHT OF LENDER.

Reversion Fund and Insurance Co. v. *Maison* (1913) 1 K.B. 364. This was an action by the plaintiff to recover from the de-

fendants (a limited company) the amount of a loan made by the plaintiff to the managing director of the defendant company, the plaintiffs knowing at the time that the director had no authority to contract the loan for the company. It appeared that the proceeds of the loan had been applied in payment of the debts of the defendant company. Scrutton, J., who tried the action, thought that in these circumstances the plaintiff had no right of action, and accordingly dismissed the action. The majority of the Court of Appeal (Buckley, and Kennedy, L.JJ.) took a different view, and considered that in substance the transaction did not amount to a borrowing, but merely the replacement of one debt by another of the same amount and although the plaintiffs had notice that the director was not authorized to borrow on behalf of the defendant company yet that was immaterial; and that in the circumstances, the plaintiff had an equitable right to recover.

It is pointed out in the judgments of the majority of the court that this equitable right of the plaintiff is not strictly a right of subrogation, because if it were, the plaintiffs would be entitled to the securities held by the creditors whose claims were discharged, but that they are not entitled to. It would rather appear to be an equity similar in some respects to, but at the same time distinct from the right of subrogation. Williams, L.J., though admitting the existence of the equity, held nevertheless it can only arise in the case of a lender who is ignorant of the agent's want of authority.

NEGLIGENCE—LANDOWNER — UNFENCED LAND—LEAVE AND LICENCE TO ENTER—CHILDREN—INVITATION—ALLUREMENT—DANGEROUS OBJECT—INJURY—LIABILITY.

Latham v. *Johnson* (1913) 1 K.B. 398, was an action to recover damages for an injury sustained in the following circumstances. The defendants owned a plot of unfenced land from which houses had been cleared. It did not adjoin any highway, but was accessible from the back of a house where the plaintiff, a child about 3 years old, lived with her parents. The public were allowed to traverse the land and children of all ages were accustomed to play upon heaps of stone, sand and other materials which from time to time were deposited there by the defendants. The plaintiff went on the land unaccompanied and was found upon a heap of paving stones one of which had fallen upon her hand and injured it. There was

no evidence to shew how the accident happened. The jury found that children played on the land to the knowledge of the defendants, that there was no invitation to the plaintiff to use the land unaccompanied; that the defendants ought to have known that there was a likelihood of children being injured by the stones and that the defendants did not take reasonable care to prevent children being injured thereby and upon these findings Scrutton, J., gave judgment for the plaintiff—he holding that the case was governed by *Cooke* v. *Midland and G.W. Ry.* (1909) A.C. 229, the turntable case (see ante vol. 45 p. 515), but the Court of Appeal (Cozens-Hardy, M.R., and Farwell, and Hamilton, L.JJ.), overruled his decision holding there being neither allurement or trap, nor invitation, nor dangerous object placed on the land, there was really no evidence to go to the jury on which they could find any legal liability on the part of the defendants for the injury complained of. The action was therefore dismissed.

REPORTS AND NOTES OF CASES.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ROYAL BANK OF CANADA *v.* THE KING.
(9 D.L.R. 337.)

Lord Chancellor, Lords Macnaghten, Atkinson, and Moulton.] [Jan. 31.

Contracts—Money had and received—Failure of consideration—Recovering back money—Loan under abortive scheme—Lender's rights—Constitutional law—Functions and powers of province—Act altering conditions of loan—Non-resident bondholders—Situs of remedy on failure of consideration—Act affecting extra-territorial rights.

Held, 1. When money has been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as for money had and received to his use; and this principle extends to cases where the money has been paid for a consideration that has failed.

2. Where money has been paid to borrowers in consideration of the undertaking of a scheme to be carried into effect and the scheme becomes abortive, the lender has a right to claim the return of the money in the hands of the borrowers as being held to his use.

Wilson v. *Church,* 13 Ch.D. 1, in appeal *sub nom. National Bolivian Navigation Co.* v. *Wilson,* 5 A.C. 176, referred to.

3. Where the purchase price of bonds was remitted by the lenders in London to a branch of a Canadian bank in New York, to be applied in carrying out the proposed construction of a railway upon a guarantee of the bonds by the Provincial Government of Alberta, and in pursuance thereof the bank through its head office in Montreal authorised the opening of a credit for the amount in a branch of the same bank in Alberta subject to be drawn upon only upon the terms of the scheme which the province had approved by statute and order-

in-council, the province cannot, by declaring a forfeiture of the concession and enacting a statute purporting to alter the conditions of the scheme previously approved, acquire jurisdiction to legislate over the civil right which arose in favour of the bondholders in London to claim from the bank in Montreal, outside of the jurisdiction of the Alberta legislature, a return of the money which they had advanced for a purpose which had ceased to exist.

