Canada Law Journal.

VOL. L. TORONTO, NOVEMBER, 1914 Nos. 21 & 22

THE NEUTRALITY OF BELGIUM.

As the armed interference by Germany with the neutrality of Belgium was the main cause of the present war, so far as Great Britain is concerned, it is interesting to refer to the treaties affecting the situation.

Belgium was at one time part of the Low Countries (the Netherlands). In 1814 it was united to Holland, forming the Kingdom of the Netherlands. This condition did not last long, and naturally so, for the Belgians are largely a Latin race, Roman Catholic in religion, whilst the Dutch are Teutonic and largely Protestant. They separated in 1830, this being arranged by the Treaty of London of November 15, 1831.

By Art. 7 of that treaty it was provided that "Belgium, within the limits assigned by articles 1, 2 and 4, shall form a State independent and perpetually neutral. It shall be bound to observe the same neutrality towards all other States."

By another article of the treaty the Courts of Austria, France, Great Britain, Prussia and Russia guaranteed to His Majesty the King of the Belgians the execution of all the preceding articles.

This treaty was in due time ratified by all the Powers; the King of Holland, however, not giving his ratification until forced so to do by England and France. This episode resulted in a new treaty, also signed in London, dated April 19, 1839, which abrogated the treaty of 1831; but, in effect, repeated article 7 of the previous treaty.

On the same day a new treaty was made between Holland and Belgium, which was identical with that of 1831, with the exception, of course, that the article containing the guarantee of the Great Powers was omitted. This was made an annex to the new treaty between the Powers, which, therefore, adopted it. The operative clause of the treaty of 1839 was as follows:—

Art. 1. "The Emperor of Austria, the King of the French, The Queen of the United Kingdom of Great Britain and Ireland, the King of Prussia, and the Emperor of Russia declare that the articles hereto annexed and forming the tenor of the treaty of even date, between the King of the Belgians and the King of Holland, are considered as having the same force and value as if they were textually inserted in the present Act, and they are thus placed under the guarantee of their said Majesties."

Our cotemporary, *The Solicitors' Journal*, thus comments upon the above matters:—

"The treaty between Belgium and Holland was ratified by Holland on the 26th day of May and by Belgium on the 28th of May. The treaty between the Great Powers and Belgium was ratified by Belgium on the 28th of May; by Austria on the 19th of May; by France on the 18th of May; by Great Britain on the 22nd of May; by the King of Prussia on the 20th of May; and by the Emperor of Russia on the 6th of May, all in 1839 (Martens, vol. 16, pp. 809-823); and it was adopted by the then Germanic Confederation on the 8th of June in the same year (*ibid.* pp. 825-847). On the outbreak of the Franco-German war each of the belligerents entered into a special treaty with Great Britain to respect the neutrality of Belgium under the treaty of 1839, but the validity of that treaty was expressly reserved, and after the war it was to remain in full force. The possibility that these special treaties might have displaced that of 1839 was discussed in Parliament, and it was shown that this had been carefully guarded against (Hansard, 3rd Ser., cciii., p. 1778).

"The rights and obligations of a permanently neutralized state are the same as those of any other state which is in fact neutral. In particular, it is under an obligation not to assist either belligerent, and to prevent belligerents from making use of its territory for military purposes (Oppenheim II. 368). This duty was observed by Switzerland in 1870 and 1871, during the Franco-German war, when she prevented the transport of troops and war material of either party across her territory, and disarmed and detained a French army of 80,000 men which had taken refuge there. It was observed by Belgium at the same

time when, after the battles of Sedan and Metz, she refused to allow the German wounded to be sent home through her territory (*ibid.* p. 393). It is said, indeed, to have been an undisputed doctrine during the eighteenth century that a neutral state might grant a passage through its territory to a belligerent army, and that the concession formed no ground of complaint on the part of the other belligerent (Hall, International Law, 6th ed., p. 594). And some writers have said that in cases of extreme necessity, the belligerent might effect his passage, even against the will of the neutral (*ibid.* p. 594, note (1)). But the author just quoted, after referring to the subsequent change of opinion and practice, continues:—There can be no question that existing opinion would imperatively forbid any renewed laxity of conduct in this respect on the part of neutral countries. Passage for the sole and obvious purpose of attack is clearly forbidden.

"There is no great difficulty in applying the above principles to recent events. Germany was, of course, bound by the obligations undertaken in the past by the King of Prussia and the North German Confederation, and one such obligation was not herself to violate the Belgian neutrality. This she has done by sending troops on to Belgian soil and attacking the Belgians, and her infringement of the treaty seems to be clear. The obligation of Belgium was to maintain her neutrality and to resist Germany's action by force so far as she could do so with a reasonable chance of success. This she has done in such a manner as to place herself entirely in the right and to earn the respect of her friends. Her merits, indeed, are measured by the extent of Germany's default.

"There remains the question of the obligation of the other signatory Powers. Under the treaty of 1831, each gave a guarantee to Belgium. Was this a guarantee only for its own conduct, or for the conduct of the others as well? Under the treaty of 1839, the neutrality of Belgium was placed under the guarantee of the Powers. The expression is varied, but not the meaning. In the case of Luxembourg the guarantee is 'collective.' But in all these cases the construction of the obligation must depend upon general principles, and not upon nice discrimination of

'joint,' or 'collective,' or—as in the case of the guarantee of Turkish independence by England, Austria and France in 1856—'joint and several.' A leading consideration is whether the guarantee was for the benefi of the guaranteed State only, or for the benefit of all the signatories. In the former case, the guarantors need only intervene on the request of the guaranteed; in the latter, any guarantor can take the initiative (Hall, p. 335); though whether it will do so much must depend on the interests at stake. The present case falls under both heads. The neutrality is for the benefit of Belgium as well as of the signatory Powers, and the request of Belgium for assistance, and her own readiness to defend her neutrality, for practical purposes, leave no doubt as to the obligation of signatories who respect the treaty. Of course, if the Belgian refusal had been unreasonable, the case would have been different. But Germany's requirement was opposed to the vital interests both of Belgium herself—for her independence was threatened—and of the other co-signatory Powers, in particular, France. Under these circumstances it seems clear that Great Britain was under an obligation to enforce the collective guarantee against a recalcitrant guarantor; otherwise there would be an end of public law."

LEGISLATIVE POWER IN CANADA.

REX V. ROYAL BANK.

In Mr. Labatt's further article in respect to legislative powers in the provinces of Canada published in the September number of this Journal he takes exception to my criticism of his original article on the same subject. I have been unable to deal with his rejoinder earlier.

The first point to which Mr. Labatt objects is where I stated that the Alberta Act which was in question in *Rex* v. *The Royal Bank* (1913), A.C. 283, might have been held *ultra vires* even if the proceeds of the sale of bonds had been situate in the province instead of Montreal. My position was that the legislation ap-

propriating the funds to provincial uses was legislation "respecting civil rights (not) in the province and therefore invalid," though it also dealt with "property in the province" over which the legislature has jurisdiction. Mr. Labatt dissents from this view.

It must be borne in mind that this is not a case of an Act that may be *ultra vires* in part and *intra vires* as to the remainder. It is a single provision relating to specified property and must either be entirely within or beyond the competence of the legislature. That being so the simple proposition is this: The Act cannot be both *intra vires* and *ultra vires*. It is *intra vires* as dealing with property; *ultra vires* as relating to civil rights out of the province. Which is to govern? My opinion is that in such case it would be *ultra vires*.

I admit that I am unable to cite authority for this proposition and the question is, of course, purely academic. But test it in this way. Assume that in *Rex* v. *The Royal Bank* the bondholders had been resident in the province and the property in Montreal. In that case the legislation would have dealt with civil rights in the province and with property *out* of it, the converse of the position on which this discussion is based. Can we say that the Privy Council would have upheld the legislation in these circumstances?

The two cases relied on by Mr. Labatt do not touch the question. In both the legislation was admittedly within the competence of the legislature and was held to be none the less so that its operation affected, in the one case, civil rights out of the province and, in the other, Dominion legislation as to licensing breweries. To be invalid the legislation must directly, not incidentally, violate the Constitutional Act. The Alberta Act was directly a violation of sec. 92(13).

The next objection made by Mr. Labatt does not call for discussion. He agrees with my conclusion and objects only to the mode by which I reached it. I confess that I hardly understand his position, but the difference between us is not of importance.

Lastly, I am said to go wrong in the statement that the rights of a shareholder must be enforced in the province where the company is incorporated. Mr. Labatt claims to refute this by saying that I surely would not seriously object to the proposition that in case of an assignment, pledge or testamentary disposition of shares in a company rights could be enforced elsewhere than in the courts of the incorporating province. I certainly do not contend otherwise, but Mr. Labatt cannot have studied the position closely or he would not have put this forward as an answer to the proposition I stated.

