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FORFEITURE UNDER CONTRACTS FOR SALE OF LANDS.

SOME OBSERVATIONS ON ARTICLE BY MR. SHIRLEY DENISON, K.C., ANTE P. 82.

The third question discussed by Mr. Denison's able and timely article is: "The purchaser, having paid some of the instalments of purchase money, makes default; can the vendor cancel the sale and keep the instalments?" From the Privy Council decision in the Saskatchewan case of *Drinkle* v *Steedman* (1916), 1 A.C. 275, Mr. Denison comes to the conclusion that "relief against forfeiture of the purchase money will be granted even in cases where specific performance cannot be had."

The judgment itself lays down no broad general rule in the above terms; and as the circumstances of that case were somewhat unusual, the applicability of the judgment should, it is submitted, be limited to the special circumstances of that case.

These special circumstances were as follows: The vendor had given notice of forfeiture of both lands and moneys pursuant to a special clause in the contract, and then brought action for a declaration, that the forfeiture claimed to have been thus extra-judicially effected was effective and valid. Furthermore the defendant not only pleaded being ready, willing and able to pay and offered to bring the balance of the money into Court, but also claimed and insisted upon specific performance by the vendor. Finally the vendor by his pleadings rejected this offer and refused to accept the balance of the purchase moneys and resisted specific performance.

These three features distinguish the case from the one ordinarily arising, *i.e.*, where (*a*) the vendor comes into Court asking

not for rescission but for performance by the purchaser within a time to be set by the Court and, in default, cancellation of the contract and forfeiture of the moneys paid out, and (*b*) the purchaser does *not* express willingness and ability to pay and the vendor *does not* refuse to accept the money. This common everyday case is not dealt with at all by the *Drinkle* judgment, and on account of its commonness it deserves special attention and enquiry.

The case of *Re Dagenham Docks*, L.R. 8 Ch. 1022, is also cited in several cases as an authority for some such broad, general proposition as Mr. Denison has based upon the *Drinkle* case. But the circumstances there were similar to those in the *Drinkle* case in this essential respect that the purchaser was ready, willing and able to pay and complete his contract although the fixed time for payment was past. The judgment, in relieving the purchaser from the forfeiture provided by the contract, does so upon the express condition of the purchaser paying the balance of the purchase money with interest as compensation for his default. In *Barton* v. *Capewell*, 68 L.T.R. 857, cited by Mr. Denison in this connection, the vendor had rescinded or cancelled extra-judicially as in the *Drinkle* case, and the validity of such rescission was assumed by the Court.

I. Does the presence or absence in the contract of a clause providing for forfeiture upon notice effect such a case? How can it? Such a clause prescribes an extra-judicial procedure and surely can have no application whatever when forfeiture (if that indeed is an appropriate expression) is sought by another procedure, viz., by a suit not based on any such notice or clause but upon other considerations.

II. If not, then how can there be jurisdiction to relieve against forfeiture of purchase-moneys paid? Is not the jurisdiction to relieve against forfeiture limited to and founded upon penal *clauses* in contracts?: 13 Halsbury, 150-154.

III. It may be answered, however, that the Court can reach the same result or relief by exercising another and distinct jurisdiction, *i.e.*, the jurisdiction to impose equitable terms on a plaintiff seeking equity. This raises the question as to what is the

essential nature of the kind of suit now under consideration. Mr. Denison says: "It [the proposition that the vendor must return everything but the deposit] naturally follows also from the attempt to rescind the contract: the contract being put an end to both the parties must be remitted to their original positions."

It is true that such an action is commonly called a "rescission" suit but the name seems inappropriate. A true rescission suit would seem to be where the plaintiff alleges that no contract has in reality ever been entered into between the parties but a certain document purporting to be such contract was entered into through fraud or mistake and the Court is asked to set aside the document in the sense of declaring that it never was originally binding upon the parties. In such cases, restitution by the plaintiff would be a natural or logical term or condition to be imposed upon him by the Court in granting relief, and in fact *is* invariably a term. On the other hand, in the kind of suit now under consideration the vendor comes into Court declaring that the contract *was* really entered into and that it remained in full force and effect for some time and he asks for a declaration that by reason of the purchaser's repudiation, he, the vendor, is and always will be discharged, absolved, and relieved from performance of his part of the contract, so that the contract is at an end in so far at least as the land is concerned. The proper term to describe the result thus sought would seem to be the word "determination" rather than the word "rescission."

Halsbury (vol. 7, at p. 438), speaking of contracts in general, says: "Where a contract is to be performed on a future day or the performance is dependent on a contingency and one of the parties repudiates the contract and shews that he does not intend to perform it, the other party is absolved from further performance of his part of the contract and, if he elects to do this, the party in default is not entitled to an opportunity of changing his mind. In such a case the contract is completely determined and the party who is in default cannot insist upon the performance by the other party." Mr. McCaul's valuable work on Vendors and Purchasers, 2nd ed., ch. 5, applies this general principle of contracts to the sale of land:

IV. Even if the Court had jurisdiction to impose such a term (*i.e.*, the return of instalments paid) would it be equitable to do so? It is submitted that it would *not* be, for the following reasons:—

The purchaser has had the valuable right to sell the property to another person and also, in the ordinary case, has had possession. Thus (A) the purchaser has not suffered a total failure of consideration; (B) It is impossible for the Court to adequately arrive at the value of the advantage gained on the one side and lost on the other; (C) The parties cannot be restored to their original positions.

In *Butchart* v. *McLean*, 15 B.C.R. 246, Irving, J.A., says: "The contract being in part performed it is impossible to relegate the parties to the original position they were in before the contract was made. The plaintiff has parted with his good money but has not the defendant lost something? Did he not forego the right to sell in the interval, no matter what price was offered? How is it possible to assess the damages he has sustained?"