The King v. *Lovitt*, [1912] A.C. 212, distinguished.

4. As the effect of the Alberta statute, 1910, ch. 9, the Alberta and Great Waterways Railway Bonds Act, if validly enacted, would have been to preclude the bank, through which the money of the bondholders was being advanced under the terms of a government concession, from fulfilling its legal obligation accruing and remaining enforceable at a place outside of the Province of Alberta, the statute is *ultra vires*.

Sir R. Finlay, K.C., and *William Finlay*, for all the appellants. *J. H. Moss*, K.C., for the appellants the Alberta and Great Waterways Ry. Co., and the Canada West Construction Co. *S. O. Buckmaster*, K.C., *C. A. Masten*, K.C., and *Geoffrey Lawrence*, for respondents.

Dominion of Canada.

SUPREME COURT.

Que.] CITY OF MONTREAL *v.* LAYTON. [Feb. 18.

Public health—Suspected food for sale—Action by health officers Control by Court—Evidence—Injunction.

In December, 1910, the appellant company had a large quantity of eggs, frozen in bulk, stored in the warehouse of a cold storage company, the mis-en-cause in the action. On Dec. 19th a food inspector of the city of Montreal entered the warehouse and removed four cans of the eggs, and on the 25th notified the cold storage company that the whole lot was under seizure until a report was obtained on the samples so taken. On Jan. 24th, 1911, the Chief Food Inspector of the city notified the cold storage company that they must consider the eggs as still under seizure and not allow any of them to be removed or sold, and on

the next day he instructed them to comply with an order of the Provincial Board of Health that the eggs were not to be sold anywhere in the province. On the 26th the respondents were notified that if the eggs were not removed from the province they would immediately be destroyed. The respondent company then brought action to restrain the city from further interference with their property, and a temporary injunction was issued which was enlarged from time to time until the action was decided when it was made permanent, the trial judge holding that the eggs were fit for human consumption and the city's proceedings were illegal. His judgment was affirmed by the Court of King's Bench on the ground that there had been no lawful seizure of the eggs and the injunction restrained the city from seizing or interfering with them otherwise than by due process of law. On appeal to the Supreme Court of Canada:—

Held, that the finding of the trial judge that the eggs were fit for human consumption should not be disturbed.

Held, per FITZPATRICK, C.J., DAVIES and IDINGTON, JJ., that the actions of the health officers in exercising the authority conferred on them by law are not final, but are subject to control by the Superior Court.

Held, per FITZPATRICK, C.J., that there was no lawful seizure of the respondents' eggs.

Held, per ANGLIN and BRODEUR, JJ., that the Chief Food Inspector did not exercise his independent judgment in condemning the eggs, but merely followed out the instructions of civic officials and could not claim any protection under the Public Health Act.

Appeal dismissed with costs.

Atwater, K.C., and *Aimé Geoffrion*, K.C., for appellants. *Dale Harris*, for respondents.

Ont.] BOULTER *v.* STOCKS. [Feb. 18.

Contract—Rescission—Sale of land——Misrepresentations—Affirmance.

B. advertised for sale his farm in Ontario stating the contents and describing it as in first class condition. He also stated the number of trees, old and new, in the orchard on it. S., then in Britsh Columbia, was shewn the advertisement and, after some correspondence in which B. reiterated the statements therein,

came to Ontario and spent some time in inspecting the farm which he finally purchased on B.'s terms and entered into possession. Shortly after he leased the orchard for ten years and within a day or two discovered that the farm contained over forty acres less than, and the contents of the orchard only half of, what had been represented; also that the farm was not in the condition stated, but badly overrun with noxious weeds. He, therefore, procured the cancellation of the lease of the orchard and brought action to have the sale rescinded.

Held, that the lease of the orchard was not, under the circumstances, an affirmance of the contract for sale which would disentitle S. to rescission; that if it were an affirmance as to the orchard the subsequent discovery of the other misrepresentations would entitle him to a decree. *Campbell* v. *Fleming*, 1 A. & E. 40, distinguished.

Appeal dismissed with costs.

Anglin, K.C., for appellant. *McKay*, K.C., for respondent.

Alb.] CROSS *v.* CARSTAIRS. [Feb. 21.

RE EDMONTON (PROVINCIAL) ELECTION.

Appeal—Provincial election—Preliminary objections—Judicial proceedings—Final judgment.