Take the case of a shareholder assigning his shares and wishing to assert his rights against the assignee. Would he there be asserting the rights of a shareholder? Clearly not for by the assignment he ceases to be a shareholder in respect to the shares assigned. He would thereby proceed to enforce the contract for a transfer of property made with the assignee. The position is the same in proceedings by the assignee. Likewise if shares are pledged the pledgor in asserting his rights against the pledgee or the pledgee against the pledgor would not do so *qua* shareholder, but as a property owner in the one case and a holder of securities in the other and in each as a party to the pledging contract. That shares were pledged would be a mere incident; the proceedings would be the same if it were horses or any other property. And if shares are disposed of by will necessarily the testator could never enforce rights in respect to them. If his executors did so it would not be as shareholders, but against shareholders, the devisees. And if the latter proceeded against the estate it would be merely to enforce the provisions of the will as to the devise of property which happens to be shares in the stock of a company. I, therefore, adhere to my position, namely, that the rights of a shareholder (as such) cannot be enforced elsewhere than in the province of origin of the company.

C. H. MASTERS.

DOCUMENTS RELATING TO THE DECLARATION OF WAR.

A Dominion Blue Book, entitled "Documents Relating to the European War," which includes the White Paper issued by the British Government as to the commencement of the war with Germany, is desirable at the present time. It gives, without comment, all Orders in Council, cablegrams and correspondence, as well as the speeches delivered in the Imperial House of Commons relating to the interviews and events which led up to the declaration of war between Germany and Great Britain.

The first part contains the Dominion Orders in Council from August 3 to 15, 1914, bearing on the outbreak of hostilities in Europe; the second part the cablegrams between the Governor-General and the Secretary of State for the Colonies from August 1 to 15; the third part the cablegrams between the Prime Minister and Mr. Perley, our representative in London, from August 4 to 13.

Part four contains the correspondence between Sir Edward Grey and our various ambassadors, together with copies of the notes and communications from and to foreign ambassadors, with a variety of other important documents; part five the speeches delivered in the Imperial House of Commons by Sir Edward Grey, Mr. Asquith, and Mr. Bonar Law, also the despatch from Sir E. Goschen, our ambassador at Berlin, to Sir Edward Grey, containing an account of his historic interview with the German Chancellor, and the latter's frenzy of rage and disappointment when informed that England would keep her plighted word although only evidenced by "a scrap of paper."

During the time of the Boer War there were several decisions as to the validity of wills made by soldiers in actual military service, and these have been referred to by various legal journals since the outbreak of the present war. There is very little to be added to the chapter on the subject in Theobold on Wills, in the Canadian edition, (Canada Law Book Co., 1908), at p. 53. So far as we remember there are no authorities on the subject in this country.

THE JUDICIAL COMMITTEE.

REX v. THE ROYAL BANK.

In the *Canadian Law Times* (April, 1913) I ventured to criticize respectfully the decision of the Judicial Committee in *Rex v. The Royal Bank*. Ostensibly as a reply to that criticism, an article written by Mr. Labatt appears in THE CANADA LAW JOURNAL of September, 1914. It is not a reply. It is an unwitting (no doubt) misrepresentation of my criticism, and an unpardonable attack upon myself. Why the latter, I am at a loss to say. I have not the honour of Mr. Labatt's acquaintance, and I have never made any allusion to him. His article would have remained unnoticed but for my unwillingness that the profession should be left without explanation of what he has thought proper to say about me.

The foundation mistake into which Mr. Labatt has fallen in his comments upon my criticism is that he took my article as a discussion of "the meaning of the phrase 'civil rights in the Province'" (p. 475). It was not. Their Lordships held the statute in question to be *ultra vires*—

> "inasmuch as what was sought to be enacted was neither confined to property and civil rights within the Province, nor directed solely to matters of merely local or private nature within it."

It was necessary, therefore, to say more or less about 'civil rights within the Province," and I did. But it was not necessary (as I thought) to discuss the meaning of the phrase. And I did not do it. If anyone thinks otherwise, it would be a kindness to tell me what the conclusion was at which I arrived. It may be (as Mr. Labatt is good enough to say) that my criticism was

> "merely a superstruction of unsound doctrine erected upon a basis of misstated facts" (p. 490);

but whether so or not, no discussion of the meaning of the phrase can be found in my article.

Mr. Labatt might very well have observed this, for in its absence, he himself suggests (p. 486) something which he says

"possibly Mr. Ewart is prepared" to contend; and he points to "a very important phase" (pp. 486-7) which "has not been discussed at all"; and he says that "one of the crucial points" was "inadequately discussed"—which is all perfectly true. I had two reasons for not discussing the meaning of the phrase "civil rights within the Province": (1) Because whatever its meaning might be, I believed the decision of the Privy Council to be bad; and (2) because, although reasonably certain that neither Mr. Lefroy nor Mr. Labatt is right as to the meaning, I am not sure that I can declare it. I have never had to study the subject.

Discussion of the meaning was unnecessary because clause 13 of section 91 of the British North America Act giving jurisdiction to the Provinces over civil rights in the Province was not (in my view) the clause which ought to have governed the decision. The railway company had been incorporated by the Alberta Legislature; the proceeds of the sales of its bonds were in Alberta;[1] the statute under attack as *ultra vires*, dealt with those proceeds; the effect of that statute, if *ultra vires*, would have affected the right of bondholders in England to sue the bank at its head office in Montreal for a return of their money; and my principal argument was that ample support for the statute could be found in clause 10 of section 91—"Local works and undertakings." The following is an extract from my article:—

> "Their Lordships hold that the statute was bad because of its effect upon a civil right outside the Province. Yet their Lordships agree that Alberta could have repealed all its legislation—could have cancelled the charter of the company, and could, thus, have deprived every bondholder (irrespective of his residence) of his civil right to sue the company anywhere. But what authority, for so doing, has a local Legislature? Clearly the sub-section 'property and civil rights in the province' has no bearing upon the subject. Fix attention upon that clause (as their Lordships do), and the conclusion necessarily is that the legislation was without authority—for the civil right with which they were dealing, is without the Province. Base your argument upon 'local works and undertakings' and the result is, just as clearly, the contrary. If, under that heading, all the rights of the bondholders,

1. "to the credit of the Province of Alberta—Alberta and Great Waterways Railway special account—in the Royal Bank of Canada, Edmonton."

everywhere, to enforce their purchased bonds can be absolutely cancelled and destroyed, how can it be said that, acting under the same head of jurisdiction, the Legislature cannot deal with the railway and its assets in Alberta in such a way as will, incidentally, deprive the bondholders of a right, anywhere, to cancel their purchase? Fix attention upon the railway and its assets in Alberta, and ask whether, in legislating with regard to them, the province is limited by considerations of the effect of its statute upon the legal relations of everybody outside Alberta to everybody else?"

Of that argument, Mr. Labatt takes no notice. Did he mistake it for a discussion of "the meaning of the phrase 'civil rights within the Province?'"

I illustrated that argument by recalling that the Province of Manitoba had passed statutes "reducing or postponing or otherwise dealing with their bonded obligations," although holders of the bonds resided outside the Province, and I added that

"it was not because of control over 'civil rights within the Province' that the authority to borrow was given to them. It was because of power over 'municipal institutions in the Province.'"

Of that argument Mr. Labatt takes no notice.

For another reason, discussion "of the meaning of the phrase 'civil rights within the Province'" was unnecessary, namely, because the pleadings did not raise it, and, without a good deal of proof, it could not properly be dealt with. The Privy Council assumed that "the action of the government altered" the purpose for which the money had been raised, and as to that I said:—

"But what was the alteration in the scheme? There is no sign of it in the statute. There is no trace of it in the evidence. There is no suggestion of it in the pleadings. Their Lordships attribute it to the 'Government.' What did the Government do? As far as we can see, the Government did nothing, and had no power to do anything. Even if there had been some alteration, the necessary result would not be the creation of a right in the bondholders to return their money. We should have to ascertain very carefully, what the alteration was; whether it affected prejudicially the position of the bondholders; the circumstances under which the bondholders advanced their money; how far the work of construction had proceeded; whether the bondholders had in any way (by accepting interest from the Government, or otherwise) precluded themselves from bringing an action for the return of the money, and so on. In short, the bank should have pleaded all the facts necessary to shew the existence of the bondholders' cause of action; the Government would then have pleaded such facts as were

thought to be material in defence; and at the trial, the question for decision would have been the one question that, at the trial, nobody mentioned, and nobody imagined to be of the slightest importance."

I affirmed

"that none of the bank's advisers either in Canada or England had imagined that there could be any validity in the point decided; that it was not referred to in the pleadings; that it was not mentioned in either of the two arguments in Canada; that it was not suggested in the opening speeches of the bank's counsel in London; that it was never hinted at by anybody until leading counsel for the Province had delivered two-thirds of his address; that it was then put forward, not by the bank but by Lord Macnaghten; and that counsel for the Province, without a moment for reflection, had to deal with it as best he could."

Of that argument, too, Mr. Labatt takes no notice.

He does deal with one of my "points," saying that it would be "a work of supererogation" to analyse the others: I had suggested that there must be legislative authority somewhere in Canada to do what the legislature of Alberta did, and that no argument could be advanced in favor of the authority of the Dominion. In reply Mr. Labatt says:—

"It is strange that the learned critic should have failed to take notice of the obvious alternative, that, as the trust-fund was deposited in the head office of the Royal Bank of Montreal, it was subject to the jurisdiction of the Quebec Legislature" (p. 491).

For contradiction of the fact alleged in this sentence, we have only to turn back to page 487 of Mr. Labatt's article where he says:—

"The position taken in this regard is clearly indicated by the emphasis which Lord Haldane, in his summary of the evidence, laid upon the circumstance that the special account opened in favour of the railway company *at the Edmonton branch* of the Royal Bank was retained under the control of the head office."

