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RIGHTS OF ALIENS IN RELATION TO PROPERTY

Our English contemporary, the *Law Times*, has drawn attention to the change of law effected in England in 1870 whereby aliens were enabled to acquire, hold and transmit real estate in England as if they were natural-born British subjects.

This privilege had been conceded in Ontario as far back as November, 1849. Here, as in England, no distinction is made between alien friends and alien enemies.

In Ontario the statutory privilege is confined to real estate, but in some other provinces it extends alike to real and personal estate. Laws of this kind are based on the assumption that hospitality will not be abused, but in view of German methods it may perhaps be necessary to reconsider the matter. R.S.O. ch. 108, as we have observed, is confined to real estate, and as regards chattels, real and other personal property, the rights of aliens in Ontario would appear still to be governed by the Common Law.

This distinction of late years has perhaps not been observed, and many leases which have been made to aliens may probably have been forfeitable to the Crown.

Under the Common Law an alien merchant may take a lease only for the purpose of his trade or habitation, "and the privilege applied" only to the merchant himself if he leaves the country, the King, on "office found," may take the lease; and on the merchant's death it does not pass to his personal representatives, but apparently vests in the King. According to Lord Coke a lease to an alien enemy is forfeitable to the Crown even though the lessee be a merchant. An alien, not being a merchant, is not entitled to hold any leasehold except subject to forfeiture to the

Crown on a return to an inquisition finding the lessee to be an alien, which proceeding is technically termed "office found." Where the King takes a lease for forfeiture he does so *cum onere*, and is subject to payment of rent and observance of covenants.

With regard to personal property other than chattels real, aliens have under the Common Law the same rights as British subjects. But under the Merchant Shipping Act, 1894 (57 58 Vict. ch. 60), sec. 1, aliens cannot be registered as owners of British ships.

At Common Law the conveyance by an alien of lands within the jurisdiction was valid except as against the Crown; and the grantee could not set up alienage as against his grantor. An alien's deed of property which is subject to forfeiture is therefore not null and void, but it is voidable by the Crown: see *Doe d. Macdonald* v. *Cleveland*, 6 O.S. 117.

It would also appear that an alien plaintiff was not, under the Imp. Stat. 5 Geo. II., ch. 7, entitled to issue execution against lands in Upper Canada: see *Wood* v. *Campbell*, 3 U.C.R. 269; and this restriction appears still to exist under R.S.O. ch. 80, sec. 11, which also, it will be observed, is a provision in favour of "His Majesty" and "any of His subjects."

Rule 533, on the other hand, which is also of statutory force, applies to "any person," and it may be argued that it in effect removes the restriction contained in R.S.O. ch. 80, sec. 11. On the other hand, it may be said that "any person" in Rule 533 merely means "any person" entitled under R.S.O. ch. 80, sec. 11, and is not intended to include "any person" which that section excepts.

Under the former practice the objection had to be raised by plea in bar of execution: see *Wood* v. *Campbell*, *supra*, but under the present procedure the point, if tenable, may probably be taken by motion to set aside the writ; clear evidence of the alienage of the party issuing the execution would have to be adduced: *Ib.*, and see *Dehart* v. *Dehart*, 26 C.P. 489.

DEVOLUTION OF ESTATES.

It will be useful for practitioners to note that the R.S.O. 1914 do not include all the provisions now in force relating to the devolution of estates. When the R.S.O. 1897, c. 127, was revised by 10 Edw. 7 c. 56, that Act did not deal with the whole of c. 127, but left unrepealed ss. 22-58: see s. 35. These sections deal with descents before July 1, 1834, and subsequent thereto up to July 1, 1886. They also include some general provisions, viz., that co-heirs shall take as tenants in common: s. 56; that posthumous children shall inherit: s. 57; and that illegitimate children shall not inherit: s. 58. These provisions, which were left in force by 10 Edw. 7 c. 56, have not apparently been repealed by any other statute, and are not included in the Schedule of Acts repealed by 3 & 4 Geo. 5 c. 2: R.S.O. 1914, p. xv.; and Sched. A, *Ib.* p. lvii.

It seems an ill-advised proceeding to have left these important provisions of R.S.O. 1897, s. 127, in this position and without any reference thereto in the present Devolution of Estates Act, R.S.O. c. 119.

LAWYERS FOR LEGAL OFFICES.

It should not be necessary for the profession to remind any Government that lawyers should be appointed to legal offices, yet such action seems to be necessary. A petition has been largely signed by members of the profession in Toronto requesting the authorities to appoint some one from the profession as Clerk of the County Court of the County of York. It is most objectionable that legal offices, which require a person of legal training to properly do the necessary work, should be given to worn-out politicians and others, who are absolutely ignorant of the duties they will have to perform. For example, in the metropolitan city of Ontario a good baker was lost to his trade by being made Clerk of the Surrogate Court; the same Government were so impressed with the commanding presence and stentorian voice of a genial and popular auctioneer that they appointed him a County Registrar. Another Government of a different

stripe of politics thought well to appoint a farmer, who possibly finding politics more paying than farming, became a member of the Provincial Parliament and then procured for himself the position of a County Court Clerk. Such instances might be largely multiplied. As we have often said, if the profession would stick together and insist, not merely their rights, but upon what is really decent in the premises, such outrageous appointments would not be made.

COMBATANTS AND NON-COMBATANTS.

As the civil population, however, becomes more and more involved in the direct conduct of the war, it seems much more likely that the tendency will be to confiscate private property belonging to the enemy. Under the latest system, whereby private individuals are detained and not permitted to leave the country, even for neutral destinations, and under which the receipt of dividends by persons in enemy countries is firmly controlled, we have something very like a temporary confiscation of enemy property. And no war-confiscation can be other than temporary: because permanent confiscations will always form the subject of discussion when the terms of peace are negotiated.

Both at sea and on land the dividing line between the combatant and the non-combatant is becoming blurred. Every citizen is an actual or a potential member of the Army Ordnance Corps. Every merchantman is an actual or potential scout or ram. The protection promised to the invaded populace, on condition of their remaining quiet, has proved illusory. The peaceful dweller at the seaside finds the proximity of a signal station or a railway line draws down on his villa a rain of naval shells. It seems really probable that the theoretical immunity of private property from confiscation, which in Napoleon's time Lord Ellenborough thought so unassailable (in *Wolff* v. *Oxholm*), will not much longer be maintained.

But it is curious to reflect that, for all that, the nation in

arms is nothing new. Revolutionary and Imperial France was a nation in arms. The Germany of 1814 was a nation in arms; and if ever there was a nation in arms at all, it was the Spain of 1808. Yet that was the very era in which the principle laid down by Franklin and Rousseau was adopted, that war is a struggle between armed forces, which ought not to involve civilians.

The British attempt to intercept provisions destined for France in 1793, on the ground that France could only be brought to terms by creating distress among its civil population, was resisted not only by America, but by Denmark. Under Jay's Treaty of 1794, Great Britain paid damages for the seizures of American goods made in the prosecution of the attempt. Woolsey's remark has always seemed sensible, that a nation which arms the bulk of its population—as the British asserted France had done—would be reduced to famine by the operation of the laws of political economy, without the need for any special interference on the part of its enemy. In fact, the *quasi* siege warfare of modern days must result in the strain on civil supply being too great. The swollen armies in the trenches must sooner or later be depleted for the service of the factories and the fields. And in such a prolonged contest, that nation will be likely to succeed which has the most perfect and reliable civil basis at home for its operations at the front. When this is recognized, it will be difficult to maintain the immunities of civilians in their entirety.—*Law Magazine.*

RIGHTS OF MINORITIES OF SHAREHOLDERS IN COMPANIES.

When an indignant shareholder in a company finds himself in disagreement with the majority of his fellow shareholders at a general meeting, and asks what remedy he has, the answer is that the court will not interfere with the internal management of the affairs of a company, and that for any wrong done to the company it is the company which must sue and not the individual member of the company.

This is known as the rule in *Foss* v. *Harbottle*, 2 Ha. 461, but the meaning and scope of the rule are not apparent until the cases which lay it down have been examined.

The reason for the rule is set out very clearly by Vice-Chancellor Wigram in *Bagshaw* v. *Eastern Union Railway*, 7 Ha. 114. He says in that case, "if the act . . . be one which a general meeting of the company could sanction, a bill by some of the shareholders on behalf of themselves and others to impeach that cannot be sustained, because a general meeting of the company might immediately confirm and give validity to the act of which the bill complains." In other words, the court has no jurisdiction. Nor for a mere irregularity is there any equity, for a dissatisfied member to complain. In *MacDougall* v. *Gardiner*, 1 Ch. Div. 13, the adjournment of a general meeting was moved, and, on being put to the vote, was declared by the chairman who was one of the directors, to be carried. A poll was duly demanded, but the chairman ruled that there could not be a poll on the question of adjournment, and left the room. One of the shareholders sued on behalf of himself and all other shareholders, alleging that that course was taken with a view to stifling discussion. Lord Justice Mellish says in his judgment: "Looking to the nature of these companies, looking at the way in which their articles are formed, and that they are not all lawyers who attend these meetings, nothing can be more likely than that there should be something more or less irregular done at them. . . . Now, if that gives a right to every member of the company to file a bill to have the question decided, then if there happens to be one cantakerous member . . . everything of this kind will be litigated; whereas if the bill must be filed in the name of the company, then, unless there is a majority who really wish for litigation, the litigation will not go on. Therefore, holding that such suits must be brought in the name of the company does certainly greatly tend to stop litigation."

That there must be exceptions to the rule was recognized in *Foss* v. *Harbottle*: "Corporations like this of a private nature are in truth little more than private partnerships, and, in cases

which may easily be suggested, it would be too much to hold that a society of private persons, associated together in undertakings which, though certainly beneficial to the public, are, notwithstanding, matters of private property, is to be deprived of their civil rights inter se, because, in order to make their common objects more attainable, the Legislature may have conferred upon them the character of a corporation."

The exceptions to the rule are (1) where the act done or proposed to be done is ultra vires the company, and (2) where there has been fraud or where the majority of a company propose to benefit themselves at the expense of the minority.

As to (1), it is obvious that the act cannot be sanctioned by the company, and therefore the court can interfere: *Simpson* v. *Westminster Palace Hotel Limited*, 8 H.L.C. 712: *Hoole* v. *Great Western Railway*, 17 L.T. Rep. 453, L. Rep. 3 Ch. 262.