In *Mulholland* v. *Holcombe*, 6 U.C.C.P. 520, the Full Court in refusing to order a return of monies to a purchaser says: "We find it laid down in Chitty on Contracts (624 of the 3rd ed., p. 742), the action for money had and received is not maintainable if the contract has been in part performed and the plaintiff has derived some benefit and by recovering a verdict the parties cannot be placed in the exact situation in which they respectively stood when the contract was entered into. It cannot be said that the plaintiff did not derive some benefit from the contract as he went into possession of the lands and retained possession nearly one year."

Halsbury (vol. 7, p. 477), says: "The action for money had and received is not maintainable where the parties cannot be restored to their original positions: as where the plaintiff has had possession of the defendant's goods during a certain period and it is impossible to ascertain of what rights and privileges the defendant has been deprived;" and citing *Bede* v. *Blandeford*, 2 Y. & J., 278, and *Clarke* v. *Dickson*, E.B. & E. 148. Halsbury (vol. 7, p. 483), says: "Where a sum of money is paid for an entire considera-

tion and only a partial failure of the consideration ensues no proportionate part of the amount paid can be recovered as money had and received to the payer's use."

These principles it is submitted are equitable. And if the purchaser has no right of action for refund of instalments paid, how does he acquire the right thereto merely by reason of his being the defendant in the suit and the vendor the plaintiff?

V. Inability to pay surely cannot be held to give the purchaser an affirmative right to such a refund. In *Soper* v. *Arnold*, 14 A.C. 435, Lord Macnaghten, says: "If there is a case in which a deposit is rightly and and properly forfeited, it is when a man enters into a contract to buy real property without taking into consideration whether he can pay for it or not."

VI. If the defaulting purchaser were entitled to a refund in such a suit, the practical result would be to make it purely optional with him whether he will carry out his contract or not, while of course the vendor is firmly bound. This point is emphasized in the above mentioned chapter of Mr. McCaul's.

VII. A default by the purchaser after a decree for specific performance should, it is submitted, be regarded much more seriously than mere delay in payment before or apart from such a decree. Halsbury (vol. 25, p. 397, footnote (*n*)), says: "If after an order for specific performance the purchaser makes default in payment of the purchase money the vendor is entitled to an order for rescission (*Foligna* v. *Martin* (1853), 16 Beav. 586; *Watson* v. *Cox* (1873) L.R., 15 Eq. 219; *Hall* v. *Burnell* (1911), 2 Ch. 551." In *Standard* v. *Little*, the Saskatchewan Full Court says: "The failure of the purchaser to obey the decree (for specific performance) and pay the money found to be due is a sufficient abandonment or repudiation of the contract to justify rescission without restitution: *Henty* v. *Schroder* (1879), 12 Ch. D. 666."

VIII. It is submitted that it is inappropriate to apply the term penalty to the position of a purchaser who has been dealt with by the Court as in *Standard* v. *Little* above. Halsbury (vol. 13, p. 151), speaks of a penalty as "a larger sum to be paid on non-payment of a smaller sum." Neither is it a case of forfeiture. It is simply a case of part performance of fulfillment, of an in-

divisible consideration, full performance or fulfillment of which is a condition precedent to the party being entitled to anything. In *La Belle* v. *O'Connor*, 15 O.L.R. 519, Anglin, J., describes payment in full as a "condition precedent" and adds "against conditions preceden it is well settled that there is no equitable jurisdiction to relieve."

In *Kerfoot* v. *Yeo*, 20 M.R. 133, Macdonald, J., says: "Had he not abandoned the contract, and had he expressed himself as ready and willing to carry out the terms, and sought specific performance of it, he might be entitled to a return of the moneys paid by him."

In *Hole* v. *Wilson*, 10 W.L.R. 154, Prendergast, J., says: "Nor do I see that it matters (and this has reference to the defendant's claim for a return of the $2,000) whether the forfeiture clause is in the nature of a penalty. Supposing it were? The return of the $2,000 could only be decreed against the plaintiff as an alternative left to her between that and the performance of her part of the agreement. In order to have a standing before this Court the defendant must at least be in a position to say: "I am ready and willing to perform my part of this agreement. I ask the Court to compel the plaintiff to perform hers; and if she does not do so, I claim the return of the $2,000."

The terms "penalty" or "forfeiture" are no more appropriate in this connection in the case of a sale of land than in the case of the sale of chattels. Halsbury (vol. 25, p. 279), after speaking of the right of the buyer to recover money paid as on a failure of consideration says: "Secus where the buyer only is in default, see *Pitt* v. *Cusenot*, 4 M. & G., and *Thomas* v. *Brown*, 1 Q.B.D. 714."

IX. The positions of vendor and purchaser under an agreement of sale are commonly and fairly considered as closely analogous for most purposes to the positions of mortgagee and mortgagor. The judgment for foreclosure in a mortgage action makes no provision for refund or return of the moneys, paid by the mortgagor; and such judgments of equity Courts though established for centuries do not appear to be criticized as unjust for lack of such a provision.

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*SOME SUGGESTIONS REGARDING COMPANY LEGISLATION.**

The Dominion Parliament has power to and has enacted a statute under which the Secretary of State may issue charters of incorporation for all manner of commercial companies with authority to transact business throughout Canada, and it has been lately held that companies so incorporated may carry on their operations in all or any of the Provinces. Each of the nine Provinces has its statutes, under which it undertakes to incorporate companies with power to carry on their operations in the Province and elsewhere at their discretion.

The Provinces generally require companies incorporated by the Dominion or by another Province to obtain licenses and to file elaborate statements of their affairs with officers, designated by the respective Acts.

Some of the Provinces deny the right of extra-Provincial corporations and Dominion corporations to do business or to enforce contracts within the Province unless and until they had paid the fee , registered, and complied with the other conditions laid down by the Provincial legislation. We need not consider whether the Provinces have any jurisdiction over Dominion or extra-Provincial corporations or whether the can insist as a prerequisite to doing business within the limits of the Province on such companies complying with their requirements. It is enough to know that they insist they have these powers and that companies disputing their validity must ascertain their own rights by tedious processes of litigation ending in the Privy Council.