And for contradiction of the allegation that the account was "opened in favor of the Railway Company," we have only to look at the memorandum which the bank gave to the government declaring that the money was "to the credit *of the Province of Alberta*—Alberta and Great Waterways Railway special account—in the Royal Bank of Canada, Edmonton."

Under these circumstances, Mr. Labatt contends that the legislature of the Province of Quebec would have had jurisdiction

to pass a statute "disposing of the fund in the same manner" as by the impeached Alberta statute—that is to say, that the Quebec legislature could have declared that the proceeds of the bonds should form part of the general revenue fund of the Province of Alberta, free and clear of any claim by the railway company; that the amount of the deposit should be paid over to the Treasurer of the Province; and that the Province should be primarily liable upon the bonds. Probably that *is* the only alternative to the assertion that the Province of Alberta could so enact. It has not a very attractive appearance.

If Mr. Labatt be correct in asserting that the decision of the Privy Council really was influenced in determining the *situs* of the fund by "the circumstance that the special account . . . was retained under the control of the head-office," he has furnished us with another example of "the handicaps" under which their Lordships labour in applying their attention to Canadian cases. Every court in Canada knows that there is *no* part of the work of a bank agency which is *not* under the control of the head-office. And no court, therefore, would hold that the *situs* of a fund could depend upon whether cheques were to be honoured under general instructions, or only upon special instructions, from the head-office. If, according to the memorandum given by the bank to the government (in the present case), the fund was in Edmonton, what possible effect upon its *situs* could the nature of the general or special instructions from the head-office to the local manager have as between the bank and the government?

The real reason for the decision of the Privy Council is not hard to find. The statute interfered with the contractual position of the bank in a way hard to justify—unless by the use which was intended to be made of it; and the Privy Council was, probably, influenced by feelings which Mr. Labatt himself entertains.

> "Being strongly impressed with the desirability of placing, wherever it is possible, upon the British North America Act a construction which will preclude the Provincial Legislature from exercising their plenary powers in such a manner as to impair the obligation of contracts and confiscate property, I own that I should like to find some satisfactory ground upon which such a theory as is here set forth could be sustained."

Whether the prohibitions of the United States constitution work beneficially or not, I do not know, but I feel no hesitation in saying that while our constitutions remain as they are, the courts ought not to permit themselves to be influenced by the impolicy or impropriety of our statutes.

Turning to Mr. Labatt's personal attacks, I begin with an acknowledgment that my series of articles was written "for the express purpose of discrediting the Judicial Committee," if by that is meant (as Mr. Labatt elsewhere says (p. 491)) for the purpose of furnishing examples "of the incapacity of the Privy Council to deal with Canadian appeals." I do not question the ability of the court. I merely say that being unfamiliar with local conditions, and local methods, and local expressions, it cannot be as well qualified as our Supreme Court to deal with Canadian cases.

I did say that, to the six cases which I criticised as wrongly decided, "anybody can easily add to the list"; and I proved the truth of the assertion in the February and March numbers of *The Canadian Law Times*.

I did say that

> "some of their Lordships are able men, and, considering the handicaps under which they labour they do surprisingly good work."

But I resent Mr. Labatt's characterisation of that statement as a "condescending admission." I make no such nasty reply when Mr. Labatt is good enough to speak of me as "one of the leaders of the Canadian bar?"

I did say that the Canadian Supreme Court

> "never falls into such gross errors as not infrequently characterize the judgments of the Judicial Committee" (p. 492).

But I repel the insinuation of Mr. Labatt's comment—

> "No doubt, the learned Judges who constitute the Court which is extolled in this exaggerated strain have sufficient discrimination to estimate such a eulogy at its true value." [2]

2. The injustice of the insinuation will be obvious to any one who will look at the context from which Mr. Labatt extracted the quoted words. They are followed by suggestions for strengthening the court: 33 C.L.T., p. 678.

Had Mr. Labatt read the other articles in my series (courteously, he calls them "lucubrations") he would have understood what I intended by "such gross errors." I did not mean, of course, that the Supreme Court never goes wrong. In my judgment, it sometimes does. But it never bluntlers because of unfamiliarity with common Canadian knowledge. For example, no judge in our Supreme Court would say, as Lord Halsbury said in two important cases, that there is no such thing as an unconstitutional (in the sense of an *ultra vires*) statute. There is, of course, no such thing in England, and unfamiliarity with the federal system led Lord Halsbury into very surprising error. Other examples may be found in my "lucubrations."

I take strong exception to Mr. Labatt's assertion that I have launched against the Privy Council "sweeping censures and rhetorical diatribes." In self-defence, but with much regret. I think it proper to say that there is not the least foundation for that statement. The extent of my guilt is that I published the opinions of other persons. For example:—

> "The result has been that though the Privy Council is considered good enough for the colonies, it is not allowed in Great Britain and Ireland to be good enough for us."

That language was used by the present Lord Chancellor, in 1900.

> "Again the state of the Supreme Court of Appeal is unsatisfactory. Just now it is split into the House of Lords, which acts for England, Scotland and Ireland, and the Judicial Committee . . . which acts for the rest of the King's dominions. The neglect of statesmen has led to the second being starved for the sake of the first. It is no part of the business of the Colonial Office to look after it, and there are murmurs, loud and long, every now and then, over the state of what, after all, is an important link between the colonies and the mother country."

That is the language of the same man, in 1905.

> "Since those events the Government and, I think, the great majority of the Parliament and people of Australia have not altered their attitude upon this question. They are no more contented with the present condition of appeal cases than they were in 1900 or 1901. Nor are their sentiments likely to alter after the judgment given lately in an Australian case, in which two matters of vital importance came before the consideration of the Judicial Committee."

Those words were used by the Premier of Australia in 1907.

"It is really not plausible (*sic*) at this day to assert that the working of the Judicial Committee gives general satisfaction."

Sir Frederick Pollock wrote that in 1909.

"Complaint has too often been made of late that important appeals have been disposed of by only three Judges, whereas the original tribunals in Canada or Australia were composed of double that number. Two appeals in the present lists are set down to be re-argued—an expensive result which might perhaps have been avoided if the appellate Judges had been more numerous."

That is quoted from *The Times* (London) of May 27, 1913.

These are the nearest approaches to "sweeping censures and rhetorical diatribes" in my *Canadian Law Times* articles.

JOHN S. EWART.

SHOCK AS BEING ACTIONABLE IN NEGLIGENCE.

Definition of Shock.—I have preferred in treating this subject to employ the word "shock" rather than "fright," as commonly used. The former imports a physical effect, which, at least, in some cases all of the Courts hold to give occasion for the recovery of damages; the latter never affords the basis for such recovery. For example, we will suppose one negligently lets loose a blast in the vicinity of a dwelling house. One member of the household is frightened, another is struck and a third is seriously shocked. The first has no right of action, the second has, and whether the third has depends on other circumstances. Fright has nothing to do with the right of recovery in the second case, nor has it in the third except that shock may be the physical effect of fright. The intervening fright, however, does not break the chain of causation between letting off the blast and the shock any more than it breaks it where one is struck. A physical result ensues in both cases, and if fright is intended or foreseen a strike or a shock, a something of tangible character, may also be intended or foreseen.

Furthermore, shock being the substantial thing to be considered, fright is not the only antecedent to its existence, so far

even as its actionableness is concerned. What, then, is shock? Its presence in a human being has been called: "A sudden and violent effect tending to impair the stability and permanence of something: a damaging blow to a person's health or constitution. A sudden and disturbing impression on the mind or feelings, usually one produced by some unwelcome occurrence or perception, by pain, grief or violent emotion (occas. joy) and tending to occasion lasting depression or loss of composure; in a weaker sense, a thrill, start of surprise or of suddenly excited feeling of any kind. A sudden debilitating effect produced by over-stimulation of nerves, intense pain, violent emotion, or the like; the condition of nervous exhaustion resulting from this."[1]

Thus far we see nothing of "fright" causing shock. In another Dictionary[2] we learn that "shock" is "a strong and sudden agitation of the mind and feelings: a startling surprise accompanied by grief, alarm, indignation, horror, relief, joy or other strong emotion." As showing susceptibility to injury, an excerpt is made from George Eliot's writings that: "She has been shaken by so many painful emotions, that I think it would be better, for this evening at least, to guard her from a new shock if possible." Among the cases hereinafter submitted it will appear that "fright" as the precursor in many of them do shew fright and shock. The inquiry is whether emotion may be so suddenly and violently stirred by a negligent act as to cause serious shock. If this is through causing fright, it is the same as though the act caused grief. As an illustration of shock arising from grief, in which recovery was allowed is an English case.[3] This was a case of wilful tort in a practical joker informing a wife that her husband had met with a serious accident, but the principle of resulting shock howsoever produced giving right to damages is illustrated. And in Massachusetts,[4] where the rule is against recovery, "fright, terror, alarm and anxiety" are placed in the same category.

1. VIII New English Dictionary, 721.
2. VIII Century Dictionary and Cyclopedia, Title, "Shock."
3. (1897) *Wilkinson* v. *Downton*, 2 Q.B. 57.
4. *Spade* v. *Lynn & C.R. Co.*, 168 Mass. 285; 60 Am. St. Rep. 393.