Vice-Chancellor Wigram in *Bagshaw* v. *Eastern Union Railway*, *supra*, speaking of acts ultra vires the company, says: "A single dissenting voice would frustrate the wishes of the majority. Indeed, in strictness, even unanimity would not make the act lawful."

As to fraud, *Atwool* v. *Merryweather*, L. Rep. 4 Eq. 464*n*, is a good example. There M., appearing as sole vendor, sold property to the company for £7,600, of which M. received £4,000 and W. took £3,000. This transaction was not disclosed, and M. and W. together had sufficient votes to secure a majority at the shareholders' meeting: Cf. also *Spokes* v. *Grosvenor Hotel Company*, 76 L.T. Rep. 679, (1897), 2 Q.B. 124.

It is not fraud for a shareholder or a majority of shareholders to carry a resolution in their favour where they have an interest in the subject-matter of the vote: *Burland* v. *Earle*, 85 L.T. Rep. 553, (1902) A.C. 83; e.g., a resolution of a general meeting to purchase a vessel at the vendor's price was held to be valid notwithstanding that the vendor himself held the majority of shares in the company: *North-Western Transport Company Limited* v. *Beatty*, 57 L.T. Rep. 426, 12 A.C. 589. The court, however,

will interfere where the majority of a company propose to benefit themselves at the expense of the minority: *Menier* v. *Hooper's Telegraph Works*, 30 L.T. Rep. 209, L. Rep. 9 Ch. 350. To give the minority a cause of action, the majority must abuse their powers so as to deprive the minority of their rights and confiscate their interests: *Dominion Cotton Mills Company* v. *Amyot*, 106 L.T. Rep. 934, (1912) A.C. 546; and see *Alexander* v. *Automatic Telephone Company Limited*, 82 L.T. Rep. 400; (1900) 2 Ch. 56. Where a scheme for voluntary winding-up and amalgamation of company A and company B by sale and transfer of their assets to a new company is unfair to the independent minority of A company, and is only passed as regards A company by means of a large majority of shares held by B company, who benefit by the scheme, the court will at the instance of the minority of A company stop the scheme by making a compulsory winding-up order, and will not leave the minority to their remedy of being paid out as dissenting members: *Re Consolidated South Rand Mines Deep*, 100 L.T. Rep. 319. (1909) 1 Ch. 491.

When a shareholder wishes to sue, the question arises as to who are the proper parties to the action. A majority may vote in favour of taking action, and then, of course, the proper plaintiff is the company: *Russell* v. *Wakefield Waterworks Company*, 32 L.T. Rep. 685, 20 Eq. 474. "Where there is a corporate body capable of filing a bill for itself to recover property, either from its directors or officers, or from any other person, that corporate body is the proper plaintiff and the only proper plaintiff": *Gray* v. *Lewis*, 29 L.T. Rep. 12, L. Rep. 8 Ch. 1035, at p. 1050. Where the act complained of is alleged to be ultra vires the company or unfair to the minority, a single shareholder can sue on behalf of himself and all other shareholders except the defendants, as the form of action is preferable to an action in the name of the company and then a fight as to the right to use its name: *Alexander* v. *Automatic Telephone Company*, *supra*; *Menier* v. *Hooper's Telegraph Works*, *supra*; and *MacDougall* v. *Gardiner*, *supra*, at p. 22. Where it can be established that

the majority of shareholders acted ultra vires or there is fraud, then any shareholder can sue in his individual capacity: *Dominion Cotton Mills Company* v. *Amyot, supra.* The company of which the shareholder is a member is properly made a defendant, and also any other person or corporation affected by the act in dispute. In *Russell* v. *Wakefield Waterworks Company, supra,* Sir George Jessel says, at p. 481: "If the subject-matter of the suit is an agreement between the corporation acting by its directors or managers and some other corporation or some other person strangers to the corporation, it is quite proper and quite usual to make that other corporation or person a defendant to the suit because that other corporation or person has a great interest in arguing the question and having it decided, whether the agreement in question is really within the powers or without the powers of the corporation of which the corporator is a member."

With the above limitations, the rule in *Foss* v. *Harbottle* is inviolable.—*Law Times.*

PROFESSIONAL ETHICS.

Ought a lawyer to defend a prisoner whom he believes to be guilty? Mr. Justice Darling in a case in which a solicitor was the plaintiff made some observations on this familiar problem which ought not to go unrecorded. He protested, says the London *Globe,* against the notion that a lawyer, whether barrister or solicitor, is under an obligation to cease to conduct a case which he realizes to be bad. "If an advocate in the course of a trial for murder comes to recognize that his client is guilty, is he," asked the learned judge, "to say to the court, 'Hang my client'?" To lawyers this counter-query with its self-evident response effectually places beyond the realm of argument the original question. They know that when once embarked on a case they cannot retire therefrom without the consent of the client or the court, and to come before the latter with a revelation of facts damaging to the person they have chosen to defend

is such a breach of confidence that no lawyer worthy of the name could be found to commit it. Moreover, even if a lawyer were himself willing to commit such perfidy, the law itself, having regard to the sacredness of the relation subsisting between attorney and client, would from motives of public policy effectually seal his lips. But how about a lawyer accepting a retainer and voluntarily engaging in the defence of an accused person where he has, prior to his retention, direct knowledge of the prisoner's guilt, derived, we will say, from the accused's own confession? Is not such a defence highly unethical and evidence of a professional depravity in the lawyer who will dare to undertake it, the pseudo-moralist asks? And Lord Macaulay in his glittering style inquires, "Can it be right that a man should, with a wig on his head and a band round his neck, do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire?" To this rhetorical question we answer simply, "It can." The public hangman or chief electrocutioner can by virtue of his office and under warrant from the state legally and morally deprive of his life at the appointed time a murderer condemned to die; but let any one before such time seek to accomplish his death by lynch law or otherwise, and it is the duty of the sheriff or other proper custodian to defend him to the utmost, even to the point of taking life, although the prisoner may be richly deserving of death. His death, however, the law and good morals say, should be accomplished only by due process of law. The trouble with most detractors of the legal profession is that they fail utterly to comprehend the principle on which advocacy is based. Advocacy implies nothing more than the substitution for an actual litigant of a person professing special skill and learning in litigation to do on behalf of the litigant and in his stead all that he, if possessing sufficient knowledge and ability, might do for himself with fairness to his opponent. Every man, accused of an offence, has a constitutional right to a trial according to law; even if guilty, he ought not to be convicted and undergo punishment

unless on legal evidence, and with all the forms which have been devised for the security of life and liberty. As former Chief Justice Sharswood of Pennsylvania has wisely said: "These are the panoply of innocence, when unjustly arraigned; and guilt cannot be deprived of it, without removing it from innocence." To conduct his defence in accordance with the forms of law, a prisoner, no matter how guilty, is entitled to the benefit of counsel, and moreover, if he cannot procure counsel the law will assign him counsel and force the latter to act under pain of punishment for contempt if he fails to discharge his duties properly. It can therefore not be improper or unethical for an attorney to do what the law can oblige him to do, and this principle is embodied in the codes of professional ethics adopted by many states which provide that "an attorney cannot reject [or is not bound to reject] the defence of a person accused of a criminal offence, because he knows or believes him guilty. It is his duty by all fair and honourable [or lawful] means to present such defence as the law of the land permits, to the end that no one may be deprived of life or liberty, but by due process of law."—*Law Notes.*

TRADING WITH THE ENEMY.

Whatever excuses there may have been during the early stages of the war, on the grounds of ignorance or uncertainty, for committing the serious offence of trading or attempting to trade with the enemy, the sooner the truth is brought home to those who place pocket before patriotism the better. The infliction of fines alone for this breach of the law, owing to the lucrative nature of the business, is useless, and a sharp sentence of imprisonment, in addition to a heavy fine, is the only method of bringing home their position to those who are incapable of realizing their duty as citizens.

REVIEW OF CURRENT ENGLISH CASES.

WILL—CHARITABLE LEGACY—INTEREST IN LAND IN ENGLAND OF NO VALUE.

In re Dawson, Pattisson v. *Dawson* (1915) 1 Ch. 626. The Court of Appeal (Lord Cozens-Hardy, M.R., and Phillimore, L.J., and Joyce, J.) have affirmed the decision of Neville, J. (1915) 1 Ch. 168.

WILL—CONSTRUCTION—CHARITABLE LEGACIES—DIRECTION THAT TRUSTEES SHALL DECIDE ANY QUESTION OF DISPUTED IDENTITY—ATTEMPT TO OUST JURISDICTION OF COURT—LATENT AMBIGUITY—PUBLIC POLICY.

In re Raven, Spencer v. *National Association, etc.* (1915) 1 ch. 673. In this case the construction of a will was in question. By the will a legacy was given to a charitable institution; there was a latent ambiguity as to the institution intended to be benefited; it was claimed by two institutions. The will contained a provision that if any dispute arose as to the identity of the legatees the question should be decided by the trustees of the will. One of the claimants desired the trustees to determine the dispute; the others objected to their doing so. The trustees were willing to act if they had the power to do so. The application was, therefore, made to the Court to decide whether or not the trustees had power to decide the question. Warrington, J., held that the clause in question was an attempt on the part of the testator to oust the jurisdiction of the Court, which was contrary to public policy, and, therefore, void. On the merits he determined that the legatee intended was the one which answered to the name used in the will, rather than another like institution, which carried on its work in the place where the testator lived, and to which, in his lifetime, he had been a subscriber. Evidence to shew that the latter institution was the one intended by the testator to be benefited was held not to be admissible, the description used by the testator not being, in the learned Judge's opinion, applicable indifferently to both claimants, but only to the one in whose favour he decided.

PATENT FOR INVENTION—PETITION FOR LICENCE TO MANUFACTURE PATENTED ARTICLE—PATENTS AND DESIGNS ACT, 1907 (7 EDW. 7, 29), s. 24—(R.S.C. c. 69, s. 44).

In re Robin Electric Lamp Co. (1915) 1 Ch. 780 deserves atten-

tion as casting light on the construction to be placed on the Canada Patent Act (R.S.C. c. 69), s. 44. The application was made under the English Patent Act, which is somewhat wider in its terms, for a compulsory licence to manufacture a patented invention, on the ground that the reasonable requirements of the public were not satisfied by reason of the refusal of the patentee to make, construct, use or sell the invention. The application was heard by Warrington, J., who held that mere default in supplying the patented article, or granting a licence to any individual, does not necessarily amount to a default in supplying the article within the meaning of the statute, and that what is aimed at is a default in supplying the public at large. That the statute does not authorize the granting of a licence to the public generally, but merely to particular applicants.