Lawyers can readily understand how desirable it is that all company law or indeed all law should in so far as possible be the same throughout the Dominion of Canada so that a man of business, educated in the law of one Province, may not be in a foreign land when he crosses its borders into another or that companies, like individuals, may not be thwarted or embarrassed in business

* This is a paper by Hon. George Lynch Staunton, K.C., Senator, read at the Annual Meeting of the Ottawa Bar Association.

by unnecessary and irritating acts of the various legislatures. The chief reason why, I think, the Provincial Governments are so industriously building up barriers against Dominion and extra-Provincial corporations is because they need the money paid for charters by those who wish to take advantage of the Companies' Act. These fees are in the aggregate large and are of much more importance to the Province than they are to the Dominion, and if one can overcome this objection it seems to me that the Provinces would readily acquiesce in the passing of the Dominion Companies' Act and repeal their Acts if they found that no Provincial interest would be affected.

I propose therefore that the Dominion Government should amend the Companies' Act, as follows:—

1. Enact that the Provincial Secretary or some other member of the Provincial Government should have authority to issue charters for the Secretary of State at the capital of the Province.

2. That all applications for charters should be made to the Provincial Secretary of the Province in which the head office of the proposed company was intended to be situated.

3. That the schedule of fees named in the Act should be paid to the Provincial Secretary, and that he should account for twenty per cent. to the Secretary of State and apply the remainder for the use of the Province.

4. That the Provincial Secretary should forward a copy of the application and the charter to the Secretary of State immediately after the granting of the charter.

5. That all returns required to be made by the Act should be made to the Provincial Secretary in the Province in which the head office is situated, and that the Provincial Secretary should forward copies of these returns to the Secretary of State immediately after their receipt.

6. That all companies theretofore incorporated under any Provincial Companies' Act would *ipso facto* on filing an application in a simple form to be made a schedule to the Act, and on paying a nominal fee become incorporated to the same extent and with the same powers, privileges and rights as they had under their Provincial charters, under this Act, and providing that

their incorporation under the Provincial charter should continue to exist.

The Provinces then should repeal all legislation requiring companies to make returns or to take out licenses together with all other legislation inconsistent with or rendered unnecessary by the Dominion Companies' Act and declare the Dominion Act to be the law of the Province regarding companies.

If some such course as above indicated were taken we would in the end have uniform company legislation throughout the Dominion which, as the years go on and the population and the business of the country increases, will be found to be most desirable.

Common and Mining Stock.

Whether or not the above recommendations are ever acted upon, all the company law of the Dominion of Canada should be amended so as to provide that only one class of stock should be issued by any company. The enormous capitalization of common or of what is called "watered" stock of Canadian corporations is most lamentable. No sound, commercial or financial reason can be urged for the issue of more than one class of stock and both the interests of the public and of the companies themselves would be better served if only one kind of stock was allowed to be issued. To illustrate: Persons having a commercial undertaking whose assets as a going concern are reasonably worth $5,000,000 wish to become incorporated. The usual course in Canada is under a trust deed to issue as large amount at 5 or 6 per cent mortgage bonds as can be disposed of in the market, assume in this case, $2,500,000—then to issue $2,500,000 of cumulative preferred stock. Then the directors value the goodwill at another $5,000,000 and issue $5,000,000 of common stock which everybody knows is "blue sky." The company commences business with $2,500,000 bonds and $5,000,000 common stock and $2,500,000 preferred stock. The common stock is usually given as a bonus to purchasers of bonds or preferred, or sold to the speculative public in boom times at from 30 to 70 cents on the dollar of its face value and in dull times at from 10 to 20 cents on the dollar. The holders of these shares have sometimes the control of the

election of directors, in many others having half the voting power, in many others with a small amount of preferred they can control the company. They soon become hungry for dividends and commence a campaign on the directorate for their payment, with the result that all the profits or a greater portion of the profits which should go to the reserve for the payment of dividends on stock which was issued for value is paid out to people who never gave the company any value for the stock and when dull times come along the company is compelled to pass its dividend on its preferred stock because it has been unable to build up a proper reserve against lean years, and when it wishes to make additions to its business it is compelled for the same reason to make a further issue of bonds. In a great many cases besides these evil results the common stock prevents the company from accumulating a proper working capital so that it is always at the mercy of the bank. Prudent investors will hesitate and wise solicitors will refuse to advise their clients to purchase the preferred stock of companies, no matter how flourishing, which have a large quantity of outstanding water securities. The only persons who desire or who derive any benefit from watered stock are the speculating public and the brokers. It is not the law's business to encourage stock speculation. Its duty ceases when it provides the machinery for creating companies and affording to them power and means of carrying on the business on sound financial principles for which they are incorporated. No stock should be issued excepting for an equivalent in cash or in property as it is expressed in some of the English cases "an equivalent in meal or in malt."

Common stock is used by promoters as a lure to induce the public to purchase preferred shares. If an equal amount of common is given to every buyer of the same amount of preferred clearly no benefit accrues to any; if an unequal proportion is given to various purchasers of the same amount of preferred then an injustice is done to those who receive the lesser amount; and if a large amount of common is given to promoters and underwriters for services or risk as is the common case an injustice is done to the purchasers of the preferred who came in because of the bonus of common. If no bonus of common is given, true no injustice is

done the preferred holders who know that the common goes to the promoters and underwriters, but the value of the preferred is affected by reason of the inability of the company to build up a reserve and the company may be crippled for want of capital which goes to pay dividends on the common for which little, if any, value is given. The issue of common stock is contrary to the intention of the limited company legislation which was that all issued stock should represent an equal amount of capital paid into the coffers of the company and it is only by taking advantage of the decisions which hold that where there is any consideration given for the issued stock the Courts will not inquire into its adequacy that watered stocks other than mining shares are legally issued.