"Great emotion may, and sometimes does, produce physical effects." And it refused to place its judgment on the ground that physical injury may not be directly traceable thereto. It may be said, however, that in almost all of the cases, fright as accompanied by the physical injury, was in the facts and this has caused Courts to speak of fright resulting in shock and not other emotion so resulting. We need, however, to get back to the idea that it is shock as a physical fact and howsoever caused, that is the thing of importance.

Acts of Wilful Tort Causing Shock.—The cases seem to be in practical unanimity that where shock, or mental disturbance amounting to serious shock, results from a deliberate and wilful tort the wrongdoer is liable in damages. Thus there is the case of *Wilkinson* v. *Downton*, *supra*, where the shock was from grief. And shock to the mind of a woman resulting in miscarriage from a drunken man entering a house where the woman was and threatening to shoot her, required a verdict for plaintiff.[5] And the *Spade* case, *supra*, expressly excepts from its ruling, "those classes of action where an intention to cause mental distress or hurt the feelings is shewn or is reasonably to be inferred." In Missouri it has been ruled that shock from a wilful tort, resulting in neurasthenia was the basis for an action for damages.[6] The learned Judges in that case said that "suffering thus occasioned is as much due to physical injury as that which results from an open wound on the surface of the body." This Court might hold that unintentional negligence would give no right of action, but it would have to do so on some other theory, than its not producing a wound in the body.

And an Iowa case[7] distinguishes the cases against recovery for injuries resulting from fright, or as I say from shock, by portraying the wilful, deliberate wrong perpetrated by the defendant, and saying: "His discovery there under such circumstances might well cause alarm to the boldest man, and if it pro-

5. *Barbee* v. *Reese*, 60 Miss. 906.

6. *Hickey* v. *Welch*, 91 Mo. App. 4.

7. *Watson* v. *Dilts*, 116 Iowa 249, 89 N.W. 1068, 57 L.R.A. 559, 93 Am. St. Rep. 239.

duced nervous prostration and physical disability, the theory, no matter what its reason, that would say there was no actionable wrong, would be too fine spun and too cold for our sanction." But if you allow recovery for a wilful tort, there must be some other reason in unintentional negligence than that it is not a physical injury, or that the injury is of a class that is easily feigned. It was said in speaking of the policy of the law against fictitious claims that "greater evil would result from a holding of no actionable wrong than can possibly follow the rule we announce," viz.: that shock causing prostration gives a right of action.

In New York,[8] where there was an assault alleged to have caused nervous prostration and maniacal insanity, there was quoted from the Court of Appeals[9] that one cannot recover damages from fright disconnected from other injuries, but it was ruled to have no application to the case before the Court, because for negligence purely the measure of damages is confined to the natural and probable consequences of the act or omission, constituting the cause of action. It did not hold, however, that nervous prostration and insanity from a wrongful act were not physic.' injuries, which might not be recovered for if reasonably contemplated by such an act.

And so in a Vermont case,[10] where the situation of a blind girl, a guest in the house, was referred to, where defendant's conduct caused her to be "so frightened and shocked in her feelings as to injure her health." Here the shock and injury to health were the physical evidences of recoverable damages.

The *Spade* case, *supra*, regards also as actionable "cases of acts done with gross carelessness or recklessness, shewing utter indifference to such consequences when they must have been in the actor's mind."

Occasion of Fright Not Being Actionable, Shock is in Same Category.—This is the doctrine held by many cases. But it

8. *Williams* v. *Underhill*, 63 N.Y. App. Div. 223, 71 N.Y. Supp. 291.

9. *Mitchell* v. *Rochester Ry. Co.*, 151 N.Y. 107, 45 N.E. 354, 34 L.R.A. 781, 56 Am. St. Rep. 604.

10. *Newell* v. *Whitcher*, 53 Vt. 589, 38 Am. Rep. 703.

seems opposed to all principles in regard to proximate cause. The chiefest exponent of this doctrine is a New York case,[11] which says: "Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity or even a miscarriage, in no way changes the principle. These results merely shew the degree of fright or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can be, then an action may be maintained, however slight the injury; if not, there can be no recovery, no matter how grave or serious the consequences."

Verily, this seems a play upon words and if it be true that the results of fright cannot be recovered for because mere fright is not actionable, then it makes no difference whether a wrong causing fright be wilful or reckless or that it arise out of unintentional negligence, and it comes down to the fact, that one knowing that fright will produce shock may intentionally or unintentionally frighten one with impunity.

Following this case, an Arkansas case[12] says: "Where the law allows no recovery for the mental anguish or fright, it would seem logically to follow that no recovery can be had for the consequences or results of the fright," and strange to say, in support of this proposition, there is cited, in addition to the New York case, the *Spade* case, *supra*, which case specially excepted "cases of acts done with gross carelessness or recklessness, shewing utter indifference to such consequences when they must have been in the actor's mind." This case proceeds on the theory that "as a general rule, a carrier of passengers is not bound to anticipate or to guard against an injurious result which would only happen to a person of peculiar sensitiveness," thus strongly implying that if the carrier knew to the contrary, he must anticipate or guard against an injurious result "to such a person, or make itself liable therefor."

11. *Mitchell* v. *Rochester*, *supra*.

12. *R. Co.* v. *Bragg*, 69 Ark. 402, 64 S.W. 226, 86 Am. St. Rep. 206.

Apart from the oft-quoted definition of proximate cause,[13] which excludes as an intervening cause breaking the chain of causation, anything set in motion by the wrongdoer himself, the argument in the New York case is well answered by an English case,[14] which refers to it: "If the fear is proved to have naturally and directly produced physical effects, so that the ill results of the negligence which caused the fear are as measurable in damages as the same results would be if they arose from an actual impact, why should not an action for those damages lie just as well as it lies where there has been an actual impact?" And this just as well might have been asked about grief as about fear, for, after all, it is the mental disturbance directly producing the physical effects which makes, or not, the wrong actionable, in other words it is the shock and not the fear or the grief, which is measurable in damages and, therefore, actionable. It seems, however, somewhat pitiable to see a Court declaring, that shock, which produces a mental disease, gives no ground of action because a sudden impulse of feeling, not itself actionable, is the origin of the shock. As well might it be said, that one is not responsible for a gunshot wound because for detonation that propels the bullet there is no liability. Human feelings are as explosive as powder and sometimes just as destructive, and the wilful wrong or negligence, which sets them in motion, should be deemed to be dealing with an agency with no more power of volition than an inanimate and destructive substance. Shock is the result of sudden emotion, a thing that is wholly involuntary, and against which, in some instances, not even preparation by a victim wholly may provide. For example, if a pregnant woman is warned that she is to be attacked, no sort of preparation beforehand would save her from shock and its consequences, and if she is a passenger on a train, fear of a wreck for hours before, aids in no way to arm her against shock. On the contrary, dwelling upon these things may but increase her susceptibility to an injury in the mind, which will break down her nerves and make a lasting impairment of her

13. *R. Co.* v. *Kellogg*, 94 U.S. 469, 24 L. Ed. 256.

14. *Dulieu* v. *White* (1901), 2 K.B. 669.

health. These are things of which Courts should take judicial notice, for they are known of all men.

But a Wisconsin[15] case is so very apt on this question that I quote therefrom: "It is charged that the shock was directly caused by the defendant's negligent act and that the miscarriage was caused directly by the shock. Now, if the shock can legally operate as the connecting link between the defendant's negligent act and the plaintiff's miscarriage, so that the negligence was truly the cause which operated first and set in motion the train of events which ended in the miscarriage as the natural and probable result, then it does not become necessary to decide whether 'shock' as here used is a physical or mental disturbance, or whether, as seems more reasonable, it partakes of both." There are then cited a number of cases as to which it is said: "In some of these cases the negligent act of the defendant, which was relied on as the proximate cause of the subsequent physical injuries, did not consist of a physical violence, or hostile contact, but only consisted of a negligent or wrongful act which produced extreme fright or shock, from which extreme fright or shock, physical injuries naturally resulted, but in all of the cases the chain of causation was held to be complete in case the jury found that the defendant should have anticipated that an injury to another might follow as the natural and probable result of his negligent act."[16]

In Alabama[17] it was said to have been determined by the *Engel* case that "there is no legal obstacle to prevent the recognition of fright or terror as the proximate cause of a physical injury."

Notice or Knowledge as Affecting Liability.—A late decision by Georgia Court of Appeals,[18] summarizes opinion on this question

15. *Pankoff* v. *Hinkley*, Wis., 123 N.W. 625, 7 L.R.A. (N.S.) 1159.

16. See also *Purcell* v. *R. Co.*, 48 Minn. 134, 50 N.W. 1034, 16 L.R.A. 203; *R. Co.* v. *Hayter*, 93 Tex. 239, 54 S.W. 944, 47 L.R.A. 32, 77 Am. St. Rep. 856; *Engel* v. *Simmons*, 148 Ala. 92, 41 So. 1023, 7 L.R.A. (N.S.) 96, 121 Am. St. Rep. 59, 12 Am. Cas. 740.

17. *Spearman* v. *McCrory*, Ala., 158 So. 927.