LANDLORD AND TENANT—COVENANT BY LESSEE NOT TO ASSIGN OR SUB-LET WITHOUT LEAVE—INTERPRETATION CLAUSE IN LEASE —COVENANT RUNNING WITH THE LAND.

Re Stephenson & Co., Poole v. *The Company* (1915) 1 Ch. 802. The defendants were sub-lessees of a lease, which contained a covenant by the lessees not to assign or sub-let without the consent of the lessors. The lease contained an interpretation clause to the effect that the term "lessees" should include the executors and administrators of the lessees. The original lessees, with the consent of the lessors, had sub-let the demised premises to the defendants in 1899. The defendants wished to assign the sub-lease to another company, but the latter company took the objection that it could not do so without the consent of the original lessors. The defendants claimed that, as "assigns" were not named in the covenant nor in the interpretation clause, they were not bound by it; but Sargant, J., who heard the summons, held that, notwithstanding the omission of the word "assigns" in the covenant and the interpretation clause, the covenant ran with the land and bound the assigns, and the omission of the word "assigns" from the interpretation clause could not be held to indicate any contrary intention.

PERPETUITY—SETTLEMENT—GIFT OVER FOR LIFE TO PERSONS IN ESSE PRECEDED BY INTERESTS VOID FOR REMOTENESS.

In re Hewett, Hewett v. *Eldridge* (1915) 1 Ch. 810. An ante-nuptial marriage settlement was in question in this case whereby the settlor limited personal property, on the death of the settlor and his intended wife, for all the children of the marriage who,

being sons, should attain 25 years or, being daughters, should attain that age or marry, and, in default of such children, then to his three sisters. The question for the Court was whether, seeing that the gift to the children was void for remoteness, the gift over to the sisters was valid. It was attempted to support the claim of the sisters by what is said in Gray on Perpetuities, 2nd ed., p. 226, but Astbury, J., held that he was bound by the decision, *In re Thatcher*, 26 Beav. 365, to hold that the gift over was void. It may be remarked that in *In re Davey*, *Prisk* v. *Mitchell* (1915) 1 Ch. 837, this view of the law was recognized by the Court of Appeal as correct: see p. 846.

WILL—CHATTELS—LEGAL LIMITATION OF CHATTELS TO LIFE TENANT AND REMAINDERMAN—DEATH OF TENANT FOR LIFE—CHATTELS LOST OR INJURED BY LIFE TENANT—REMAINDERMAN—LIABILITY OF ESTATE OF LIFE TENANT—BAILEE—TRUSTEE.

In re Swan, *Witham* v. *Swan* (1915) 1 Ch. 829. This was a summary application, by a remainderman, made in an administration action for compensation out of the estate of the deceased for loss or injury to certain chattels of which, under a will, the deceased was life tenant. It was contested on the ground that the action was in the nature of a claim for a tort to which the maxim *actio personalis moritur cum personâ* applied. But Sargant, J., held that the deceased, as life tenant, was in the position of a trustee or bailee of the chattels for the remainderman, and the statement in Fearne on Contingent Remainders, 10th ed., vol. 1, p. 414, to the effect that, on the executors' assent to the possession of the first taker, the latter may "be considered as taking in trust for the ulterior legatees, subject to his own anterior beneficial interest therein," was judicially approved, and that the maxim above referred to did not apply.

COMPANY—ARTICLES OF ASSOCIATION—ARBITRATION CLAUSE—SHAREHOLDERS—ARBITRATION ACT, 1889 (52-53 VICT. c. 49), ss. 4, 27—(R.S.O. c. 65, ss. 5, 8).

Hickman v. *Kent or Romney Marsh Sheep Breeders Assn.* (1915) 1 Ch. 881. In this case Astbury, J., decided that, although articles of association neither constitute a contract between a company and an outsider, nor give any individual member special contractual rights beyond those of other members, yet they do constitute a contract between the company and its members in respect of their ordinary rights as members, and,

therefore, a clause in the articles of the defendant company providing for a reference to arbitration of disputes between the company and its members was valid and a sufficient submission in writing within the Arbitration Act, (see R.S.O. c. 65, ss. 5, 8).

FOREIGN WILL—DEVISE OF REALTY IN ENGLAND—DEFECTIVE EXECUTION—BEQUEST TO HEIR—ELECTION.

In re De Virte, Vaiani v. *Ruglioni De Virte* (1915) 1 Ch. 920. In this case a testatrix, domiciled in Italy, in 1899, made an Italian will purporting to devise real estate in England to Vaiani, and bequeathed personalty to her daughter Maria, Maria being her heir at law. The will was insufficient to pass the realty. The question was whether Maria was entitled to take the land as heiress at law and also the legacy, or whether she was bound to elect which of the two she would take. Joyce, J., decided she was entitled to both, and was not put to election.

COMPANY — PROSPECTUS — MISREPRESENTATIONS — DIRECTORS —UNCORROBORATED STATEMENTS OF PROMOTERS.

Adams v. *Thrift* (1915) 2 Ch. 21. In this case the Court of Appeal (Lord Cozens-Hardy, M.R., and Pickford and Warrington, L.JJ.) have affirmed the decision of Eve, J. (1915) 1 Ch. 557 (noted *ante* p. 318).

RESTRAINT OF TRADE—EMPLOYER AND SERVANT—MECHANICAL ENGINEERING BUSINESS—RESTRAINT FOR SEVEN YEARS EXTENDING TO UNITED KINGDOM—INTERESTS OF SERVANT AND PUBLIC.

Morris v. *Saxelby* (1915) 2 Ch. 57. This was an action to restrain the defendant from committing a breach of an agreement whereby he bound himself that he would not, within seven years from leaving the plaintiffs' employment, be concerned in the sale of pulley blocks, overhead runways, electric overhead runways, and hand overhead travelling cranes, or any part thereof, or be concerned or assist in any business connected with the sale or manufacture of such machines within the United Kingdom. The plaintiffs were manufacturers of such machines. The defendant contended that the agreement was void as being in undue restraint of trade. Sargant, J., who tried the action, although of the opinion that, from the point of view of the plaintiffs, the restraint was not unreasonable as to either time or space, yet considered that, from the point of view of the em-

ployee and the public, that it was unreasonable, as the public would be unreasonably deprived of a great deal of skill and experience acquired by the defendant in the course of his employment, which was not of a confidential character, acquired on behalf, or for the benefit, of the plaintiffs; and with this opinion the majority of the Court of Appeal (Lord Cozens-Hardy, M.R., and Joyce, J., concurred, Phillimore, L.J., dissenting. The Master of the Rolls also considered that the fact that the defendant had been required to enter into the agreement immediately after attaining twenty-one was unreasonable, a view with which Joyce, J., also appears to concur.

ADMINISTRATION—LEGACY DUTY—IMPROPER PAYMENT OF LEGACY DUTY OUT OF CAPITAL—REFUNDING IMPROPER PAYMENT BY TENANT FOR LIFE.

In re Ainsworth, Finch v. *Smith* (1915) 2 Ch. 96. This was an application by executors for authority to retain out of growing payments due to a life tenant of a legacy, the amount of legacy duty which the executors had improperly paid out of the capital. One of the applicants was a solicitor and also beneficially entitled as a residuary legatee, and as such interested in the money being refunded, and it was claimed that, as the persons beneficially interested had made the mistake, the money ought not to be ordered to be refunded. Joyce, J., however, determined that the error ought to be rectified, and the over-payment, upon all proper adjustments being made, should be retained out of future payments of the income of the tenant for life.

CONVERSION—TRUST FOR SALE ON REQUEST IN WRITING OF SETTLORS—DEATH OF ONE OF SETTLORS BEFORE REQUEST FOR SALE—FREEHOLD WHETHER CONVERTED INTO MONEY.

In re Goswell (1915) 2 Ch. 106. This was a summary application to determine the question whether, under a trust for sale on the request in writing of the settlors of the trust property, there is an equitable conversion of the trust property into money, where one of the settlors dies before any request in writing to sell has been made. Younger, J., decided the question in the negative.

WILL—POWER OF APPOINTMENT—SPECIAL POWER—DELEGATION OF POWER—EXERCISE OF POWER.

In re Joicey, Joicey v. *Elliot* (1915) 2 Ch. 115. The facts in this case were that a testator gave a sum of money to trustees

upon trust to pay the income thereof to his daughter for life, and, after her decease, as to the principal in trust for her issue, "for such interests, in such proportions and in such manner in all respects" as she should by deed or will appoint. The daughter made an appointment by will in favour of her issue, who, if they attained 21, were to take absolutely, to which she added this proviso, "Provided always that if the said trustees" (of the testator's will) "shall (if and so far as I can authorize the same) have power from time to time or at any time during the said period of 21 years, in their absolute discretion, to transfer and make over the share or shares for the time being of the appointed funds, of any son of mine who shall have attained the age of 21 years, or any part of such share or shares to such son for his own use absolutely." The present application was made by the surviving trustee of the original testator to determine whether the proviso was valid. Joyce, J., held that it was not, and the Court of Appeal (Lord Cozens-Hardy, M.R., and Pickford and Warrington, L.JJ.) were of the same opinion, it being considered an attempt on the part of the daughter to delegate the power given to her, the proviso being, in effect, more than a mere power of advancement, and authorizing the trustees, in their absolute discretion, to turn a contingent interest into an absolute interest, and thereby destroy the interests which the other children and their issue might, in certain events, become entitled.

COMPANY—ENGLISH COMPANY WITH ALIEN ENEMY SHAREHOLDERS —RIGHT OF ALIEN ENEMY SHAREHOLDERS TO VOTE AT MEETINGS—TRADING WITH THE ENEMY ACT, 1914 (4 & 5 GEO. 5, C. 87), S. 1 (2)—TRADING WITH THE ENEMY PROCLAMATION, NO. 2, CLAUSE 6.