Held, per DAVIES, IDINGTON and ANGLIN, JJ., that under the provisions of the Alberta Controverted Elections Act, the judgment of the Supreme Court of the province in proceedings to set aside an election to the legislature in final and no appeal lies therefrom to the Supreme Court of Canada.

Held, per DUFF, J., that a proceeding under said Act to question the validity of an election is not a "judicial proceeding" within the meaning of sec. 2(e) of the Supreme Court Act.

Held, per BRODEUR, J., that the judgment of the Supreme Court of Alberta on appeal from the decision of a judge on preliminary objections filed under the said Controverted Elections Act is not a "final judgment" from which an appeal lies to the Supreme Court of Canada.

Appeal quashed with costs.

Lafleur, K.C., and *O. M. Biggar*, for appellant. *Ewart*, K.C., for respondent.

N.S.] GRAVES v. THE KING. [Feb. 24.

Criminal law—Indictment for murder—Trial—Charge to jury—Non-direction—New trial.

On the trial of an indictment for murder of one Kenneth Lea it was proved that the prisoners, who had been drinking, came on the deceased's lawn and commenced to shout and sing and use profane and insulting language towards him. He twice warned them away and finally appeared with a loaded gun threatening to shoot. A rush was made towards the verandah where he stood when he took hold of the barrel of the gun and struck one of the prisoners with the stock. The gun was discharged into his body and there was evidence that the prisoners then maltreated him and his wife. He was taken to a hospital in Halifax, where he died shortly after. The trial judge in charging the jury instructed them that the prisoners were doing an unlawful act in trespassing on the property of deceased and that if they were actuated by malice it would be murder, if not, it was manslaughter, drawing their attention especially to sections 256 and 259(b) of the Criminal Code. The prisoners were found guilty of murder. On appeal from the decision of the Supreme Court of Nova Scotia on a reserved case:—

Held, that the judge should have drawn the attention of the jury to sub-section (d) of section 259 and directed them to find whether or not the prisoners knew, or ought to have known, that their acts were likely to cause death and his failure to do so was non-direction for which the prisoners were entitled to a new trial.

Appeal allowed with costs.

Roscoe, K.C., for appellants. *Newcombe*, K.C., for respondent.

Duff, J.] RE DEAN. [Feb. 25.

(9 D.L.R. 364.)

Theft—With breaking and entering—Cr. Code 1906, *s.* 11, 460—*Courts—Supreme Court (Can.)—Habeas corpus jurisdiction.*

Held, 1. The offence of breaking into a counting-house and stealing money therefrom as declared by the English statute 7-8 Geo. IV. c. 29, s. 15, was a part of the criminal law of British Columbia prior to its admission into Confederation, and

remains in force under Cr. Code, s. 11, subject to the change made by the Criminal Code as to the nature of the punishment.

[See Cr. Code, s. 460.]

2. A judge of the Supreme Court of Canada has concurrent jurisdiction with provincial courts to grant a writ of *habeas corpus* under the Supreme Court Act, R.S.C. (1906), c. 139, s. 62, in respect of a commitment in a criminal case where the commitment is in respect of some act which is made a criminal offence solely by virtue of a statute of the Dominion Parliament, and not where it was already a crime at common law or under the statute law in force in the province on its admission into the Canadian Confederation and which had not been repealed by the Federal Parliament.

Re Sproule, 12 Can. S.C.R. 140, applied.

J. Travers Lewis, K.C., for applicant. *E. F. B. Johnston*, K.C., for Attorney-General for British Columbia.

Province of Ontario.

SUPREME COURT.

Garrow, Maclaren, Meredith, Magee, and Hodgins, JJ.] [Jan. 15.

COOPER *v.* LONDON STREET R. CO.

(9 D.L.R. 368.)

Street railways—Duty of railway company—Usual stopping place—Negligently running past stationary car—Trial—Submission of questions to a jury—Lack of care in running car—Car stationary discharging passengers—Taking case from jury—Negligence—Personal injuries.

1. A passenger who had just alighted from a street car which was being met on a parallel track by another, at a point where cars usually stopped to discharge and receive passengers, and where, to the knowledge of the railway company, it was the custom or habit of persons alighting from cars to cross a parallel track in order to reach another street, is not necessarily guilty of contributory negligence, where the fact that another passenger warned the plaintiff, a woman, to look out for the car, might well have flurried and perturbed her, as witnesses said, and led her to lower her head in the face of a strong wind, as

she went around the rear of the car from which she had just alighted, and attempted to cross the parallel track, where she was struck by a car which was negligently run past the stationary car at an unusually high rate of speed.