Another reason why issue of common stock without adequate consideration should be forbidden is because it affords an excellent opportunity to defraud the people, the great majority of whom, including the legal profession, are quite ignorant of company law and promoters' practices and believe that things are what they seem. They do not know or understand that when they buy a hundred shares of the par value of $10,000 that the real value of such shares is usually nothing. There are hundreds of millions of dollars of mining and common stocks roaming about Canada seeking a resting place in the pockets of the innocent stock gamblers which are worth perhaps the paper they are printed on and have no other intrinsic value. Even if it is true that it is impossible to prevent shares being issued for less than a full equivalent of their face value because of the difficulty of appraising at its true value property taken in exchange it only makes it more desirable that only one class of stock should be permitted, because where all the shares rank equally for all purposes those who understand among persons who pay the money or give the property would see that they were not swept away in a flood of stock given to persons who give nothing but services for their allotments.

Mr. Thomas Mulvey, K.C., Under Secretary for State, in his interesting article, "Certified Securities," *American Economic Review*, September, 1914, thinks two kinds of stocks not un-

desirable and that the legislature cannot protect the public against its own stupidity. My reply is that true the legislature cannot be expected to shepherd the lambs through life, but still the legislature should not set traps for them.

The most glaring cases of encouraging gambling and unwise and improper speculation by the Legislature are those Acts of the various Provinces for the incorporation of mining companies. There is no reason why dollar stocks selling at two cents on the dollar should be issued excepting that they are tempting betting propositions. To incorporate a company for mining purposes and allow it to issue stocks with no personal responsibility at any price it chooses to the public is no more and no less than a great lottery scheme authorized and fathered by the State. In countries where people profess an abhorrence for the most innocent kind of gambling, it is very curious to see their tolerance for perhaps the most pernicious form of gambling, that is, stock speculation. A perusal of the mining promoter's literature which is fabricated to extract the dollars from the simple minded should satisfy anybody that it were much better to allow unrestricted betting on horse races, when one at least gets a run for his money, than continue the legislation under which these companies carry on their business. It is said that if we did not allow their incorporation, incorporation for any scheme which man can devise is authorized in one or other of the neighbouring States, and that the Provincial Government would lose the fees while there would be no diminution of these companies. Appropriate legislation might easily be passed forbidding under very severe penalties sales of the stock of any foreign company within this Province which issued its stock for less than its par value and providing that no company which did not comply with the laws of the Province should operate within its limits. It is said that unless money can be raised by these methods there would be no mining development. I emphatically dispute this statement. People will pay, if they wish to do anything more than speculate, a dollar a share for 100 shares as quickly as ten cents a share for 1,000 shares. Further, in most cases the shares are sold for a nominal sum which is used to mine the public, not to develop the mining country.

Equitable Relief.

The case of *Foss* v. *Harbottle*, 2 Hare, 461, is the foundation of what, to my mind, is an unwise rule of law, namely, that the Courts will not interfere with the domestic affairs of a company excepting to prevent or to give relief against fraud, where the acts complained of are confirmed by or are capable of being confirmed by a majority of the members of the company. It ought to be a law that neither the directors nor a majority should be entitled to do anything which is inequitable with regard to the minority and the Courts should have power to give relief against inequitable conduct. Corporations only exist for the convenience of business and not in order to allow a majority to tyrannize over a minority. Where two or more persons are in partnership no partner has in the eye of the law any more control or right over the undertaking in which they are embarked in common than the other, and there is to my mind no sound reason why the law of partnership in that respect should not apply to companies. It is not here suggested that the Court should interfere, excepting in cases of injustice. Where the majority, in the exercise of its judgment, adopts a course which reasonable people might well consider for the interest of the company, the Court certainly should have no right to interfere, but where the only justification for the action which injuriously affects the interests of the minority is that it is the act of the majority or the act of the directors who control the majority, then it is a denial of justice to deny that relief on the doctrine laid down in *Foss* v. *Harbottle*.

Director Officials.

The provisions in the Companies' Act, with regard to the payment of directors who are officers of the company, which requires that no remuneration shall be paid to them unless under a by-law passed by the shareholders is nearly universally evaded.

A general by-law on the incorporation of a company is passed authorizing the directors to pay to a director officer such amount as they in their discretion may think proper and the matter never comes before the shareholders again. In large corporations

this evasion of the Act seldom if ever occasions injustice, but in small companies it constantly does, as men who control such companies usually are the directors and can increase and do increase their own salaries, keeping equal step with the prosperity and operations of the company, so that many investors in these semi-private companies are starved out.

CLASSES MOST PROMINENT ON THE FIRING LINE.

As illustrating public opinion in Britain as to the righteousness of the cause for which the allied armies are fighting, it is both interesting and instructive to note that no element in the population has contributed more largely, in proportion to its numbers, than the professional class; the clergymen, who have emptied their homes of their young men, the lawyers and doctors of medicine, men of intelligence and thinking power above the average, able to judge of the right or wrong of a large national cause. Lists of names have been carefully collected in these three professions in England and Scotland, and, while it is not said that they are complete, yet the extent to which they prove that these professions have furnished of their very best is a remarkable testimony of the devotion to a good cause of the guiding thought of the nation.

In a considerable degree the same is true of the aristocracy and gentry, and also of the working class of Britain. To the latter their country is everything, for indeed they possess but little else to satisfy their manly pride; and the aristocracy, being so deeply rooted in the past of the United Kingdom, naturally associate with their families the glorious traditions their ancestors had done so much to create.

The great middle class may not have done comparatively as well, for reasons which do not apply to the other two, yet the middle class also has shewn itself to be not devoid of patriotism in a real sense when the very existence of the country is at stake.

REVIEW OF CURRENT ENGLISH CASES.

SOLICITOR—LIEN—DOCUMENTS OBTAINED WITHOUT LITIGATION—BANKRUPTCY—TRUSTEE—DOCUMENTS OBTAINED BY SOLICITOR AFTER BANKRUPTCY—COSTS.