Robson v. *Premier Oil and Pipe Line Co.* (1915) 2 Ch. 124. This is an important decision under the Trading with the Enemy Act, 1914 (4 Geo. 5, c. 87), s. 1 (2). At a meeting of the shareholders of the defendant company the chairman rejected the votes of a certain German bank shareholder, with the result that the nominees of the bank as directors failed to be elected. The German bank had a branch in England, which was being carried on under a licence granted by the Home Secretary, in pursuance of powers conferred on him by Aliens Restriction (No. 2) Order in Council, 1914, made under the Aliens Restriction Act, 1914. The action was brought to set aside the election of directors. Sargant, J., who tried the action, held that during a state of war an alien enemy shareholder in an English company has no right

to vote, and, therefore, that the votes in question were properly rejected, and that the licence to carry on business as bankers in England did not include the right to vote as shareholder of an English company; and with this conclusion the Court of Appeal (Lord Cozens-Hardy and Pickford and Warrington, L.JJ.) agreed.

COMPANY—WINDING-UP—DECEASED INSOLVENT—SHAREHOLDER INDEBTED TO COMPANY—EXECUTORS' RIGHT TO SHARE IN SURPLUS ASSETS OF COMPANY—SET-OFF.

In re Peruvian Ry. Construction Co. (1915) 2 Ch. 144. This was an application in a winding-up proceeding. One Alt, a shareholder of the company in liquidation, was a debtor of the company. His estate was insolvent. His estate was entitled to a share of the surplus assets of the company: the liquidator claimed that against this share must be set off the debt due by the estate to the company. The executors of Alt, on the other hand, contended that all that could be set off was the amount of the dividend which Alt's estate was able to pay in respect of the debt to the company, and this was the view upheld by Sargant, J.

WAR—TRADING WITH THE ENEMY—PAYMENTS MADE IN ENGLAND IN DISCHARGE OF LIABILITY OF ENEMY DEBTOR.

King v. *Kupfer* (1915) 2 K.B. 321. This was a prosecution for trading with the enemy contrary to Trading with the Enemy Act (4-5 Geo. 5 c. 87), ss. 1 (1*b*), 2, and the Royal Proclamation of September 2, 1914. The facts were that the defendant and two brothers, all being naturalized British subjects, carried on business in Frankfurt and London. Two of the brothers managed the Frankfurt business and the accused managed the London branch. The Frankfurt business contracted a debt to a Dutch merchant, and, in order to discharge this debt, the accused, at the request of the Frankfurt branch, paid the amount into a bank in England, with instructions to credit the Dutch creditor therewith. This was done, and was held to be a breach of the Act and Proclamation, as it had the effect of increasing the resources of individuals in Germany and diminishing those of individuals in Great Britain. The accused was found guilty, and a month's imprisonment awarded, and the conviction was affirmed by the Court of Criminal Appeal (Lord Reading, C.J., and Ridley and Atkin, JJ.). The Chief Justice, in delivering the judgment of the Court, said: "We desire to make it quite plain in this Court that the offence of trading with the enemy is a serious offence, and should be dealt with seriously by those whose duty it is to try these cases."

CRIMINAL LAW—ATTEMPT TO OBTAIN MONEY BY FALSE PRETENCES —WHAT ACTS NECESSARY TO CONSTITUTE ATTEMPT.

The King v. *Robinson* (1915) 2 K.B. 342. This was a prosecution for attempting to obtain money by false pretences. The facts were that the accused insured his stock-in-trade against burglary. He subsequently pretended to the police that his premises had been entered, that he had been bound and gagged, and his safe broken open and its contents taken by burglars. This was proved to be false and was the pretence relied on. The accused had made no claim on the policy. He was convicted, but the Court of Criminal Appeal (Lord Reading, C.J., and Bray and Lush, JJ.) quashed the conviction, holding that on these facts the defendant could not be convicted of an attempt to obtain money from the insurers by false pretences.

RAILWAY COMPANY—CARRIAGE OF GOODS—OWNER'S RISK—CHANGE IN TRANSIT OF MODE OF CARRIAGE—DELAY—LIABILITY OF CARRIER.

Gunyon v. *South Eastern and Chatham Ry.* (1915) 2 K.B. 370. This was an action for damages occasioned by delay in delivering goods. The goods in question were consigned by passenger train at a special rate and subject to a condition that they should be at the owner's risk, except occasioned by wilful misconduct of defendants' servants. Owing to some mistake on the part of the defendants, the goods were transferred from a passenger to a goods train, in consequence of which the delivery of them was delayed, and they deteriorated in quality and the plaintiffs suffered loss. The defendants relied on the conditions, and the County Court Judge who tried the action gave judgment for the defendants; but the Divisional Court (Lawrence and Sankey, JJ.) reversed his decision, holding that, as the defendants had changed the mode of transit, they had themselves broken the contract and were not entitled to rely on the conditions, but were subject to the usual common law liability, and judgment was given in favour of the plaintiff.

SALE OF GOODS—C.I.F. CONTRACT—PAYMENT ON TENDER OF SHIPPING DOCUMENTS—OUTBREAK OF WAR BEFORE TENDER—EFFECT OF WAR ON CONTRACT.

Karberg & Co. v. *Blythe* (1915) 2 K.B. 379. In this case two contracts were in question, for the sale of beans to be shipped from Chinese ports to Naples and Rotterdam respectively, and each contained a provision for payment of contract price in cash

in London on arrival of goods at port of discharge, in exchange for bills of lading and policies of insurance, but payment was to be made in no case later than three months from date of bills of lading, or on posting of the vessel at Lloyd's as a total loss. The beans were shipped in July, 1914, on German vessels, which, on the outbreak of the war on August 4, 1914, entered ports of refuge in the East, where they remained. At the expiration of three months the sellers presented the bills of lading, with an English and German policy of insurance. The buyers refused payment. Scrutton, J., who tried the action, held that the outbreak of the war had, by considerations of public policy, rendered the contract void and unenforceable as regards any obligations of performance after the outbreak of war, as it would involve entering into contractual relations with the King's enemies, and, therefore, the buyers were justified in refusing payment.

INSURANCE—RE-INSURANCE—COMPROMISE BETWEEN ORIGINAL ASSURED AND ORIGINAL INSURERS—RE-INSURERS ENTITLED TO BENEFIT OF COMPROMISE.

British Dominions General Insce. Co. v. *Duder* (1915) 2 K.B. 394. The Court of Appeal (Buckley, Pickford and Bankes, L.JJ.) have reversed the judgment of Bailhache, J. (1914) 3 K.B. 335, noted *ante* p. 33. The Appellate Court holds that the contract of re-insurance is a contract of indemnity, and that, where the original insurers effect a compromise with their insured, the re-insurers are entitled to the benefit of the compromise, notwithstanding they may have objected to its being made.

CRIMINAL LAW—MURDER—PROVOCATION—DUTY OF JUDGE TO DIRECT JURY ON QUESTION ARISING ON EVIDENCE, THOUGH NOT RELIED ON BY COUNSEL.

The King v. *Hopper* (1915) 2 K.B. 431. This was a prosecution for murder. The accused was a non-commissioned officer and the person killed was one Dudley, a private soldier in his charge. The facts were that the accused had been drinking, and, having missed a bottle of whiskey, accused Dudley of stealing it. Dudley called the accused a liar, and a fight took place, and the deceased and another private, named Gates, attacked the accused and "hammered" him considerably. An officer arrived and ordered the arrest and disarming of the two privates, and the accused, as a non-commissioned officer, had to take them in charge with an escort. On the way to the guard-room Dudley was ordered to give up his bayonet twice, and on each occasion

refused to do so, and, according to the accused, he said, "I will stick it into you." A struggle took place in an attempt to get the bayonet away from him, and the accused raised his rifle and fired, and the deceased fell dead. The rifle was a Lee-Metford, with a light pull and no safety catch. It was not disputed that it was proper for the accused to be carrying a loaded rifle. At the trial the defence mainly relied on was that it was an accident. In his summing up Atkin, J., who presided at the trial, told the jury that it was impossible, on the evidence, to find a verdict of manslaughter, and he directed them that, if they did not find it was an accident, that they should bring in a verdict of murder. The jury returned a verdict of murder. The Court of Criminal Appeal (Lord Reading, C.J., and Bray and Lush, JJ.) held that the Judge had erred in not giving the jury an option of finding a verdict of manslaughter, and the Court ordered the conviction for murder to be quashed and a verdict of manslaughter to be entered, and imposed a sentence of four years' penal servitude, under the provisions of s. 5 of the Criminal Appeal Act, 1907, which enables the Court to substitute for the verdict found, the verdict which the jury might have found if properly directed.

THEATRE—LICENSE—CINEMATOGRAPH—COMPANY IN CONTROL OF ALIEN SHAREHOLDERS.

The King v. *London County Council* (1915) 2 K.B. 466. This was an application for a mandamus to compel the London County Council to grant to the applicants music and cinematograph licences. The council, under an Act, had power to "grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid (*i.e.*, cinematograph exhibitions) on such terms and conditions and under such restrictions as, subject to regulations of the Secretary of State, the council by the respective licences may determine." Under another Act the county council had power to grant music licences "as they, in their discretion, shall think proper." The applicants were a company, 99,000 out of a 100,000 of the shareholders of which were alien enemies. The Council, on this ground, refused the licences, and the Divisional Court (Lord Reading, C.J., and Bray and Shearman, JJ.) held that they had a discretion which was not limited to terms and conditions for securing safety, and that, in the circumstances, the discretion had been properly exercised, and with this conclusion the Court of Appeal (Buckley, Pickford and Bankes, L.JJ.) agreed.

PRACTICE—CLAIM FOR DECLARATORY JUDGMENT—NO CAUSE OF ACTION—"WHETHER ANY CONSEQUENTIAL RELIEF IS OR COULD BE CLAIMED OR NOT"—JURISDICTION—RULE 289—(ONT. JUD. ACT, S. 16 (*b*)).

Guaranty Trust Co. v. *Hannay* (1915) 2 K.B. 536. The plaintiffs in this case had *bonâ fide* purchased a bill of exchange and bill of lading attached, and obtained payment thereof from the defendants, named as drawees. After payment, the defendants discovered that the bill was a forgery, and that no goods had been shipped under the bill of lading, and they were suing the plaintiffs, in New York, to recover the money. The plaintiffs claimed a declaration that, according to the law of England, where the bill was presented and paid, the plaintiffs did not, by presenting it, warrant its genuineness nor the genuineness of the bill of lading attached, and they also claimed an injunction to restrain the defendants from further prosecuting the action in New York, on the ground that it was vexatious and likely to cause injustice and expense. The defendant applied to strike out the claim for a declaratory judgment, on the ground that no cause of action was shown. Bailhache, J., refused the motion, and the majority of the Court of Appeal (Pickford and Bankes, L.JJ.) upheld his decision, but Buckley, L.J., dissented. Pickford, L.J., however, held that a declaration that a person is not liable to an existing or possible action, though not beyond the power of the Court to make, is, nevertheless, one which the Court would rarely make. Bankes, L.J., thought that the claim for the declaration was ancillary to the claim for the injunction, and for that reason was one which the Court might make; whereas Buckley, L.J., was of the opinion that a declaratory judgment could only be properly granted where it is founded on facts shewing a cause of action, and he thought the declaration claimed did not lead to, or bear upon the claim for the injunction. Of course, this case does not determine that, in the circumstances of this case, the declaratory judgment asked would in fact be made, but, in effect, that the claim is not demurrable.