18. *Goddard* v. *Watters*, 82 S.E. 304.

as follows: "To put the matter in condensed form, it appears that no recovery can be had for fright alone, caused by less than such gross negligence on the part of one acquainted with the condition of the plaintiff, or with the facts and circumstances surrounding the plaintiff, as would authorize the conclusion that the defendant must have known that certain definite physical injuries would naturally flow from or follow the fright or nervous excitement brought about by him, or unless the fright, resulting in physical injuries or impairment of health should have been brought about deliberately, maliciously or wantonly by the defendant through an utter disregard of the natural and probable consequences to the injured party, or from a wilful intent to so injure the party."

Here it is perceived, injury to the feelings is spoken of as a physical fact and in no way of there being a sense of humiliation and disgrace, whether the wrong be intentional or not. It is treated like an external wound or hurt, but there seems a distinction as to negligence being gross or not, though in ordinary negligence there might be the same knowledge of conditions. I doubt greatly whether this distinction exists, as every negligence should be deemed such, where any hurtful consequences may be contemplated therefrom.

For example, in the North Carolina case,[19] cited by Georgia Court of Appeals, the matter is put a little differently. Thus it was said: "It must also appear that the defendant could or should have known that such negligent acts would, with reasonable certainty, cause such result, *or* that the injury resulted from gross carelessness or recklessness, shewing utter indifference to the consequences." In this case it appears that there must be knowledge as to an act merely negligent, but in gross carelessness or recklessness there need be no knowledge. In the Georgia case there must be knowledge as to the accompaniment of gross negligence.

Two later North Carolina cases[20] enforce the rule laid down

19. *Watkins* v. *Kaolin Mfg. Co.*, 131 N.C. 536, 42 S.E. 983, 60 L.R.A. 617.

20. *Drum* v. *Miller*, 135 N.C. 208, 47 S.E. 424, 65 L.R.A. 890, 102 Am. St. Rep. 528; *Kimberly* v. *Howland*, N.C., 55 S.E. 778, 7 L.R.A. (N.S.) 545.

in the *Watkins* case of simple negligence with knowledge of plaintiff's condition bringing on liability.

Many cases might be cited along this line, but it seems to me, that it must be patent that the Georgia case has little to support it in its distinction between ordinary and gross negligence. It is true the latter might embrace some cases not within the former, but if so, this would be upon the ground stated in the *Spade* case, *supra:* it becomes akin to wilful tort and the consequences of knowledge are visited on the wrongdoer, whether he actually has knowledge or not.

The Rule or Policy Excluding Damages from Shock.—The rule has been consistently adhered to in Pennsylvania that mental disturbance and its consequences should not, in negligence cases, at least, be recognized in actions for damages.[21] These cases hold that "fear and nervous excitement and distress caused by a collision of cars on a railroad, producing mental and physical pain and suffering and permanent disability, but unaccompanied by any injury to the person, afforded no ground of action."[22] The later case of *Houston* v. *Freemansburg*, *supra*, explained that this doctrine was based on expediency, and its adoption something of a protest against an expansion of the doctrine of negligence so as to embrace intangible, illusory, untrustworthy and speculative causes of action.

It is difficult to see where this protest takes hold, when we consider, that any external injury to the person opens the door to damages for internal injury that also ensues. A pin prick opens the door for heart-break and the abrasion of a finger authorizes damages for the impairment of health. The material thing sued for is the internal pain and this is as illusory, and not more so, in one case as the other.

A New Jersey case[23] is an excellent illustration of what is just said. The plaintiff in this case was passing under an over-

21. *Chittick* v. *Transit Co.*, 224 Pa. 13, 73 Atl. 4, 22 L.R.A. (U.S.) 1073; *Huston* v. *Freemansburg*, 212 Pa. 548, 61 Atl. 1022, 3 L.R.A. (U.S.) 49.

22. *Linn* v. *DuQuesne Borough*, 204 Pa. 551, 54 Atl. 341, 93 Am. St. Rep. 800.

23. *Porter* v. *R. Co.*, 73 N.J.L. 405, 63 Atl. 890.

head railway bridge, which fell while an engine was passing over it. Something, she claims, hit her upon the back of the neck, and dust from the crash got into her eyes. The chief injuries are alleged to be to her eyes and nervous system. Defendant claimed she suffered no physical injury whatever, but that the condition she alleges she is suffering from was due to fright alone.

The Court held that proof of either of the external injuries would take the case out of the rule as to non-recovery for fright alone.

Here it is perceived, the Court was possessed of the idea advanced in *Mitchell* v. *Rochester*, *supra*, but misapplies it by allowing for the consequences of fright, where there is any external physical injury. And how may it be said that it is legal policy to allow one to tack on to a negligible external injury damages for internal injury, and it is against policy to allow recovery for the latter unaccompanied by external injury? Shall a plaintiff, in order to recover substantial damages, be encouraged to feign an external injury or to falsify as to its existence? In what way is pain or suffering more tangible and less illusory when asserted to arise from an external injury, than impairment of health from a shock to the feelings? At all events, however, these cases for impairment of health as the result of shock, whether that arise from fright or grief, and if they attach to it that there shall be external injury, the principle for which I contend is supported.

This very exception is a tribute to the rule for which I contend and when there is added the other exceptions in wilful tort and gross carelessness, which even New York, by decision in lower Courts admit, there seems little of square out decision to support the general principle, that there can be no recovery for shock bringing on impairment of health as the result of negligence, where it may be shewn to be anticipated, or of reckless negligence or wilful tort, whether anticipated or not.

There is a very interesting review of cases in 52 Cent. L.J. 339, in an article, where the same doctrine is advocated as in this article. Many authorities are here used, which were not in existence then, which either squarely or impliedly admit what the former article contended for.—*Central Law Journal.*

REVIEW OF CURRENT ENGLISH CASES.

PROBATE—MUTUAL WILLS—JOINT TENANCY OF LEASEHOLDS—SEVERANCE—REVOCABILITY OF WILL—SUBSEQUENT WILL ADMITTED TO PROBATE—DECLARATION OF TRUST.

In the Estate of Heys, Walker v. *Gaskill* (1914), P. 192. This was a probate action in which it appeared that the testatrix and her husband being jointly possessed of leaseholds had executed mutual wills and had agreed each with the other, that they should be irrevocable. The husband died in 1911 and thereafter his widow made a codicil to her will of 1907 and subsequently in 1913 a new will. Certain persons who would be interested under the will of 1907 resisted probate being granted of either the codicil to the will of 1907, or the will of 1913; but Evans, P.P.D. held that, as far as the Probate Division was concerned, it was limited to ascertaining which was in fact the last will of the deceased, and that as the law did not admit that any will could be made irrevocable that Court was bound to declare the will of 1913 to be the last will and as such entitled to probate; and he also held that the agreement to execute mutual wills, and the execution of those wills, operated as a severance of the joint tenancy. The defendants claimed that the Court should declare that the executors of the will of 1913 were trustees for those entitled under the will of 1907, but the learned President determined that the Probate Division had no jurisdiction to make any such declaration, that being a subject reserved to the Chancery Division of the Court.

CHURCHWARDENS—ACTION BY ONE CHURCHWARDEN—EVIDENCE—HISTORICAL WORK.

Fowke v. *Berington* (1914), 2 Ch. 308, was an action by a perpetual curate and one churchwarden to recover possession of a ruined part of a church on the ground that it was part of the parish church. The case is noteworthy for two points: first, it was ruled by Ashbury, J., that one churchwarden alone cannot bring an action; and secondly, that an historical work, "Hobington's Survey of Worcestershire," published in the 17th century, was inadmissible as evidence of the physical condition of the building when the author saw it.

CASE STATED BY JUSTICES—POINT RAISED IN DIVISIONAL COURT NOT TAKEN BEFORE JUSTICES—QUESTION OF LAW.

Kates v. *Jeffery* (1914), 3 K.B. 160. In this case the question arose to what extent a point can be taken in a Divisional Court on a case stated by justices, which was not taken before the justices. The Divisional Court (Darling, Avory, and Rowlatt, JJ.) held that no point can be taken on the facts stated which was not taken before the Justices, but that a question of law, which no evidence could alter, might be taken, though not taken before the Justices.

JUSTICES—APPREHENDED BREACH OF PEACE—RECOGNIZANCE TO BE OF GOOD BEHAVIOUR—JURISDICTION OF JUSTICES—34 EDW. 3.

Lansbury v. *Riley* (1914), 3 K.B. 229. This was a case stated by a magistrate. The defendant was summoned on an information charging him with being a disturber of the peace and an inciter of others to commit breaches of the peace. It appeared, by the evidence, that the defendant was a supporter, though not a member, of the Women's Social and Political Union, a suffragette organization which had for its object the commission of crimes in order to secure votes for women—and of late several crimes had been committed by members of the union, and it was proved that the defendant had delivered speeches urging the women to continue breaking the law. The Magistrate ordered him to enter into recognizances to be of good behaviour, and in default to be imprisoned for three months. The defendant contended that neither under the statute, 34 Edw. 3, c. 1, or under his commission had the Magistrate jurisdiction to make such an order, but the Divisional Court (Bray, Avory, and Lush, JJ.) held that whatever the origin of the jurisdiction might be, whether derived from the common law, statute or otherwise, the practice of making such orders, for the purpose of preventing apprehended breaches of the peace, was too well established to admit of its being now questioned, and that it was not necessary that it should be shewn that any individual person had been put in bodily fear by the defendant.