Meguerditchian v. *Lightbound* (1917) 1 K.B. 297. This was an action by a trustee of a bankrupt to recover certain documents belonging to the bankrupt on which the defendants (a firm of solicitors) claimed a lien, as well for costs due them by the bankrupt, as also for costs due them by the trustee in respect of business transacted by them in procuring the delivery up of the documents in question. The plaintiff did not contest the defendant's right to a lien for costs for business transacted in reference to the documents pursuant to his instructions, and paid into Court the amount of such costs; but he disputed the right of the solicitors to any lien on the documents for any costs incurred in reference thereto, prior to the bankruptcy. Rowlatt, J., who tried the action, held that no lien attached to the documents in respect of any costs incurred in reference to any endeavours to procure them prior to the bankruptcy, and gave judgment for the plaintiff.

CONTRACT—ILLEGALITY—PUBLIC POLICY—ASSIGNMENT OF PRESENT AND FUTURE EARNINGS—COVENANT IN RESTRAINT OF PERSONAL FREEDOM—COVENANT NOT TO LEAVE PRESENT EMPLOYMENT WITHOUT SANCTION OF ASSIGNEE.

Horwood v. *Millar's Timber Co.* (1917) 1 K.B. 305. This was the case in which a Divisional Court decided (1916) 2 K.B. 44, (noted ante vol. 52, p. 350), that a man cannot, by contract, deprive himself of freedom of action so as to put himself in a position of slavery to another. The contract in question was one made between a lender and a borrower whereby the latter assigned his future earnings to the lender and bound himself not to leave his employment without the assignee's leave. The Court of Appeal (Lord Cozens-Hardy, M.R., and Warrington, and Scrutton, L.JJ.), agreed with the Divisional Court that such a contract is against public policy and illegal. It is well to know that the law will not enforce contracts of that kind for they are absolutely inimical to freedom, for as Scrutton, L.J., puts it, such a contract "made the unfortunate man the slave of the money-lender."

CONTRACT—SALE OF GOODS—CUSTOM OF TRADE—REASONABLENESS—APPROPRIATION OF GOODS TO CONTRACT.

Produce Brokers v. *Olympia Oil & Cake Co.* (1917) 1 K.B. 320. This is an appeal from the decision of a Divisional Court (1916) 2 K.B. 296 (noted ante vol. 52, p. 390). The question was as to validity of a custom of trade to the effect that goods in transit might be validly appropriated by the seller to a particular contract, notwithstanding that at the time of such appropriation the goods might, unknown to the seller, have been actually lost at sea. The Divisional Court upheld the custom, and the Court of Appeal (Lord Cozens Hardy, and Warrington, and Scrutton, L.JJ.), affirm his decision.

LANDLORD AND TENANT—COVENANT BY TENANT TO PAINT PREMISES IN SPECIFIED YEAR—NOTICE BY LESSEE TO TERMINATE TENANCY DURING CURRENCY OF YEAR—LIABILITY OF LESSEE.

Kirklinton v. *Wood* (1917) 1 K.B. 332. This was an action by a landlord against his tenants for breach of a covenant to paint the demised premises in a certain specified year. The tenants sought to escape liability on the ground that prior to the specified year they had given notice of their intention to terminate the tenancy during that year. The specified year was 1916, and according to the notice the tenancy was terminated in March, 1916. Lush, J., held that this was no defence.

SALE OF GOODS—APPROPRIATION TO CONTRACT—PASSING OF PROPERTY.

Healy v. *Howlett* (1917) 1 K.B. 337. This was an action to enforce a contract for the sale of fish in the following circumstances: The plaintiff carried on business as a fish exporter at Valentia, Ireland, the defendants contracted to buy 20 boxes of hard, bright mackerel to be sent to the defendants at Billingsgate. On the same day the plaintiff consigned by railway to his own order in Holyhead, 190 boxes of mackerel, and telegraphed instructions to the railway company, out of the 190 to deliver 20 of them to the defendants, and the rest of the 190 boxes to other named persons. Owing to a delay in the train from Valentia to Dublin the boat by which they ought to have been carried to Holyhead was missed. After the 190 boxes had been delivered to the railway the plaintiff sent the defendants an invoice in which they stated that the goods were at the buyers' risk after their delivery in Valentia to the railway company. The railway

company picked out twenty boxes and forwarded them to the defendants, but owing to the delay in transit the goods were not in a merchantable condition when they reached the defendants, and they refused to receive them. This was an action for the price. The plaintiff relied on the delivery to the railway company as being a delivery to the defendants, and contended that the property in the goods then passed to them, and therefore that they were henceforth at their risk. The County Court Judge, who tried the action, gave judgment for the plaintiff, but the Divisional Court (Ridley, and Avory, JJ.), held that the statement in the invoice could not be regarded as a term of the contract, because it was not sent until after the contract was complete; and that there had been no real appropriation of goods until after the goods arrived at Holyhead, and after the delay had occurred, which had caused the deterioration of the fish, and the defendants were entitled to reject the fish, and the plaintiff could not recover the price.

CRIMINAL LAW — EVIDENCE — INDECENT ASSAULT — COMPLAINT MADE BY PROSECUTRIX — ADMISSIBILITY — EVIDENCE.

King v. *Norcott* (1917) 1 K.B. 347. This was a prosecution for indecent assault, and the question was whether a statement made by the prosecutrix on the following day to a female friend was admissible evidence. It appeared that the statement was voluntarily made, and partly in answer to questions put by the woman, not of a suggestive or leading character, but which might have had the effect of persuading the girl to tell her unassisted and unvarnished story. The Court of Criminal Appeal (Lord Reading, C.J., and Darling, and Atkin, JJ.), held that it was admissible, and in so doing explain *Rex* v. *Osborne* (1905), 1 K.B. 551, on which counsel for the prisoner relied.

INSURANCE—LOSS OR DAMAGE TO GOODS—EXCEPTION OF THEFT OR DISHONESTY OF INSURED'S OWN SERVANT—BURDEN OF PROOF—EVIDENCE.