BANKER AND CUSTOMER—ACCOUNT AT ONE BRANCH OF A BANK—DEMAND OF PAYMENT AT BRANCH OTHER THAN THAT AT WHICH ACCOUNT IS OPENED—REFUSAL TO PAY.

Clare v. *Dresdner Bank* (1915) 2 K.B. 576. The defendants were bankers, having a branch at Berlin and also in London. The plaintiff had an account at the Berlin branch, and demanded payment of the amount there to his credit from the London

branch. Payment being refused, this action was brought, which Rowlatt, J., held would not lie.

FOREIGN JUDGMENT—JURISDICTION OF FOREIGN COURT—CONDITIONAL APPEARANCE—MOTION TO SET ASIDE WRIT—JUDGMENT BY DEFAULT.

Harris v. *Taylor* (1915) 2 K.B. 580. This was an action on a judgment recovered by the plaintiff against the defendant in the High Court of the Isle of Man. On being served with process in that Court, the defendant entered a conditional appearance, and moved to set aside the writ and service, on the ground that he was domiciled in England, and was not subject to the jurisdiction of the Court of the Isle of Man. The motion was dismissed, and the defendant did nothing more, and judgment was recovered against him by default. Bray, J., gave judgment for the plaintiff on the ground that by his conditional appearance the defendant submitted to the jurisdiction of the Court for the purpose of getting a decision of the Court as to whether or not he was subject to its jurisdiction, and, that point having been decided against him, he was bound by the subsequent proceedings against him, and his judgment was affirmed by the Court of Appeal (Buckley, Pickford and Bankes, L.JJ.).

SHIP—CHARTER PARTY—PROVISION FOR CESSATION OF PAYMENT OF HIRE—"LOSS OF TIME THROUGH DAMAGE PREVENTING EFFICIENT WORKING OF VESSEL FOR MORE THAN 48 HOURS"—LOSS OF TIME EXCEEDING 48 HOURS—CESSATION OF PAYMENT FOR FIRST 48 HOURS.

Meade-King v. *Jacobs* (1915) 2 K.B. 640. The Court of Appeal (Buckley, Pickford and Bankes, L.JJ.) have affirmed the decision of Bailhache, J. (1914) 3 K.B. 156 (noted *ante* vol. 50, p. 536) to the effect that, under a provision in a charter party providing for the cessation of payment of hire in case of "loss of time through damage preventing efficient working of vessel for more than 48 hours," in the event of the clause taking effect, the cessation of payment dates from the beginning and not from the lapse of the 48 hours.

ASSIGNMENT FOR BENEFIT OF CREDITORS—EXECUTION OF DEED NOT COMMUNICATED TO ANY CREDITOR—REVOCABILITY OF DEED.

Ellis v. *Cross* (1915) 2 K.B. 654. In this case the simple question was whether or not a voluntary deed of assignment for the

benefit of creditors, which had been executed by the debtor and delivered to the trustee, was revocable before the same had been communicated to any creditor. The question arose on an interpleader issue between an execution creditor and the assignee, and was determined by a County Court Judge in favour of the creditor, on the ground that his execution had been placed in the sheriff's hands prior to the assignment having been communicated to any creditor and while it was, therefore, revocable, and the decision was affirmed by the Divisional Court (Bailhache and Shearman, JJ.).

TRIAL WITH JURY—RETIREMENT OF JURY TO CONSIDER VERDICT—STRANGER IN ROOM WITH JURY FOR A SUBSTANTIAL TIME—INVALIDITY OF VERDICT.

Goby v. *Wetherill* (1915) 2 K.B. 674. This was a county court action which had been tried with a jury. It appeared that, after the jury had retired to consider their verdict, the town sergeant, under a mistaken sense of duty, remained in the room with them while they considered their verdict. The County Court Judge, being satisfied by affidavit of the foreman of the jury that the sergeant had in no wise interfered with the deliberation of the jury, upheld the verdict, but the Divisional Court (Bailhache and Shearman, JJ.) held that the verdict, in the circumstances, was absolutely null and void, and a new trial was ordered.

TRESPASS—PASSENGER EJECTED UNDER ERRONEOUS BELIEF THAT HE HAD NOT PAID HIS FARE—LIABILITY OF CORPORATION FOR ACT OF CONDUCTOR.

Whittaker v. *London County Council* (1915) 2 K.B. 676. This was an action for damages against the defendants for wrongful ejection from one of its tram cars by a conductor. The plaintiff was lawfully travelling on the car and had duly paid his fare, but the conductor of the car, acting on the mistaken belief that the plaintiff was travelling beyond the limit for which he had paid, ejected him. The County Court Judge who tried the action dismissed it on the ground that the conductor, in ejecting the plaintiff, was not acting within the scope of his authority, but his decision was reversed by the Divisional Court (Bailhache and Shearman, JJ.), that Court holding that the right of the corporation was not limited to that given by s. 52 of the Tramways Act 1870 (33 & 34 Vict. c. 78), namely, the right to seize and detain a passenger who refuses to pay his fare until he can be taken before a justice of the peace, but it is entitled to treat

the offender as a trespasser and eject him, using no unnecessary force—therefore, that the conductor had acted within the scope of his authority, and that the defendants were responsible for his act.

EXTRADITION—FRANCE—PRISONER UNDERGOING SENTENCE FOR EXTRADITION CRIME—ESCAPE FROM PRISON.

Ex parte Moser (1915), 2 K.B. 698. This was an application for a habeas corpus by a person who, having been convicted of an extradition crime in France, while undergoing sentence had escaped to England. A magistrate had made an order for his committal for extradition, and the object of the application was to obtain a review of this order. The Divisional Court (Lord Reading, C.J., and Avory and Low, JJ.) held that the order had been properly made and refused the application.

CRIMINAL LAW—INDECENT EXPOSURE—EVIDENCE OF PREVIOUS ACTS—ADMISSIBILITY.

Perkins v. *Jeffery* (1915) 2 K.B. 702. This was a prosecution for indecent exposure in July. The prosecutrix tendered evidence of herself and others that the accused had committed similar acts in the previous May and on other occasions, with intent to insult the prosecutrix and other females, and the question was whether such evidence was admissible. The Divisional Court (Lord Reading, C.J., and Avory and Sankey, JJ.) held that the evidence of the prosecutrix was admissible for the purpose of shewing that the prosecutrix was not mistaken in her identification and that what was done was done wilfully and not accidentally, and that it was done to insult her. But the Court held that the evidence of other witnesses of previous acts of a similar character by the accused was not admissible unless and until the defence of accident or mistake or an absence of an intention to insult was definitely put forward, and unless it appeared that the other occasions on which the accused had indecently exposed himself were sufficiently proximate to the commission of the alleged offence to shew a systematic course of conduct.

MARINE INSURANCE—CONCEALMENT OF MATERIAL FACT—INNOCENT MISTAKE AS TO MATERIALITY—"HELD COVERED" CLAUSE IN POLICY.

Hewitt v. *Wilson* (1915) 2 K.B. 739. The Court of Appeal (Lord Reading, C.J., Eady, L.J., and Bray, J.) have affirmed the decision of Bailhache, J. (1914) 3 K.B. 1131 (noted *ante* p. 145).

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Man.] *In re* ESTATE OF ROBERT MUIR *v.* THE TREASURER OF THE PROVINCE OF MANITOBA. [May 18

Constitutional law—Provincial legislation—Succession duties—Taxation—Property within province—Bona notabilia—Sale of lands—Covenant—Simple contract—Specialty—Construction of statute—Severable provisions—R.S.M., 1902, *c.* 161, *s.* 5 (*Man.*)—4 & 5 *Edw. VII.*, *c.* 45, *s.* 4 (*Man.*)—*Appeal—Jurisdiction—Surrogate Court—Persona designata.*

M., who died in June, 1908, had his domicile in Manitoba and, under a verbal agreement, had erected elevators for L., also domiciled in Manitoba, on lands belonging to the Canadian Pacific Railway Company in the Province of Saskatchewan. Until fully paid for the buildings were to remain the property of M. who was to retain possession and operate the elevators and all net revenues were to be applied in reduction of the price for which they had been constructed. M. also owned lands in Saskatchewan known as the "Kirkella Lands," which he had agreed to sell to purchasers under agreements under seal, in his possession in Manitoba at the time of his death, by which he remained owner until they had been fully paid for and then the lands were to be conveyed to the purchasers. The agreements contained no specific covenant to pay the price of the lands. The executors denied the right of the Government of Manitoba to collect succession duties in respect of these debts under the Manitoba "Succession Duties Act," R.S.M., 1902, chap. 161, sec. 5, as re-enacted by the Manitoba statute 4 & 5 Edw. VII., chap. 45, sec. 4.

Per curiam.—The debt due under the contract with L. constituted property within the Province of Manitoba and, as such, was liable for succession duty as provided by the Manitoba statute. Also, Davies, J., dissenting, that under the agreements for sale of the "Kirkella Lands" a covenant to pay should be implied, and, consequently, they were specialty debts which, as such, constituted property within the Province of Manitoba and were liable for succession duty there.

Per FITZPATRICK, C.J., and DAVIES, IDINGTON, ANGLIN, and

BRODEUR, JJ.:—The duties imposed by the Manitoba "Succession Duties Act" are direct taxation and, consequently, the legislation imposing them is *intra vires* of the provincial legislature.

Per IDINGTON and BRODEUR, JJ :—The provincial legislature is competent to impose taxation as a condition for obtaining the benefit of probate.

Per DUFF, J.:—In so far as the statute professes to impose duties in respect of property having a *situs* within Manitoba it is *intra vires* of the provincial legislature. *Rex* v. *Lovitt*, (1912) A.C. 212, followed. In so far as the statute professes to impose duties on property not having a *situs* in Manitoba, and without respect to the domicile of the owner, the attempted taxation is ineffective as it is not direct taxation within the province and, consequently, *ultra vires* of the provincial legislature. *Cotton* v. *The King*, (1914) A.C. 176, applied.