DEFAMATION LIBEL ANNUAL MEETING OF LICENSING JUSTICES —APPLICATION FOR LICENSE—NOTICE OF OBJECTION—PRIVILEGED OCCASION.

Attwood v. *Chapman* (1914), 3 K.B. 275, was an action for libel. The libel consisted in a notice given by the defendant of his

intention to oppose the plaintiff's application for a license for the sale of liquor on certain grounds therein set forth, which constituted the alleged libel. The notice was served on the plaintiff and the clerk of the licensing Justices, on the superintendent of police and the owners of the premises.

The defendant subsequently abandoned his objections. It was claimed that the occasion was privileged but Avory, J., who tried the action, held that the licensing Justices were not a Court of law, and that even if they were, the defendant, in objecting to the reversal of the license, did not come within the category of persons on whose behalf privilege could be claimed, and that even if he did, the privilege would not extend to copies served on the superintendent of police, or the owner of the premises.

CRIMINAL LAW—DEMANDING MONEY WITH MENACES—THREAT TO PUBLISH ATTACKS ON A COMPANY—EVIDENCE—LARCENY ACT 1861 (24-25 VICT. C. 96), S. 45—(CR. CODE, S. 451).

The King v. *Boyle* (1914), 3 K.B. 339. The appellants in this case were convicted of "demanding money with menaces, with intent to steal the same," under s. 45 of the Larceny Act, 1861 (see Cr. Code, s. 451). He appealed to the Court of Criminal Appeal (Lord Reading, C.J., and Coleridge, and Sankey, JJ.). The evidence shewed that the accused, partly through an agent, made threats to the chairman of a limited company that attacks upon the company would be published in a newspaper, the effect of which would be to reduce the market price of the shares of the company, and the agent demanded £600 in gold as the price of refraining from such attacks. The Court held that this constituted an offence within the statute. Evidence was admitted to prove that a few months previously a transaction, similar in all respects to that charged, had been carried out by the same agent and a sum paid to him in gold. This was objected to as inadmissible, but the Court held that it was properly admitted.

BILL OF EXCHANGE—BANKER AND CUSTOMER—CHEQUE—AUTHORITY TO SIGN PER PRO—MISUSE OF AUTHORITY—FORGERY—BANK IN GOOD FAITH RECEIVING PAYMENT FOR CUSTOMER—NEGLIGENCE—RATIFICATION—BILLS OF EXCHANGE ACT, 1882 (45-46 VICT. C. 61) SS. 25, 82—(R.S.C., C. 119, SS. 51, 173.)

Morison v. *London County & Westminster Bank* (1914) 3 K.B. 356. In this case the defendants had in good faith collected the amount of the plaintiffs' cheques which had been deposited with them in the following circumstances. One Abbott had been ap-

pointed the plaintiff's manager in 1900 and had authority to sign and endorse cheques for the plaintiff. In 1905 Abbott opened a private bank account with the defendants, without the plaintiff's knowledge, and from 1907 to 1911 paid into that account 50 cheques of the plaintiff which he had drawn, or indorsed when necessary, "per pro." These cheques had all been collected in the usual way and credited to Abbott. About the beginning of 1912 Abbott's fraud was discovered and the action was brought to recover the amount of the cheques so improperly used by Abbott. It was contended for the plaintiff's that the cheques being signed "per pro" the Bank had notice under the Bills of Exchange Act, 1882, s. 25 (R.S.C. c. 119, s. 51), and that the principal was only bound when Abbott was acting within the limits of his authority; and that at all events the cheques were forgeries. But the defendants claimed the protection of s. 82 of the Act, (R.S.C. c. 119, s. 173) the cheques having been crossed to the defendants, and that s. 25 did not apply after a bill had been paid. The Court of Appeal (Lord Reading, C.J., and Buckley and Phillimore, L.JJ.) upheld the defendant's contention and dismissed the action overruling the decision of Coleridge, J., who had given judgment for the plaintiffs. The Court of Appeal thought that the defendants were entitled to assume, after the first year or two, that Abbott was acting within his authority no objection having been made, and that as regards the cheques previously paid there had been a ratification by the plaintiff or his agents of the act of Abbott.

PATENT AGENT—DESCRIPTION OF UNREGISTERED PERSON—"PATENT AGENCY."

Hans v. *Graham* (1914) 3 K.B. 400. This was a case stated by a magistrate. The defendant was summoned for describing himself as a "Patent Agent," contrary to the provisions of a statute forbidding any person to describe himself as a patent agent unless duly registered as such. It appeared that the defendant was not a registered patent agent, but that he occupied premises on which were affixed the words "Patent Agency." The defendant was convicted; but the Divisional Court (Ridley, Rowlatt, and Shearman, JJ.) held that the defendant had not described himself as a patent agent and quashed the conviction.

BUILDING SOCIETY—BORROWING—BANKING BUSINESS—ULTRA VIRES—WINDING-UP—DISTRIBUTION OF ASSETS—PRIORITIES—SHAREHOLDERS—CREDITORS—MONEY HAD AND RECEIVED.

Sinclair v. *Brougham* (1914) A.C. 398. This was an appeal

from the decision of the Court of Appeal (1912), 2 ch. 183 (noted ante vol. 48, p. 495). A building society, having unlimited powers of borrowing, had borrowed money and applied it in carrying on a banking business which was ultra vires. The society was ordered to be wound up, and a contest arose between the shareholders and the creditors who had deposited money with the society as bankers, as to the application of the assets. The House of Lords (Lord Haldane, L.C., and Lords Dunedin, Atkinson, Parker, and Sumner) agreed with the Court of Appeal that the power to borrow was limited to the proper objects of the society, and that the carrying on of a banking business was ultra vires of the society. Also that the depositors were not entitled to recover moneys paid by them on an ultra vires contract of loan, on the footing of money had and received. But they differed from that Court, and hold that after payment of the general creditors of the society, the assets which remained must, in part, be attributed to moneys which the depositors could follow as having been wrongfully employed by its agents in the banking business and therefore (subject to any application by any individual depositor or shareholder with a view to tracing his own money into any particular asset, and to the costs of the liquidation), the assets ought to be distributed pari passu, between the depositors and unadvanced shareholders, according to the amounts due them at the date of the winding-up order.

CONTRACT—COMBINATION OF TRADERS—RESTRAINT OF TRADE—PUBLIC POLICY—ILLEGALITY—EVIDENCE—PLEADING.

North Western Salt Co. v. *Electrolytic Alkali Co.* (1914) A.C. 461. This in view of the prevalence nowadays of trade combinations, is an important deliverance of the House of Lords on the subject. The plaintiff company was a combination of salt manufacturers, for the purpose of regulating and keeping up the price of salt. The members of the company (of whom the defendant company was not one) were entitled to be appointed distributors for the sale of salt on behalf of the plaintiff company. The defendants' company agreed to sell to the plaintiffs' company for four years 18,000 tons of salt per annum, at a fixed uniform price per ton, and undertook not to make any other salt for sale. They were to have the option of buying back the whole or part of the table salt included in the 18,000 tons, at the plaintiff company's current selling price, and were to be distributors on the same terms as the plaintiff company's other distributors. The defendant company, having sold salt in violation of their agreement, the

present action was brought for breach of contract. The Court of Appeal held that the contract was against public policy, as being in undue restraint of trade and could not, therefore, be enforced (1913) 3 K.B. 422; but the House of Lords (Lord Haldane, L.C., and Lords Moulton, Parker, and Sumner) although conceding that a contract in restraint of trade may be, on its face, so unreasonable in its terms as to be unenforceable by a Court of Law, yet, considered that as the illegality of the contract in question had not been pleaded, and the question of whether or not it was in undue restraint of trade depended on surrounding circumstances, in such a case the Court should not, as a rule, give effect to an objection of illegality; and being of the opinion that the contract on its face was not in unreasonable restraint of trade, they reversed the judgment of the Court of Appeal and gave judgment for the plaintiffs.

CONTRACT—SALE OF GOODS—BREACH—NON-DELIVERY—MEASURE OF DAMAGES.

Williams v. *Agius* (1914) A.C. 510. This was a claim for breach of a contract for the sale of coal. Agius agreed to sell to Williams a cargo of coal, to be shipped in November, 1911, at the price of 16s. 3d. per ton, c.i.f. Genoa. He failed to deliver the cargo. The contract contained an arbitration clause and the claim was accordingly referred to arbitration. It appeared that in October, 1911, Williams had agreed to sell to Ghiron, in Turin, a cargo of coals of the same amount and quality, at 19s. per ton, c.i.f. Genoa. In November, Ghiron sold to Agius the cargo he had bought from Williams and ceded to Agius all his rights under that contract. At the date of Agius's breach of contract the market price of coal was 23s. 6d. at Genoa. On the arbitration the measure of damages was in dispute. The arbitrator found that Williams intended to resell to Ghiron the cargo due to him from Agius, and appropriated that cargo to his contract with Ghiron, and he gave his award in the form of a special case and the question turned on the point whether the measure of damages was the difference between 20s. and 23s. 6d. or 16s. 3d. and 23s. 6d. The Court of Appeal decided in favour of the former, but the House of Lords (Lord Haldane, L.C., and Lords Dunedin, Atkinson, Moulton, and Parker) came to the conclusion that the arbitrator had no jurisdiction to deal with matters outside the contract and the ordinary rule as to the measure of damages applied, viz., the difference between the contract price and the market price at the data of the breach.