2. The negligence of the defendant street railway company was sufficiently shewn so as to prevent the withdrawal of such question from the jury, where the evidence disclosed that sufficient caution was not observed in running a street car towards a car standing on a parallel track discharging passengers at a street crossing where they were regularly discharged and received, and where, to the knowledge of the company, it was the habit or custom of passengers to cross a parallel track in order to reach another street, and that the car struck and injured the plaintiff, who had just alighted from the stationary car, and without noticing the car approaching from the opposite direction, passed around the rear of the standing car and stepped upon the parallel track.

Cooper v. *London Street R. Co.*, 5 D.L.R. 198, affirmed.

3. Where there is no reasonable evidence upon the whole case whether adduced by the plaintiff or the defendant upon which the jury could find in the plaintiff's favour in an action of negligence, the case should be withdrawn from them and the action dismissed; it is not necessary to go through the form of directing the jury to find a verdict for the defendant and of having such verdict recorded. (Dictum *per* Meredith, J.A.)

Hellmuth, K.C., for defendants, appellants. *Sir George C. Gibbons*, and *G. S. Gibbons, contra.*

Province of Manitoba.

KING'S BENCH.

Metcalfe, J.] [March 10.

CANADA LAW BOOK CO. *v.* BUTTERWORTH & CO. AND BUTTERWORTH & CO. (CANADA). (9 D.L.R. 324.)

Injunction—Contract rights—Competing business—Evidence—Contracts—Suggestive facts—Part performance—Statute of Frauds—Construction—Intention of parties—Several papers—Estoppel—Equitable estoppel by conduct—Continuation—Exercising option.

Held, 1. An injunction may be granted against a publisher and a company controlled by him, jointly sued for infringing his contract which conferred exclusive rights of sale of a copyrighted book upon another company in consideration of the latter's purchase of a specified number of copies of the work, to restrain the future selling or offering for sale of such work by either of defendants in contravention of the contract, and damages may be awarded for the past infringement.

See *Pitt, Pitts* v. *George & Co.*, [1896] 2 Ch. 866; *Walsh* v. *Whitcomb*, 2 Esp. 565; *Bohn* v. *Bogue*, 10 Jur. 421; *Re Hirth*, [1899] 1 Q.B. 612, 625.

2. In an action for infringement of exclusive territorial rights of sale conferred by contract, the court may give weight to the circumstance that the defendant had, prior to the expiry date for which he himself contended, and which was in dispute, made extensive preparations to invade the business territory in question in competition with the party holding such contractual rights, and had not communicated the fact to the latter.

See *Bank of New Zealand* v. *Simpson*, [1900] A.C. 182; *Waterpark* v. *Fennell*, 7 H.L.C. 650, 678; *The "Curfew,"* [1891] P. 131.

3. Where an exclusive agency for a copyright publication has been granted within a defined territory in consideration of a guaranteed purchase by the agent of a large quantity for resale and where the parties for a long period thereafter have acted as though there were an enforceable contract and goods have been supplied and accepted in pursuance thereof, a plea of the Statute of Frauds (sec. 4) is not a bar in equity to the enforcement of the contract so acted upon, even if there were no sufficient memorandum to answer the statute.

Prested v. *Garner*, [1910] 2 K.B. 776, and in appeal, [1911] 1 K.B. 425, distinguished.

4. A letter setting forth in detail what the writer claimed had been agreed upon and purporting to confirm an unsigned cablegram sent by him a short time previously must be regarded in ascertaining the terms of a contract informally made and not theretofore completely shewn by a writing signed by the party to be charged; and where the party receiving the letter did not repudiate (although through inadvertence) and the contract in other respects was acted upon and partially performed, he must be taken to have accepted any variation of terms expressed in the letter.

5. Where documents can be connected by a reasonable inference, although there is no express reference from one document to the other, they may be read together so as to constitute a complete memorandum under the Statute of Frauds (sec. 4).

Bristol, etc., Aerated Bread Co. v. *Maggs,* 44 Ch.D. 620, applied; and see *Treadgold* v. *Rost,* 7 D.L.R. 741, 749.

6. A company may be estopped from setting up that the alleged stipulation relied upon by the other contracting party and set forth in a letter purporting to confirm the contract was in fact a variation from the terms already agreed upon, if the company without notifying the other party of its repudiation of the variance proceeds with the fulfilment of the contract in other respects; and this although such letter when received by the company was not brought to the attention of any of its officers or employees having authority to deal with the matter, of which circumstance the sender had no knowledge.