Per ANGLIN, J.:—The succession duties imposed by the Manitoba statute are not fees payable for services rendered but constitute taxation subject to the restrictions mentioned in item 2 of section 92 of the "British North America Act, 1867."

Per DUFF and ANGLIN, JJ.:—The provisions of the Manitoba "Succession Duties Act" in respect to taxation which may be *ultra vires* may be construed severably and do not render the statute ineffective as a whole.

IDINGTON and ANGLIN, JJ., questioned the jurisdiction of the Supreme Court of Canada, under subsection (*d*) of section 37 of the "Supreme Court Act," to entertain an appeal in a matter or proceeding originating in the Surrogate Court of Manitoba.

ANGLIN, J., suggested that in the proceedings provided for by section 19 of the Manitoba "Succession Duties Act" the Judge of the Surrogate Court would act as *persona designata* and that there may not be an appeal from his order to the Supreme Court of Canada.

The judgment appealed from, (24 Man. R. 310,) was affirmed.

W. R. Mulock, K.C., for appellants. *Wallace Nesbitt*, K.C., and *R. B. Graham*, for respondent.

Ont.] VIVIAN & Co. *v.* CLERGUE. [June 24.

Contract—Sale of mining land—Substituted purchaser—Reservation of claim against original purchaser—Forfeiture of second contract—Sale of land to other parties—Effect on reserved claim.

In June, 1903, V. & Co., by agreement in writing, contracted

to sell, and C. to buy, mining property for $125,000, to be paid $5,000 down and the balance in annual instalments of $24,000. The $5,000 was paid and in March, 1905, when an instalment was overdue and the second accruing, a new agreement was executed, to which C. was a party, for sale of the property to a mining company for the same price and on the same terms. This agreement provided that nothing in it should affect the right of the vendor to claim from C. the amount payable under the original contract up to March, 1905, otherwise the latter was to be merged in the new contract. The mining company made default in their payments and, as provided in their contract, the vendors gave notice that the contract was at an end and, later, sold the property for $75,000. They then took action against C. for the amount unpaid on the original agreement and recovered judgment. After the final sale of the mine C. applied for and obtained from a Judge an order declaring that V. & Co. were not entitled to enforce their judgment against him except for costs. On appeal from the affirmance of this order by the Appellate Division:

Held, affirming the decision of the Appellate Division, (32 Ont. L.R. 200,) that, by extinguishing the interest of the mining company in the land and then selling it, V. & Co. had put it out of their power to place C. in the position he was entitled to occupy on making payment and had thus disabled themselves from enforcing their judgment.

Appeal dismissed with costs.

W. M. Douglas, K.C., and *Lefroy*, K.C., for appellants. *Shepley*, K.C., and *H. S. White*, for respondent.

N.S.] EVANGELINE FRUIT CO. *v.* PROVINCIAL FIRE INSURANCE CO. [June 24.

Fire insurance—Statutory conditions—Gasoline "stored or kept" on premises—Supply kept near building—Material circumstance—Non-disclosure.

By a condition in a policy of insurance against fire the policy would be void if more than five gallons of gasoline were "kept or stored" at one time in the building containing the property insured.

Held, that keeping, 15 or 16 feet from said building, under an adjacent platform a barrel of gasoline for supplying the quantity required for daily use was not a breach of such condition.

Held also, reversing the decision of the Supreme Court of Nova Scotia, (48 N.S. Rep. 39,) that as the company, when

issuing the policy, knew that a gasoline engine had been installed in the building for use in manufacturing, and must be deemed to have known that a reasonable supply of gasoline for feeding it would be kept close at hand, the keeping of the barrel where it was placed was not a circumstance material to the risk, non-disclosure of which would void the policy.

Appeal allowed with costs.

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

Ont.] UNION BANK OF CANADA *v.* A. MCKILLOP & SONS. [June 24.

Company law—Trading company—Powers—Contract of suretyship—R.S.O., 1897, *c.* 191.

An industrial company incorporated under, and governed by, the "Ontario Companies Act," R.S.O. 1897, chap. 191, has no power to guarantee payment of advances by a bank to another company whose sole connection with the guarantor is that of a customer, and such a contract of suretyship is *ultra vires* and void.

Judgment appealed from, (30 Ont. L.R. 87,) affirmed.

Appeal dismissed with costs.

H. Cassels, K.C., for appellants. *C. A. Moss*, and *J. B. McKillop*, for respondents.

N.S.] CAPITAL LIFE ASSURANCE CO. *v.* PARKER. [June 24.

Life insurance—Non-payment of premiums—Misrepresentation to insured—Estoppel.

P., in payment of premiums on a life policy, gave his note for one instalment and an overdue balance of another. Shortly before it matured an official of the company, specially authorized to deal with the matter, informed P. that his policy had lapsed owing to the inclusion in the note of the overdue balance which was against the company's rules. In consequence of this representation P. did not pay the note nor tender the amount of another instalment falling due before his death. In an action on the policy by the beneficiary no rule of the company was proved avoiding the policy as stated.

Held, affirming the judgment appealed from, (48 N.S. Rep. 404,) Fitzpatrick, C.J., and Davies, J., dissenting, that the company was estopped, by conduct, from claiming that the policy lapsed on non-payment of the note and subsequent instalment.

Per FITZPATRICK, C.J., and DAVIES, J.:—That the non-

payment of the note could not be relied on as avoiding the policy, but the estoppel did not extend to the effect of failure to pay the portion of the premium which afterwards became due.

Appeal dismissed with costs.

J. J. O'Meara, for appellants. *Mellish*, K.C., and *Findlay MacDonald*, K.C., for respondent.

Ont.] TORONTO POWER CO. *v.* RAYNER. [June 24.

Negligence—Power company—Accident to employee—Injury from supposed dead wire—Duty of employer—Proper system.

A power company is not liable for injury to an employee from contact with an electric wire represented to be harmless but which had, in some way, become charged, when it is shewn that every reasonable precaution had been taken for the safety of employees and there is nothing which proves or from which it can be inferred that the accident was due to the negligence of some person for which the company was responsible.

Per IDINGTON, J. (dissenting):—The only reasonable inference from the evidence is that the accident was caused by negligence; therefore, as decided by *McArthur* v. *Dominion Cartridge Co.* (1905), A.C. 72, and *Toronto Railway Co.* v. *Fleming*, 47 S.C.R. 612, it is not necessary to determine precisely how such negligence produced the injury complained of. There was also some evidence of a want of proper system and failure to employ competent persons to superintend the work.

Judgment of the Appellate Division (32 Ont. L.R. 612) reversed, FITZPATRICK, C.J., and IDINGTON, J., dissenting.

Appeal allowed with costs.

D. L. McCarthy, K.C., for appellants. *J. H. Campbell*, for respondent.

Province of Manitoba.

COURT OF APPEAL.

Mathers, C.J.] CHAPMAN *v.* PURTELL. [22 D.L.R. 860.

Moratorium—Word "instrument"—Registered judgment—Suspension of lien.

The word "instrument" as used in s. 2 of the Moratorium Act, Man., does not include a registered judgment for the payment of money so as to suspend or take away the judgment cre-

ditor's right of action for a declaration of lien in respect of the certificate of judgment registered in the land titles office and enforcement of same by a judicial sale.

E. A. Deacon, for plaintiff. No one for defendant.

ANNOTATION ON THE ABOVE CASE IN DOMINION LAW REPORTS.

Etymologically, the word Moratorium is derived from the Latin word *moratorius*, denoting delay and, in the legal sense, it signifies the legal title to delay in making due payment, or a legislative authorization of suspension of payment. In England they are termed as the Postponement of Payment Acts.

A moratorium is either minor or major: a minor moratorium only applies to bills of exchange; a major moratorium includes all other debts except such as may be expressly reserved. In the Franco-Prussian war of 1870, the moratorium declared in France continued until the end of the war. There has been no moratorium in England for over a hundred years, but one has to go back to Napoleon's times to find a parallel for the present emergency. The British moratorium in the present war, as will be noted, may be classed as a major moratorium, since it practically applies to all payments, save those expressly excepted: 33 L.N. 257, 69 L.J. 475.

Moratory laws are an encroachment on vested rights and they should be subject to a strict construction: *Fisher* v. *Ross*, 19 D.L.R. 69, 72; 24 Man. L.R. 773, 778. They should, therefore, be construed as not to interfere with such rights to any greater extent than is expressly, or by necessary implication, provided: *Chapman* v. *Purtell, supra,* 25 Man. L.R. 76.

Discussing the Effect of War and Moratorium, Mr. Schuster, in his 2nd ed., 1914, at pp. 58, 59, says: "War is not carried on exclusively by the armed forces, and is not exclusively directed against the enemy state as such. The interference with commerce is a weapon which is not less deadly than the bullet or the shell. To injure all subjects of the enemy state, to dry up the springs of their prosperity, to raise the price of their food, and to impede their trade and their intercourse with the world is just as much a patriotic duty as to join in the actual fighting. Justice and equity are to be considered only in so far as the principal object, the infliction of the utmost possible injury to the inhabitants of the enemy country, is not impaired thereby. The Statutes, Orders and Proclamations issued since the outbreak of war do not override the common law rules giving effect to this principle, but are merely intended to make some undecided points clearer, and to fill up some obvious gaps. They certainly do not in any way attempt to mitigate the serious injustice to individuals which some of the rules on the subject entail."

The efficacy of the moratorium was clearly established during the Franco-Prussian War of 1870-71, when the French government from time to time introduced moratory laws and thus maintained the system of

French credit unimpaired during the time of grave national emergency. The working of the system is fully set out in the case of *Roquette* v. *Overman*, L.R. 10 Q.B. 525. A moratorium enacted by the edict of the Emperor of the French had been extended from time to time by the National Assembly, and provided for a postponement of the date of the maturity of bills of exchange accepted and payable in Paris until some months after the conclusion of the war. The delay in making presentment was excused, and the international validity of the moratory enactments was recognized by the English Courts. It was laid down that the obligations of the acceptor and the indorser must equally be determined by the *lex loci* of performance—that is, the French law: 137 L.T. 376.