Correspondence.

THE ROYAL BANK v. THE KING.

To the Editor, CANADA LAW JOURNAL:

SIR,—The able article of Mr. Labatt, in your September number, appears to me very effectually to dispose of the criticisms of Mr. Lefroy, K.C., and Mr. Ewart, K.C., on the judgment of the Judicial Committee of the Privy Council in the *Royal Bank of Canada* v. *Rex*, and it is perhaps like "slaying the slain" to say anything more on the subject. Yet I would venture to remark that it appears to me to be a curious phenomenon that astute and clear-minded men could ever have the slightest doubt about either the perfect justice or wisdom of that decision. Nevertheless, the fact remains that we have an Attorney-General of Alberta, a Provincial Assembly, and two Ontario "learned in the law" of the opinion that the legislation in question was permissible under the B.N.A. Act.

Instead of dealing with railways and millions, let us put the case in a way that "the man in the street" can grasp it. Let us suppose that Mr. A. B., a solicitor in Toronto, has a client in Scotland who sends to him at Toronto $2,000, with instructions to invest the money on a lot of land in Alberta, on the title being made out satisfactorily. Mr. A. B., we will suppose, puts the money in his pocket, and communicates with his agent in Edmonton informing him that he has the money, and that, when the title to the land is satisfactory, he may pay over $2,000, and draw on him for the amount. The agent notifies the proposed vendor that he has authority to pay him the money as soon as he makes title.

Before the transaction is completed, however, the Legislature of Alberta passes an Act confiscating all moneys due to the vendor, and enacting that they shall be paid into the Provincial Treasury, and the province will assume liability therefor. According to Messrs. Lefroy and Ewart, this would be legitimate legislation. But would it? Mr. A. B. has "opened a credit" in Edmonton in favour of the vendor *subject to a condition*, just as the bank "opened a credit" in Edmonton subject to a condition. But if the Provincial Treasurer had demanded from the agent of the bank the money, the agent would say, I have no money; I have authority to pay on certain conditions, but these conditions have not been fulfilled; I have, of course, a mass of money in my vaults, but none of it can be designated as this particular fund.

Mr. A. B.'s agent would naturally make the same kind of

reply. He would say that the money you are wanting is in Mr. A. B.'s pocket in Toronto, and if by any act of the Legislature of Alberta you think you can legislate the money out of his pocket in Toronto, you are mistaken. If any emissary of the Alberta Legislature or Government were to demand the money from Mr. A. B., he might say, the condition on which I received the money not having been fulfilled, I have returned it to my client in Scotland. The proposition that the Legislature of Alberta can legislate money out of A. B.'s pocket in Toronto is so supremely ridiculous that it is simply amazing that such a nonsensical notion could ever have been seriously entertained by anyone.

Mr. Lefroy's opinion that the civil right dealt with was a right of action within the province does not appear to have any force. What right of action, we may ask, existed within the province in respect of the money in question. Simply a right to sue for the money on the performance of the condition on which it was held. That was the only civil right within the Province of Alberta. That, it is true, might be confiscated by provincial legislation; but the right to sue for the money without performing the condition never existed within the province, and, therefore, clearly was not the subject of confiscation, even from Mr. Lefroy's standpoint.

It is exa the parallel of the case I have put in regard to the $2,000 assume is remitted to A. B. for investment in Alberta. The only civil right that can be said to exist there, is a right to sue for the money on the performance of the condition. That might be confiscated. But to say that the money could, in the circumstances, be confiscated without performing the condition is manifestly absurd, where such legislation is directed against a person who is not in any way subject to the legislative jurisdiction of Alberta.

Neither Mr. Lefroy nor Mr. Ewart have ventured to explain how the money in question could by any process known to constitutional law have been got out of the coffers of the Royal Bank in Montreal.

That, perhaps, in their view, is wholly immaterial, and yet it would seem to be absurd to suppose that provincial legislatures can pass laws affecting, or purporting to affect, the rights of persons in other parts of the King's dominions which they have no power to enforce. Though the powers of provincial legislatures, within their respective spheres, may be plenary, yet it must not be forgotten that the limits of the province circumscribe the area within which it can be exercised, and the property and civil rights which can be affected thereby.

G. S. H.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Dom. Ry. Board.] [June 19.

HAMILTON v. TORONTO, H. & B. RY. CO.

Railway Board—Jurisdiction—Constructed line of railway—Deviation—Application by municipality—Special Act—Case stated—Questions of Jurisdiction—Railway Act (R.S.C. 1906, c. 37, ss. 2 (28), 3, 26, 28, 167.

Under s. 55 of the Railway Act, the Board of Railway Commissioners may state a case in writing for the opinion of the Supreme Court of Canada on a question of jurisdiction. The Board has no power to order, against the will of the company, deviation of a constructed line of railway the location of which has been definitely established by an Act of the Legislature. ANGLIN, J., *contra*.

Per FITZPATRICK, C.J., and IDINGTON, J.: In this case the Dominion Act, 58 & 59 V. c. 66, was a "special Act" within the meaning of s. 2, sub.-s. 28 and s. 3 of the Railway Act.

Cowan, K.C., and *Waddell*, K.C., for applicant. *Hellmuth*, K.C., and *Soule*, for respondent.

Ont.] CARTWRIGHT v. CITY OF TORONTO. [June 19.

Assessment and taxes—Sale of land for arrears—Purchase by municipality—Failure to give notice—Curative Act—Evidence—Discovery—Death of deponent—Use of deposition at trial.

By s. 184 (3) of the Ontario Assessment Act (R.S.O. [1897], c. 224), where the sale of lands for unpaid taxes is adjourned for want of a bid for the full amount of the arrears, the municipality may purchase the land at such adjourned sale if its council, before the day thereof, has given notice of its intention to do so.

Held, affirming the judgment of the Appellate Division (29 Ont. L.R. 73), that failure to give such notice is cured by the provisions of 3 Edw. VII. c. 86, s. 8, and its amendment, 6 Edw. VII. ch. 99, s. 8. *Russell* v. *City of Toronto* ([1908], A.C. 493), followed.

On the expiration of the time for redemption after sale all rights of the former owner are barred.

The depositions of a party to an action taken on discovery cannot, when the deponent has died in the interval, be used against the opposite party unless the latter has first used it for his own purposes.

Appeal dismissed with costs.

George Bell, K.C., for appellant. *Geary*, K.C., and *Colquhoun*, for respondent.

Ont.] [June 19.

CANADIAN NIAGARA POWER CO. v. STAMFORD.
ONTARIO POWER CO. v. ELECTRICAL DEVELOPMENT CO.

Assessment and taxes—Municipal by-law—Exemption from taxation—Validating legislation—School rates—Public Schools Act, 55 Vict. c. 60, s. 4 (Ont.)—Special by-law.

By s. 4 of the Public Schools Act of Ontario (55 Vict. c. 60) it is provided that "No municipal by-law hereafter passed for exempting any portion of the ratable property of a municipality from taxation, in whole or in part, shall be held or construed to exempt such property from school rates of any kind whatsoever." A similar provision is contained in the Municipal Act (55 Vict. c. 42, s. 366), and both are now to be found in R.S.O. (1914), c. 266, s. 39, and c. 192, s. 396 (*e*).

Held, affirming the judgment of the Appellate Division (30 O.L.R. 378, 384, 391), DUFF, J., dissenting, that the application of this legislation is not confined to the case of a by-law passed under the general powers of a municipality, but it applies to limit the effect of a special by-law exempting a company from all municipal assessment "of any nature or kind whatsoever" beyond an amount specified as its annual assessment, even when the by-law was confirmed by an Act of the Legislature, which declared it to be legal, valid and binding "notwithstanding anything contained in any Act to the contrary."

Appeal dismissed with costs.

Nesbitt, K.C., *Grier*, K.C., and *Glyn Osler*, for appellants. *Kingstone*, for respondent.

Ont.] PEARSON *v.* ADAMS. [June 19.

Sale of land—Stipulation as to user—Covenant or condition—Detached dwelling-house—Apartment house.

In a deed of sale of land it was stipulated that it was "to be

used only as a site for a detached brick or stone dwelling-house, to cost at least two thousand dollars, etc."

Held, that this stipulation constituted a covenant.

Held, also, reversing the judgment of the Appellate Division (28 O.L.R. 154) and restoring that of the Divisional Court (27 O.L.R. 87), FITZPATRICK, C.J., and DUFF, J., dissenting, that an apartment house intended for occupation by several families was not a "detached dwelling-house" within its meaning.

Appeal allowed with costs.

Glyn Osler and *J. H. Cooke*, for appellant. *J. M. Godfrey*, for respondent.

Ont.] LONG v. TORONTO RAILWAY CO. [June 19.

Negligence—Electric railway—Duty of motorman—Contributory negligence—Reasonable care.