Hurst v. *Evans* (1917) 1 K.B. 352. This was an action on a policy of insurance to recover for loss of and damage to goods occasioned by thieves. The policy was subject to an exception of losses occasioned by theft or dishonesty of servants in the exclusive employment of the insured. The plaintiff was a jeweller, and the loss in respect to which the action was brought, was due

to a safe in his premises having been blown open and the contents taken by thieves. The defendant set up that the loss in question was occasioned by the dishonesty of one of the plaintiff's own servants. The only evidence of the alleged dishonesty was that the servant in question had been seen in a public house two days before the robbery in close conversation with three highly skilled safe breakers well known to the police. The plaintiff was unable to offer any evidence to shew by whom the theft was committed: and Lush, J., held that it was incumbent on him to shew that the theft was committed by some person other than a servant in his exclusive employment, and, as he had failed to do this, he could not recover. And even assuming that the burden of proving theft by the plaintiff's servant lay on the defendant, the evidence that had been offered was admissible for the purpose, though it might not be sufficient evidence to convict in a criminal prosecution; but evidence of the servant's bad character was not admissible.

CRIMINAL LAW — BIGAMY — FOREIGN MARRIAGE — EXPERT EVIDENCE—POLYGAMY.

The King v. *Naguib* (1917) 1 K.B. 359. This was a prosecution for bigamy. The accused was an Egyptian, and was accused of marrying a woman in England while his wife, whom he had married in England, was still alive. The accused sought to shew that the first marriage in England was void, because he had been previously married in Egypt to a woman who was still alive, and whom he had divorced, after the first, and before the second marriage in England. The accused was a Mahommedan and claimed that as he had divorced his Egyptian wife he was free to marry again. On appeal by the accused it was held by the Court of Criminal Appeal (Lord Reading, C.J., and Bray, and Atkin, JJ.), that the evidence of an expert was necessary to establish the validity of the Egyptian marriage, and that the accused was not competent to establish that marriage by tendering his own evidence of the performance of a ceremony, and leaving the Court to presume the effect thereof. The question is raised, but not decided, whether an English Court will regard as a marriage, one that is effected in a foreign country according to a law which permits polygamy.

BANKER—CHEQUE—RAISING AMOUNT OF CHEQUE—LIABILITY OF BANK—NEGLIGENCE OF CUSTOMER—FORGERY.

Macmillan v. *London Joint Stock Bank* (1917) 1 K.B. 363. This was an action by a customer of a bank to recover a sum paid

by the bank on a forged cheque of the customer. The forgery consisted in raising the cheque after being signed from £2 to £120. The forgery took place in the following circumstances: a clerk of the plaintiff's brought a cheque to be signed by one of the plaintiff's firm. The cheque had, as the Judge found, at that time a blank space for writing in the amount, but had on it in figures £2:0:0. The clerk after signature filled in the blank space with the words "one hundred and twenty pounds" and added before the "2" a "1" and after it an "0." The bank contended that the plaintiffs had negligently signed the cheque in such a shape as to give the clerk the opportunity of committing the forgery, and therefore they could not recover; but Sankey, J., who tried the action, held that the bank was liable, and in arriving at that conclusion refused to follow *Young* v. *Grote* (1827), 4 Bing. N.S. 3, which he considered had been in effect overruled by later cases. The law it must be confessed as decided in this case seems somewhat hard on banks. See *Columbia Gramophone Co.* v. *Union Bank of Canada*, 38 O.L.R. 326, a somewhat similar case.

SHIP—TIME CHARTER—RESTRAINT OF PRINCES—REQUISITION OF SHIP BY ADMIRALTY.

Modern Transport Co. v. *Duneric S.S. Co.* (1917) 1 K.B. 370. This was an appeal from the decision of Sankey, J. (1906) 1 K.B. 726 (noted ante vol. 52, p. 222). The question discussed on the appeal was simply whether the charterers of a ship chartered for a specified time, subject to an exception against restraint of princes, and which during the specified time is requisitioned and used by the Admiralty, are liable for the hire of the ship during the period it was so used by the Admiralty. Sankey, J., had held that they were liable, and his decision is now affirmed by the Court of Appeal (Eady, and Bankes, L.JJ., and Lawrence, J.). The contest arose, it may be observed, by reason of the hire received from the Admiralty being less than that payable under the charter party.

MAINTENANCE OF ACTION—MAINTAINED ACTION SUCCESSFUL—LIABILITY OF MAINTAINER—MEASURE OF DAMAGES—LIMITED COMPANY.

Neville v. *London Express Newspapers* (1917) 1 K.B. 402. This was an action to recover damages against the defendants for having wrongfully maintained an action of third party against the plaintiff, the defendants having no interest in the action

maintained. The defendants sought to escape liability on the ground that they were a limited company and therefore incapable of a criminal act, and also on the ground that the maintained action was successful and therefore the plaintiff suffered no damage. The facts were somewhat unusual. It appeared that the plaintiff had advertised a competition for a name for a new seaside resort, the establishment of which he was promoting, the winner of the competition was to get £100, and several lots of land were offered as consolation prizes, subject to the payment of £3 3s. 0d. for each conveyance. The defendants in a newspaper published by them denounced the scheme as a fraud, and offered to assist the winners of consolation prizes to bring an action to recover their money. Many of them accepted the defendants' offer and an action was brought in their names by the defendants' solicitor and was successful, and judgment was recovered for the repayment to the plaintiffs in that action of the various sums respectively paid by them to the plaintiff in the present action. The action was tried before Lord Reading, C.J., and a jury, and the jury found that the defendants did not act from any desire to assist persons to prosecute claims who would not otherwise be able to enforce their rights, and also that they did not act in the *bonâ fide* belief that the persons whom they induced to sue had any well-founded claim against Neville. On these findings the Chief Justice gave judgment for the plaintiff and held that the measure of damages was the plaintiff's costs of defence, and the costs he had been ordered to pay the plaintiffs in the maintained action, and he held that the company was liable civilly for the acts of its servants.