7. Where the contract provides that an extension of the original term for which exclusive selling rights of a copyright book are granted "shall be obtained" for another period by taking a specified quantity from year to year thereafter, the court may give effect to the renewal rights, although no notice was given during the original term of an intention to exercise the renewal option, where the election to renew was made within the first renewal year, and the other party has not been prejudiced by the delay.

See *Dainty* v. *Vidal,* 13 A.R. 47; *Barlow* v. *Williams,* 16 Man. L.R. 164; *Farley* v. *Sanson,* 5 O.L.R. 105.

A. B. Hudson, and *H. E. Swift,* for plaintiffs. *C. P. Fullerton,* K.C., and *C. S. Tupper,* for defendants.

(The judgment is given in extenso, ante, p. 361.)

Bench and Bar.

Judicial Appointments.

His Honour John Lynden Crawford, judge of the District Court of the district of McLeod, province of Alberta: to be the junior judge of the District Court of the district of Edmonton, in said province. (March 19.)

Edward Peel McNeill, of McLeod, province of Alberta, barrister-at-law: to be judge of the District Court of the district of

McLeod, in said province, in the room and stead of His Honour Judge Crawford, who has been transferred to the district of Edmonton. (March 19.)

His Honour William Roland Winter, judge of the District Court of the district of Lethbridge, province of Alberta: to be junior judge of the District Court of Calgary, in said province. (March 19.)

John Ainslie Jackson, of Ponoka, province of Alberta, barrister-at-law: to be the judge of the District Court of the district of Lethbridge, in said province, in the room and stead of His Honour Judge Winter, who has been transferred to the district of Calgary. (March 19.)

Book Reviews.

The outlines of procedure in an action in the King's Bench division, for the use of students. By A. M. WILSHERE, M.A., LL.B., Barrister-at-law. Second edition. London: Sweet & Maxwell, Limited, 3 Chancery Lane. 1913.

A most useful help to students in England and valuable for reference here; whilst many differences in procedure in the provinces of the Dominion prevent its being a safe guide here, there is much in it which all students should know about.

Flotsam and Jetsam.

MONEY THAT NO ONE CLAIMS.—Twenty millions of unclaimed money in the coffers of British banks,—derelict gold which nobody owns, and which the banks are naturally pleased to take care of? Gold more than sufficient to pave every square foot of Cheapside with sovereigns.

The sum total may be exaggerated. But make a liberal deduction, and you still have many millions to which no rightful owners make a claim. There is no bank in the whole length of Great Britain (or elsewhere) which has not its lists of these trivial sums, scarcely worth the trouble of pocketing; some are bank balances that may be said to go a-begging. Some are for amounts running into thousands.

Some years ago, when Mr. Goschen's conversion scheme was

in the air, it was found that the Bank of England alone had nearly 11,000 of these dormant accounts. Forty of them had more than $50,000 apiece to their credit; one balance was written in six figures,—907,990. The total at the bottom of the long list was $39,248,875. This amount was very largely made up of unclaimed dividends on government stock.

Scottish banks have, it is said, $45,000,000 of this overlooked gold. English banks at least double this sum. How does it come there? And what becomes of it?

It seems inconceivable that so much money, for all of which there must have been owners at some time or other, should be thus lost to sight. A score or more of simple causes account for the seeming impossibility. A man may for private or business reasons, have accounts with more banks than one. He dies, his executors know nothing of any but his usual banks; the balance at the others remain unclaimed.

He may die abroad, or disappear, leaving no clew to his banking affairs; he may even forget that such an account is not closed. In these and many similar ways—mostly the result of carelessness—money is left in the hands of bankers to swell the dormant funds.

For seven years the bankers keep the accounts open, prepared to pay over the balance to any who can prove a title to it. This term expired, they regard the forgotten gold as their own. Five million dollars of such ownerless money went to build London's splendid law courts. The city, it is said, has more than one magnificent bank building reared from the same handy material. The Bank of England, one learns, provides pensions for clerks' widows out of such a fund.

But, whatever becomes of it, these millions of "mystery gold" are always growing, fed by man's carelessness or forgetfulness, their secrets hidden away in thousands of musty bank ledgers.—*London Tit-Bits.*

CARRIERS.—A street railway company is held in *Lewis* v. *Bowling Green R. Co.* (Ky.) 39 L.R.A. (N.S.) 929, to be liable for the death of a boy whom the motorman in charge of the car has received for transportation to the police station, where he refuses to permit him to leave the car, and in attempting to restrain him from doing so the boy falls under the wheels and is killed, since the boy, being a passenger, is entitled to treatment as such, and to have the car stopped at his request to give him an opportunity safely to alight.