L. started to cross a street traversed by an electric railway, and proceeded in a north-westerly direction, with his head down and apparently unconscious of his surroundings. A car was coming from the east, and the motorman saw him when he left the curb at a distance of about fifty yards. Twenty yards further on he threw off the power, and, when L., still abstracted, crossed the devil-strip and stepped on the track, reversed, being then about ten feet from him. The fender struck him before he crossed, and he received injuries causing his death. On the trial of an action by his widow, the jury found that the motorman was negligent in not having his car under proper control, that L. was negligent in not looking out for the car, but that the motorman could, notwithstanding, have avoided the accident by the exercise of reasonable care. A majority of them found, also, that L.'s negligence did not continue up to the moment of impact.

Held, DAVIES and ANGLIN, JJ., dissenting, that the jury were entitled to find as they did; that when the motorman first saw L. he should have realized that he might attempt to cross the track, and it was his duty, then, to have the car under control; and that his failure to do so was the direct and proximate cause of the accident, for which the railway company was liable.

Held, *per* DAVIES, J.: The motorman was not guilty of negligence prior to the negligence of L., which consisted in stepping on the track when the car was near, and it was then too late to prevent the accident.

Held, *per* ANGLIN, J.: The findings of the jury, especially the

finding that L.'s negligence did not continue up to the moment of impact, were not satisfactory, and there should be a new trial.

Appeal allowed with costs.

Raney, K.C., for appellant. *Dewart*, K.C., for respondent.

N.S.] [May 18.

MCPHERSON *v.* GRAND COUNCIL PROVINCIAL WORKMEN'S ASSOCIATION.

Benevolent association—Grand Council constitution—Incorporation of subordinate lodge—Dissolution—Disposition of property.

The charter of the respondent association provides that upon the dissolution of a subordinate lodge, all its property shall vest in the Grand Council, to be applied, first, in payment of debts of the lodge and the balance as deemed best for the general interests of the order. There was also a provision allowing any subordinate lodge to become incorporated, and in 1890 Pioneer Lodge No. 1 was incorporated and all its property vested in the corporate body. In 1908 said lodge surrendered its charter to the Grand Council.

Held, affirming the judgment appealed against (46 N.S.R. 417), that the incorporation of the subordinate lodge did not constitute it an independent body; that it still remained a constituent part of the association; that the surrender of its charter was a dissolution within the meaning of the provision in respondents' charter above referred to; and that its property on such dissolution became vested in the Grand Council for the purposes mentioned.

Appeal dismissed with costs.

Ralston, for appellants. *Newcombe*, K.C., for respondents.

Book Reviews.

Burge's Commentaries on Colonial and Foreign Laws, generally, and in their conflict with each other, and with the law of England. New edition under the editorship of ALEXANDER WOOD RENTON, Puisne Justice of the Supreme Court of Ceylon, and GEORGE GRENVILLE PHILLIMORE, B.C.L., Barrister-at-Law. In six volumes. Volume IV. Part 1. London: Sweet & Maxwell, Limited, 3 Chancery Lane; Stevens & Sons, Limited, 119, 120 Chancery Lane. 1914.

This book, which is Part One of Volume IV. completes the account of the law of Persons with the consideration of the law

of Guardianship discussed in Volume III, chap. 23 of the first edition, and then deals with the law of property with special regard to the branch of real or immovable property. It is unnecessary to enlarge upon this standard work. The first seven chapters deal with Guardianship. Chapters 8 to 14 speak of property generally and chapters 15 to 20 of real property. To the student who desires to be fully equipped in his profession no more interesting book can be consulted, giving, as it does, a comparative view of the law in various nations, bearing on the various subjects treated, and showing how these different countries deal with them.

In such a work a large staff of writers is of course necessary as it covers the law of some twenty different systems of law, and, judging from the names we know, we can readily assume that the others are equally competent for the work they undertake. The Assistant Editors for Canada are: A. H. F. Lefroy, K.C. and MacGregor Young, K.C., of Toronto, and F. P. Watson, LL.D. of Montreal.

The volume before us is of 1106 pages. The price of the whole set is £10 10s. The mechanical execution is of the very best.

Scintillae Juris. By the HON. MR. JUSTICE DARLING. With prefatory note by the RIGHT HON. SIR EDWARD CLARKE, K.C. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar, 1914.

The first part of this book consists of a series of essays which comment upon various judgments—some of them by the author himself—of hints to counsel as to how best carry on the examination of witnesses, both in chief and in cross-examination—of various legal maxims—and of principles of law. Whilst the author says many clever things, his chief characteristic seems to us, with all due respect to so eminent a jurist, to be a desire to be "smart," and to be more inclined to display a cheap sort of wit rather than to use a lofty position to inculcate the principles which the young practitioner would naturally expect to be taught in such a school. In fact, the cynical tone which pervades the whole book renders it of little value for any good purpose.

The author indulges in political speculations, but as his doctrines are based upon the idea that, in public affairs at any rate, men are governed by pure selfishness, they preclude any sentiment of patriotism in the sense in which that term ought to be

used. The doctrine of national selfishness expressed in the term —"Might makes right"—seems to be accepted by our author as perfectly legitimate, and is receiving a gruesome illustration in the events now going on in Europe. All impartial observers know now that these events are the natural result of the doctrines which having been preached in Germany for years past have now become part of the life of the people, and have produced that unworthy ambition, lust for power, and brutal disregard for the rights of others which has covered the German name with undying infamy.

Bench and Bar

LAW ASSOCIATIONS AND THE WAR.

The Law Society of Manitoba.

The Law Society of Manitoba has made an order that students who go to the war will have time allowed for a year at least.

At a special meeting of the Benchers called to consider what should be done with regard to law students who have enlisted or are about to enlist and to go on active service, it was decided that students who have enlisted should have their time allowed for twelve months if on active service during that period and absent from the province; that if the war continues after that period, the subject of allowance of their time will be further considered by the benchers. All students who are preparing to take part I attorney in November next and who are entitled to write at that time will be allowed their examination if they are in active service at the time the examinations are held. All other students who have passed their second intermediate examination will be allowed two out of the three final examinations if such examinations come while the student is on active service. Students who have passed part I of the attorney will be allowed the second part of the attorney and call if such examinations come while they are absent on active service. All students entitled to present themselves for intermediate examinations in November will be allowed such intermediate examinations on active service at the time they take place. In other cases as where the war may cease shortly before the time for the examinations the examining committee has power to allow examinations if they see fit on the return of the students

from the front, and special cases will be considered by that committee. In any case where a principal has gone away on active service the time of any students in his office will be allowed the same as if he were at home.

Osgoode Hall Rifle Association.

The members of the Osgoode Hall Rifle Association continue their drill with much devotion. Some surprise, however, has been expressed that only a very few students are on the roll. This want of public spirit has not pervaded law students in the past. What has come over them? They should follow the example of their seniors. There are about three hundred attending lectures at Osgoode Hall, but, up to the time of writing, nothing like a tenth of them have joined the company. Some few of them doubtless have joined some of the city corps. Surely it is only necessary to remind them that of all classes in the community the legal profession should be the first to step to the front when the call comes. We are especially near to the King, for we are officers of his courts, and should be specially jealous of his honour.

It may be that in the hurry of forming this Association it did not occur to anyone to ask the students of the Law School to be represented as a distinct class on the committee. It would, perhaps, have been as well if this had been done, but we are sure that nothing of this sort will stand in the way of their cordial co-operation with others in the work of the Association.

The action of the Manitoba Law Society might well be followed, possibly with some variations, in the Province of Ontario.

A poet of repute has a word to say to "stay-at-home rangers." We should be quite angry with him if we thought he meant it to apply to the lawyers; nor do we think it will have application to University men after the patriotic addresses to them by such men as Principal Falconer and Archdeacon Cody. It is evident that we are being watched, and so we must be up and doing, and not let the following be applicable to us:—

All the brave boys under canvas are sleeping.
All of them pressing to march with the van,
Far from the home where their sweethearts are weeping;
What are you waiting for, sweet little man?

You with the terrible warlike moustaches,
Fit for a colonel or chief of a clan,
You with the waist made for sword-belts and sashes;
Where are your shoulder-straps, sweet little man?

Bring him the buttonless garment of woman,
Cover his face, lest it freckle and tan;
M ster the Apron-String Guards on the Common—
That is the corps for the sweet little man.

All the fair maidens about him shall cluster,
Pluck the white feathers from bonnet and fan,
Make him a plume like a turkey-wing duster—
That is the crest for the sweet little man.

—*Oliver Wendell Holmes.*

Flotsam and Jetsam.

A lawyer who makes a specialty of patent cases was once engaged in a case before a country justice.

"Who are you, anyway?" demanded the justice.

"Well," replied the lawyer, "I'm an attorney."

"P'raps you are, but I never heard one talk like you do. What kind of a one are you?"

"I'm a patent attorney."

The magistrate rubbed his chin in thought. "Well, all I've got to say is," he said, slowly, "that when the patent expires, I don't believe you can ever get it renewed again."—*National Monthly.*

Mr. Justice Maule once addressed a phenomenon of innocence in a smock-frock in the following words: "Prisoner at the bar, your counsel thinks you innocent; I think you innocent; but a jury of your own countrymen, in the exercise of such common sense as they possess, which does not appear to be much, have found you guilty, and it remains that I should pass upon you the sentence of the law. That sentence is that you be kept in imprisonment for one day, and, as that day was yesterday, you may go about your business." The unfortunate rustic, rather scared, went about his business, but thought that the law was an uncommonly puzzling "thing."