SOLDIER'S WILL—REVOCATION BY MARRIAGE.

In re Wardrop (1917) P. 54. Shearman, J., decided that a soldier's will is revoked by the subsequent marriage of the testator, whether the will be executed according to the usual form, or according to the form sufficient where the testator is on active service.

VENDOR AND PURCHASER—CONTRACT—MEANING OF "ET CETERA" IN CONTRACT—EASEMENT—RIGHT OF WAY—FORM OF CONVEYANCE—EXCLUSION OF OPERATION OF CONVEYANCING ACT, 18 (44-45 VICT., C. 41), S. 6—(R.S.O. c. 109, s. 15 (*l*)).

Re Walmsley and Shaw (1917) 1 Ch. 93. This was an application under the Vendors and Purchasers' Act to determine the proper form of the conveyance. By the contract in question

two plots of land and buildings, "materiai, etc"., were agreed to be sold; the contract omitted any mention of any right of way thereto. The premises were described by reference to a plan, and formed part of a larger property belonging to the vendor, and bounded on the north by a public highway. A farm cart track led from this highway across a field of the vendor, past the larger of the two plots sold, to the smaller plot. This cart track had been used by the former tenants of the smaller plot to carry coals and furniture, etc., thereto, but always with the permission of the vendor or her predecessors. A public foot path ran close to the side of the cart track up to the smaller plot. The purchaser claimed to have inserted on the conveyance an express grant of a right of way along the cart track, and the vendor insisted that he had no such right, and that the operation of the Conveyancing Act, 1881, s. 6 (see R.S.O., c. 109, s., 15 (1)). should be expressly excluded by the conveyance. Eve, J., who heard the motion, held that the words "et cetera" in the contract referred to "material" and were limited to something of that character, and did not carry the alleged right of way; but even if they included property of the same nature as land and buildings, the most they could include would be the rights appurtenant to the land and buildings. He also held that the contract was one for the sale of the premises with such rights as were legally appendant or appurtenant thereto, and the right of way claimed, not being appendant or appurtenant, nor a way of necessity, did not pass. He therefore held that the purchaser was not entitled to any express grant of the right of way, and that the conveyance should be framed so as to exclude the operation of the above mentioned section of the Conveyancing Act, 1881. This seems to be a case of which conveyancers would do well to make a note; as by omitting to exclude the operation of the Act, doubts may arise whether rights pass which were not intended to be conveyed.

COMPANY—TRANSFER OF SHARES—DIRECTORS—LIMITS OF DIRECTORS' DISCRETION TO REFUSE TO REGISTER TRANSFER.

In re Bede Steam Shipping Co. (1917) 1 Ch. 123. Where the directors of a company have power to refuse to register transfers of shares "if in their opinion it is contrary to the interests of the company that the proposed transferee should be a member thereof," such a power does not give them an unlimited power to refuse to register transfers, but only on grounds personal to the proposed transferee. Therefore it was held by the Court of Appeal (Lord Cozens-Hardy, M.R., and Warrington, L.J.—Scrutton, L.J., dissenting), that directors could not properly

refuse to register transfers of single shares, or shares in small numbers, because they do not think it desirable to increase the number of shareholders, or because they think that the transfer is not *bonâ fide* and that the transferee is to hold the shares as a mere nominee of the transferor, and to increase the number of shareholders who will support him in a policy which the directors disapprove. The order of Eve, J., directing the register of the transfers in question was affirmed.

MERGER — INTENTION — INTEREST — DUTY—SUBSEQUENT DEALINGS WITH PROPERTY AS AFFECTING QUESTION OF MERGER —EVIDENCE.

In re Fletcher, Reading v. *Fletcher* (1917) 1 Ch. 147. In this case the question was whether or not there had been a merger of a leasehold in the freehold. The facts were that two properties A. and B. were included in one lease at a ground rent, and were subsequently separately assigned by the lessees. The reversioners in fee took an assignment of property A. for the residue of the term. There was no evidence that they had any intention against a merger. About nine months afterwards, however, the reversioners mortgaged the term in property A. and the entire reversion separately, and the question arose whether or not the lease in property A. was still subsisting, or had been merged in the freehold. Astbury, J., held that there had been a merger and the subsequently treating the lease as if it had not merged, could not alter the fact, it not appearing that there was any interest, or duty, on the part of the grantees, to keep the term alive.

LIFE ASSURANCE COMPANY—DEPOSIT—COMPANY CARRYING ON OTHER CLASSES OF BUSINESS—WINDING-UP—COSTS—DEPOSITS AS SECURITY FOR COSTS IN ACTION BY LIQUIDATOR—(DOM. STAT. 1910, c. 32, s. 14).

In re National Standard Life Assurance Corporation (1917) 1 Ch. 193. The simple question involved in this case is as to the application in winding-up proceedings of the deposit required to be made by life insurance companies under the English Assurance Companies Acts (see Dom. Stat. 1910, c. 32, s. 14), for the protection of the holders of life policies, and Eve, J., held that the same is available for the general costs of the winding-up, and for the repayment of deposits made by the liquidator as security for costs in proceedings which he has been authorized by the Court to carry on, so far as the same costs and deposits relate to the business of life assurance for which the deposit was made.

COMPANY — WINDING-UP — INSOLVENT COMPANY — LIQUIDATOR —OBJECTION OF CREDITORS TO APPOINTMENT OF RECEIVER FOR DEBENTURE HOLDERS AS LIQUIDATOR.

In re Karamelli & Barnett (1917) 1 Ch. 203. The question involved in this case was as to the appointment of a liquidator to an insolvent company. One of the proposed liquidators was also the receiver for the debenture holders of the company, the creditors of the company objected to his appointment, and Neville, J., gave effect to their objection, on the ground that the interests of the debenture holders might be antagonistic to those of the creditors.