The British Parliament by the Postponement of Payment Act, 1914, 4-5 Geo. V. ch. 11, authorizes the postponement of payments of any negotiable instrument or any other payment in pursuance of any contract, by Royal proclamation, and confirms the moratorium of August 3rd, 1914, relating to the postponement of payment of bills of exchange. The effect of the moratorium which is in operation by virtue of the Imperial statute known as the Postponement of Payments Act, 1914, and the various proclamations issued thereunder, may be summarized as follows: It postpones for various periods all payments in respect of any bill of exchange, re-acceptance or negotiable instrument, or to payments due under any contract, excepting—Wages and Salaries; Payments by governmental departments, including payments under the Old Age Pension Acts, the National Insurance Acts, and the Workmen's Compensation Acts; the payments of bank notes; the payments of dividends and interest on trustee securities; payments in respect of maritime freight; payments in respect of rent; payments to or by retail traders in respect of their business. Liabilities when incurred did not exceed five pounds in amount; rates and taxes; debts due from any person, firm or company resident outside of the British Isles; payments in respect of withdrawal of deposits in a savings bank.

The Courts Emergency Powers Act, 1914, and the rules thereunder, are intended for the relief of debtors who for the time being are unable to discharge their debts "by reason of circumstances attributable, directly or indirectly, to the present war." Except as to alien enemies the relief applies:—

(*a*) To the enforcement of judgments and orders for the payment of money.

(*b*) To the operation of certain remedies which under normal conditions are open to creditors without the intervention of Court, *e.g.*, distress in case of non-payment of rent, resumption of possession of property, exercise of powers of sale on the part of mortgagees not being mortgagees in possession, forfeiture of a deposit in the case of the purchaser's default in the completion of a sale, forfeiture of an insurance policy in the case of the non-payment of a premium.

(*c*) To certain proceedings in the Courts by which a creditor under

normal conditions may obtain an order affecting the debtor's property (*e.g.*, ejectment on the part of the lessor, foreclosure on the part of a mortgagee), and to bankruptcy petitions.

The moratorium proclaimed under the Postponement of Payments Act, 1914, does not extend to contracts made after August 4, 1914: *Softlaw* v. *Morgan*, 31 T.L.R. 54.

In *Leving* v. *Advertiser's Mfg. Co.*, 69 L.J. 678, it appeared that the plaintiff in May sold the defendant company certain goods, of which delivery could be taken by the defendant, up to September 12, 1914. Some of the goods were delivered in July, but as a dispute arose, no further delivery was made. The terms as to payment had been agreed as 2½ per cent., discount for cash in seven days. On September 21, the plaintiff finally commenced action for the goods sold. It was contended that the moratoria did not apply to debts which became due after the date of the first moratorium in August. It was held by the Recorder of London in the Mayor's Court, that the first moratorium postponed all existing liability in respect of contracts up to September 4, 1914, and that the subsequent moratorium postponed liability for payment to October 4, 1914.

In the case of *Happe* v. *Maunasch*, 31 T.L.R. 305, it was held that the moratorium proclamation does not apply to a c.i.f. contract; namely a sale of goods subject to cash payment against documents upon arrival of steamer. In that case it involved a sale of several chests of opium, shipment from Calcutta, subject to cash payment against documents upon the arrival of the steamer in London. When the steamer arrived the seller, apparently apprehending the effect of the moratorium meanwhile declared, refused to tender the documents of shipment unless payment was first made. It was held that the moratorium did not apply to the payment in question, and that it was incumbent upon the seller as condition precedent to the performance of the contract on his part to tender the shipping documents to the purchaser, and his failure to do so will render him liable for the difference of the contract price the purchaser is obliged to pay.

The effect of the proclamations made under the Postponement of Payments Act, 1914, was to give a statutory credit for the period mentioned therein, so that during such period no action was maintainable in respect of a debt coming within the proclamations. If, during the suspensory period, a writ has been issued, the plaintiff is not entitled to judgment, although no appearance has been entered; and the Court, on the facts being brought to its notice, will of its own motion either dismiss the action or remove the writ from the files of the Court. If judgment has been inadvertently allowed to be signed, it will be set aside by the Court when brought to its notice without requiring the defendant to institute a motion for the purpose: *Gramaphone Co.* v. *King* (1914), 2 Ir. R. 535.

When, after money has become due, a writ has been issued in an action to recover the amount, the fact that after the issue of the writ a statutory moratorium temporarily suspended the plaintiff's remedy, is not a defence,

if, before the trial of the action, the temporary moratorium has ceased to apply to the plaintiff's claim: *Glaskie* v. *Petry*, 59 S.J. 92, 31 T.L.R. 40.

By a proclamation made under the Postponement of Payments Act, 1914, a moratorium was decreed in respect of certain payments, but it was provided that the proclamation should not apply to "any payment in respect of a liability which, when incurred, did not exceed £5 in amount."

In *Jupp* v. *Whittaker*, 69 L.J. 536, an action was brought to recover the payment of a sum of £20 6s. 2d. on a running account for meat supplied at different dates, consisting of small sums, none exceeding £5. It was contended that the moratorium does not apply to any payment in respect of a liability which when incurred did not exceed £5 in amount. It was held by the County Court, that, when a debt is contracted, being made up of a series of items in one running account, each item as it is incurred becomes so connected with the previous item as to constitute one debt, and there is an implied promise on the part of the debtor to pay that debt. The case is therefore not within the exception, but is subject to the Moratorium Act.

In the case of *Auster* v. *London Motor Coach Works*, 59 L.J. 24, 31 T.L.R. 26, it appeared that during the currency of the moratorium the plaintiffs issued a writ specially indorsed with a statement of claim for the price of goods sold and delivered, some of the items being less, and some more, than £5. It was held, that as the proclamation did not provide that the Moratorium should "apply to a liability exceeding £5, being an aggregate of a number of liabilities, each of which when incurred was less than £5," the defendants were not entitled to have the writ set aside or the statement of claim struck out, and the action must proceed, but as to the items which were over £5 they could plead the moratorium.

A call upon shares which is payable on a date falling within the moratorium proclaimed under the Postponement of Payments Act, 1914, is a debt within the moratorium, and consequently a resolution of the directors of the company purporting to forfeit the shares for non-payment of the call during the currency of the moratorium, is invalid. Such a resolution is also an attempt without the leave of the Court to take possession of property within the meaning of section 1 (1) (*b*) of the Courts (Emergency Powers) Act, 1914: *Burgess* v. *O.H.N. Gases, Lim.*, 59 S.J. 90, 31 T.L.R. 59.

By sec. 1(1) of the Postponement of Payment Act, 1914, and a proclamation issued in pursuance thereof, the payment of any sum due and payable before the date of the proclamation in respect of a contract made before that time was postponed to a specified date. It was held, that rent due and payable before the date of the proclamation could not be recovered in an action in which the writ was issued after the proclamation and before the specified date, because not due and payable at the date of the writ; and that as the right, given by the agreement of tenancy, to re-enter for non-payment was only a security for the rent, it followed that the right also did not exist at the date of the writ and could not be en-

forced in the action: *Durrell* v. *Gread*, 84 L.J. (K.B.) 130; [1914] W.N. 382.

It was held in *Shottland* v. *Cabins*, 31 T.L.R. 297, that though a landlord who had levied a distress for rent before the date of the proclamation of a moratorium under the Postponement of Payments Act, 1914, but who had not sold the goods before that date, was not entitled to sell the goods during the currency of the moratorium, yet he was entitled to remove the goods from the demised premises for the purpose of securing his possession of the goods.

The moratorium proclamation in force August 6th, 1914, declared that payments which were postponed, if not otherwise carrying interest, should, if specific demand was made for payment and payment was refused, carry interest at the Bank of England rate current on August 7, 1914; that rate was six per cent. It was held, that a demand by a stockbroker for payment for shares of stock sold for the mid-August account, the settlement of which had subsequently been postponed by the Stock Exchange Committee at a future date, comes within the moratorium proclamation so as to make interest payable on demand for payment at the date of account for which they were sold; and, that the broker was entitled, upon the refusal to take the shares, to sell them without applying to the Court under the Courts Emergency Powers Act, 1914, as the scrip which the purchaser received was not a "security" within the meaning of sec. 1, sub-sec. 1 (*b*) of that Act: *Barnard* v. *Foster*, 31 T.L.R. 307, [1915] W.N. 136.

A deposit of money subject to an agreed rate of interest will not, upon a demand for re-payment, subject the amount to the rate of interest current at the Bank of England at the time of the proclamation of the moratorium, but will be governed by the rate fixed by the agreement: *Coats* v. *Direction Der Disconto-Gesellschaft*, 31 T.L.R. 446, [1915] W.N. 224.

The intervention of the moratorium during the period allowed by a bank for the payment of an overdraft will postpone the date of payment of the overdraft for the morated term, and the bank has no right to refuse payment on cheques drawn meanwhile: *Allen* v. *London County, etc., Bank*, 31 T.L.R. 210.

On August 6, 1914, a moratorium proclamation was issued, providing that all payments not less than £5 due and payable before August 6 or on any day before September 4, in respect of any cheque drawn before August 4, or in respect of any contract made before that time, should be payable one month after the original due date or on September 4. A cheque was drawn on a bank August 5 and presented for payment on August 10, which was returned by the bank. It was held that the bank was protected by the moratorium, as the case was one of payment in respect of a contract made before August 4: *Flach* v. *London & South Western Bank*, 31 T.L.R. 334.

Where a debt does not become due by virtue of the proclamations under the moratorium until some date after an act of bankruptcy already com-

mitted, there is nevertheless a debt within sec. 6, sub-sec. 1 (*b*), of the Bankruptcy Act, 1883, and the debtor can commit an act of bankruptcy: *Re Sohler*, 112 L.T. 133, [1914] W.N. 439.

The Dominion Parliament authorizes a moratorium. By virtue of sec. 4 (*e*) of the Finance Act, 1914, ch. 3 (Can.), in case of war, invasion, riot or insurrection, real or apprehended, and in case of any real or apprehended financial crisis, the Governor in Council may, by proclamation published in the *Canada Gazette*, authorize, in so far as the same may be within the legislative authority of the Parliament of Canada, the postponement of the payment of all or any debts, liabilities and obligations however arising, to such extent, for such time and upon and subject to such terms, conditions, limitations and provisions as may be specified in the proclamation.

In Ontario, under the Mortgagor's and Purchaser's Relief Act, 1915, ch. 22, sec. 5, in cases of foreclosure of mortgages or agreements for the purchase of lands, no action can be taken without leave of Court, and in such cases the Judge, if he is of opinion that time should be given to the person unable to make any payment by reason of circumstances attributable directly or indirectly to the present war, may, in his absolute discretion, by order, refuse to permit the exercise of any right or remedy, or may stay execution or postpone any forfeiture or extend the time for the expenditure of any money, for such time and subject to such conditions as he thinks fit.

The Manitoba Moratorium Act does not apply to the enforcement of an agreement for the sale of lands situate in another province: *Stanley* v. *Struthers*, 22 D.L.R. 60.

Section 5 of the Moratorium Act, 1914, Man., which stays actions "for the recovery of possession of the land charged" until after the lapse of a six months' period, does not limit the recovery of a personal judgment for the amount due under a sale agreement for principal and interest, and where an action which was pending when the Act was passed had not proceeded to the entry of final judgment before August 1st, 1914, the limitation of sec. 4 as to actions to enforce a covenant or agreement in respect of lands does not prevent the subsequent entering up of judgment, although it stays proceedings to enforce payment by writ of execution or by registration of the judgment: *Fisher* v. *Ross*, 19 D.L.R. 79, 24 Man. L.R. 773.

In the case of *Ledoux* v. *Cameron*, 21 D.L.R. 864, 25 Man. L.R. 71, it was held, affirming the Master's decision, that a registered judgment was an instrument charging land with the payment of money within the meaning of sec. 2 of the said Act, and no proceedings for sale could be taken until after the lapse of 6 months from August 1, 1914.

The same view was taken in the case of *Slobodian* v. *Harris*, 21 D.L.R. 75, 25 Man. L.R. 74, and it was further held that where the judgment is registered after July 31, 1914, it is a "contract" within the exception of sec. 6, and by virtue of secs. 215-16 of the County Courts Act, so that the restrictions of the Moratorium Act do not apply to prevent an order

for sale being made thereunder within the six months' period: *Slobodian* v. *Harris*, 21 D.L.R. 75, 25 Man. L.R. 74.

But in *Chapman* v. *Purtell*, *supra*, 25 Man. L.R. 76 it was held that a registered judgment is not an "instrument charging land with the payment of money," within the meaning of that expression as used in section 2 of the Act; and, although a judgment for the payment of money is spoken of as a contract of record, it is not a contract at all in the ordinary meaning of that word, much less a contract relating to land, and the title of the Act would indicate that it was not intended to affect judgments for the payment of money in any way. In construing the words in section 2, "Notwithstanding any provision in any mortgage of land or agreement to purchase land or in any other instrument charging land with the payment of money," it is proper to apply the *ejusdem generis* rule and to hold that the words "other instrument" do not extend to a registered judgment which is not of the same genus as a mortgage or agreement of purchase.

A foreclosure decree as to the purchaser's interest under a land purchase agreement will, since the Moratorium Act, 1914, be conditional upon the non-payment of the principal, interest and costs within one year from the taxing officer's certificate, together with subsequent interest to the date of payment: *Maxwell* v. *Cameron*, 20 D.L.R. 71.

On motion for judgment in an undefended action for foreclosure of an agreement for sale, the plaintiff is not entitled to claim that the Moratorium Act does not apply because of an abandonment of the land by the defendant, as provided in sec. 7, unless there is in the statement of claim an appropriate allegation to that effect: *Armstrong* v. *Nichols*, 24 Man. L.R. 782.

In an action, commenced before the coming into force of the Moratorium Act, and not defended, the vendors claimed specific performance of an agreement of sale of land and in default, rescission and immediate possession, also that, in default of payment, the lands might be sold to realize the unpaid purchase money, interest and costs. It was held, that, so far as regards the relief by sale, the vendors were entitled to a sale at the expiration of a year from the fixing of the time for payment: *United Investors* v. *Gaynor*, 24 Man. L.R. 781.

An agreement for sale of land whereby the purchaser is to pay the proceeds of one half of the wheat crop yearly until the purchase money and interest is fully paid, is within the exception of sec. 4 (*b*) of the Moratorium Act, Man., although the agreement is not for delivery of part of the crop itself; but sec. 3 of the Act applies to extend for one year the time fixed for redemption under the Master's report made before the Act came into force: *Haight* v. *Davies*, 22 D.L.R. 507.

For a recent case on Manitoba moratorium see *Re Real Property Act*, *infra*.

It was held by the Master of Titles at Saskatchewan, that the registration of a transfer subsequent to the issue of the Moratorium Proclamation is not forbidden thereby. Accordingly, where the property in land has

passed in default of payment within the time specified in an order *nisi* for private sale to a specific purchaser, prior to the proclamation taking effect, the transfer to such person may be registered: *Re Moratorium Proclamation* (Sask.), 7 W.W.R. 795.

Finally, it might be well to conclude with the words of 137 L.T. 427, that "having now discussed these various points arising out of the positions as affected by the moratorium, it only remains to draw the reader's attention once more to the King's request of September 1, 1914, that 'all persons who can discharge their liabilities should do so without delay'—advice which we feel confident will be acted on by everyone who has the good of his country at heart."

Obituary.

SIR SANDFORD FLEMING, K.C.M.G., LL.D., M.I.C.E.

Although this distinguished man, who passed off the scene a short while since, was not a member of the legal profession, it is not inappropriate that a legal journal should refer briefly to him as one of our great Empire builders: for all lawyers should be concerned not merely with matters connected with the law in its practical aspect, but should be interested also in those who have been specially used in fostering the growth of the country the laws of which lawyers take their part in interpreting and upholding. This is especially so when so many—in fact, the majority—of our Empire builders have been members of the legal profession.

Sir Sandford Fleming was born in Kirkcaldy, Scotland, in the year 1827, but, as he came to Canada when only 18 years of age, we may well claim him as a Canadian. His achievements and the result of his enterprise, genius and perseverance have gained him a reputation which is historical, and the record of his distinguished services in and for his adopted country will not soon be forgotten.

Largely self-taught in the profession he chose, he joined the staff of the Northern Railway Company, running from Toronto to Collingwood, becoming its Chief Engineer in 1857. In 1863 the importance of the Great North-West having come into view, he was asked to report on the feasibility of connecting the then Province of Canada by rail with the Red River Valley. His capacity for such a position becoming apparent, he was subsequently put in charge of the location of Canada's greatest undertaking, the Canadian Pacific Railway, and was told to find a

route by which a transcontinental railway could pierce the Rockies and find a way to connect the Atlantic with the Pacific. It was no ordinary man who could determine upon the most feasible route and locate the historic passes of the Yellowhead, the Kicking Horse and the one known as Rogers Pass, though the latter was really first discovered by Walter Moberly, and should bear his name. Not one in a thousand of those who now travel in luxury across the North American Continent either know or could realize the genius and enterprise that made such a highway possible. From 1867 to 1871 he was entrusted with the surveying and construction of the Intercolonial Railway. These two great undertakings form an enduring monument as well to his engineering ability as to the energy and patience required in surmounting apparently insuperable difficulties.

In the later years of Sir Sandford's life there was carried into completion a scheme which for many years appealed to him as one of great Empire interest—the spanning of the Pacific with an electric cable, to complete the girdling of the globe and bring into unbroken communication the British Isles with our overseas Dominions.

Sir Sandford was not only a great engineer, but a scientist and writer of repute, but, as an Imperialist, he devoted his influence and enthusiasm to further that worthy cause. He was in all these matters, and in many others too numerous to mention, a man of whom the nation may well be proud.

Those who were privileged to know him in private life and were personally associated with him (as was the writer) will never forget the kind, warm-hearted friend, the genial companion, the brave, self-made man, and the high-minded, cultured gentleman, whom to know was to love.

War Notes.

LAWYERS AT THE FRONT FROM MANITOBA.

The following is a list of the members of the Law Society of Manitoba enlisted for active service: H. Adamson, A.H.J. Andrews, A. J. Anderson, J. K. Bell, R. deB. M. Bird, J. R. Black, H. P. Blackwood, C. Blake, H. C. H. Brayfield, R. R. J. Brown, H. R. Campbell, D. I. Cameron, L. J. Carey, W. G. Currie, H. J. Cowan, S. R. Davis, F. C. S. Davison, J. A. Denistoun, J. R. Dennistoun, R. M. Dennistoun, S. E. Dick, A. E. A. Evans,

F. M. Ferg, C. A. I. Fripp, J. Galloway, M. H. Garton, H. D. A. Gill, W. F. Guild, R. F. Greer, V. J. Hastings, R. E. Higginbotham, A. R. Hill, R. Hoskins, E. L. Howell, G. I. Jameson, C. N. Jamieson, T. H. Jones, A. G. Kemp, J. Love, C. D. H. MacAlpine, R. M Maclean, W. Martin, E. H. Matheson, A. McBride, A. A. S. McKay, D. McKenna, E. D'H. McMeans, E. R. R. Mills, J. J. Milne, F. F. Montague, A. W. Morley, J. Munro, P. J. Montague, N. Munson, L. A. Naylor, W. F. Newberry, G. F. O'Grady, D. M. Ormond, A. M. Pratt, E. C. Popham, J. S. Price, J. A. Ptolemy, K. Y. Patton, H. R. Reid, J. A. Lincoln-Reed, J. E. Reynolds, R. H. Richardson, H. J. Riley, S. Rosen, G. H. Ross, A. B. Rutherford, G. M. Rutherford, A. M. S. Ross, C. J. deB. Sheringham, F. I. Simpson, R. E. Struthers, J. Sutherland, J. G. Thomson, J. S. Thomson, M. H. Turner, R. Tidmus, C. T. Thomas, O. R. Williams, C. D. Ward, E. B. Wilkinson, J. L. Williams, A. C. Williams, W. M. Wallar.

It has frequently been remarked that since the outbreak of the war there has been a diminution of crime throughout the British Isles and that this is particularly noticeable so far as indictable offences are concerned. Congratulatory reports come not only from London, but from outside countries, both at assizes, sessions and magistrate courts as to the lightness of the calendar. Various reasons have been assigned for this, but the fact is more satisfactory than the reasons given. Human nature seems to require excitement, and perhaps there is sufficient excitement these war times. Possibly the horribleness and solemnity of war has affected the minds of the criminal classes beneficially.

Bench and Bar

JUDICIAL APPOINTMENTS.

Hon. Louis Philippe Pelletier, one of the Judges of the Superior Court, Province of Quebec, to be a Puisne Judge of the Court of King's Bench for said province, vice Hon. Honoré H. A. Gervais, deceased. (August 20.)