WILL—TESTAMENTARY GIFT OF COLLECTION OF COINS—REVOCATION — ERRONEOUS ASSUMPTION OF FACT — REVOCATION WHETHER CONDITIONAL OR ABSOLUTE—EVIDENCE—STATEMENTS BY TESTATOR.

In re Churchill, Taylor v. *University of Manchester* (1917) 1 Ch. 206. The question in this case was as to the effect of a revocation of a testamentary gift in the following circumstances: In 1901 the testator by his will gave all his coins with the cabinets in which they were placed, to the defendants. In January, 1912, he wrote a letter to the defendants whereby he purported to present to the defendants his "collection of coins" on certain conditions and the defendants accepted the gift on the conditions specified, but no coins or cabinets were then handed over. In February, 1912, the testator made a codicil in which after reciting the gift of coins and cabinets in his will, revoked the gift, and declared that he had, during his lifetime, handed over to the defendants all the coins and cabinets he intended to leave them by his will. In August, 1912, the testator delivered to the defendants eleven cabinets containing the greater part of his collection, but some remained in his possession. The testator died in 1915 and the defendants claimed the remainder of the coins and cabinets as part of his gift to them, contending that the revocation by the codicil was based on an erroneous assumption of fact, and therefore was conditional and inoperative, so that the original gift by the will took effect. Neville, J., however, held that the revocation by the codicil was absolute, and that the defendants were only entitled to the coins and cabinets handed over to them. He also held that statements made by the testator at the time when the coins and cabinets were handed over were not admissible in evidence.

COMPANY — REORGANIZATION OF CAPITAL — REDUCTION OF CAPITAL—SUBDIVISION OF SHARES PARTLY PAID UP—PART OF RESULTING SHARES PARTLY PAID, AND PART WHOLLY UNPAID —SURRENDER OF WHOLLY UNPAID SHARES—COMPANIES ACT, 1908 (8 EDW. VII. c. 69), ss. 41 (*d*), 45, 46 (*a*), 120—(R.S.O. c. 178, s. 16).

In re Doloswella Rubber & Tea Estates (1917) 1 Ch. 213. Under the English Companies Act, 1908, applications for reduction or reorganization of the capital of limited companies have to be made to the Court which under the Ontario Companies Act (R.S.O. c. 178) are made to the Lieutenant-Governor. This case furnishes an illustration of the kind of reorganization of capital which is sanctioned under the English Act, and incidentally furnishes a guide to what may be done under the Ontario Act. The issued capital of the applicant company in this case consisted of 640 shares of £500 each, on each of which shares £185 had been paid. The company sought to divide each £500 share into 5 shares of £100 each, to apply the £185 paid, equally on three of the new £100 shares, and to treat the other two shares as wholly unpaid; these shares it was proposed should be surrendered for re-issue. The Court made an order confirming the division of the shares, and the proposed application of the amount paid up, and declared the 1,580 wholly unpaid to be "unissued, and nothing is to be deemed paid thereon." The question of the right or power of a company to take a surrender of its own shares, which have been fully paid up, cannot be said to be clear. It is thought by some that it is not possible because it might lead to the distribution of the capital represented by such surrendered shares among the other shareholders and thereby cause a reduction of capital, which it is thought might be prejudicial to the rights of third persons dealing with the company, as reducing their security. On the other hand, the transaction is one that would be for the obvious benefit of both the company itself and the other shareholders, and would probably be sanctioned subject to the condition that the capital surrendered would not be distributed except on the final winding-up of the company.

SOLICITOR BILL OF COSTS SOLICITOR TRUSTEE TAXATION BY CO-TRUSTEE "PARTY CHARGEABLE" SOLICITORS ACT, 1843 (6-7 VICT. c. 73), s. 37 (SOLICITORS ACT, ONT. R.S.O. c. 159, s. 40).

In Davies (1917) 1 Ch. 216. This was an application for the taxation of a solicitor's bill. The solicitor was a trustee entitled to

charge costs for services rendered for the trust estate. The applicant was his co-trustee, and it was held by Neville, J., that the applicant was "a party chargeable" within the meaning of s. 37 of the Solicitors Act (see R.S.O. c. 159, s. 40), and as such entitled to have the bill taxed.

ADMINISTRATION — SUPPOSED INTESTATE — CANCELLED WILL — RECEIVER PENDING PROBATE—PRACTICE.

In re Oakes, Oakes v. *Porcheron* (1917) 1 Ch. 230. This was an application for the appointment of a receiver of a deceased person's estate. The deceased was supposed to have died intestate, but a will, which appeared to be cancelled, was found amongst his papers. The defendant claimed that this will had not been effectively cancelled, and was operative. After the institution of this action and service of the notice of motion for a receiver, the defendant instituted proceedings in the Probate Division for probate, and now resisted the motion for a receiver on the ground that an administrator *ad litem* might be appointed in the probate action; but Neville, J., held that the present action having been first properly instituted, the jurisdiction of the Court could not be ousted by applying for relief to another Division, and he granted the motion.

MARRIAGE SETTLEMENT—AGREEMENT BY HUSBAND TO SETTLE AFTER ACQUIRED PROPERTY—BREACH OF AGREEMENT BY HUSBAND—COVENANT TO SETTLE WIFE'S AFTER-ACQUIRED PROPERTY—TRUSTEES NOT BOUND TO ENFORCE COVENANT FOR BENEFIT OF VOLUNTEERS.

In re Pryce, Nevill v. *Pryce* (1917) 1 Ch. 234. This was an application by the trustees of a marriage settlement for advice as to whether or not they were bound to take proceedings to enforce (1) an agreement by the husband to settle after-acquired property, and (2) a covenant to settle the wife's after-acquired property. The husband had, in his lifetime, received a considerable sum which was bound by his agreement, but had spent it, and died intestate and leaving no estate beyond what was required to pay his funeral expenses and debts. The husband was also entitled to a reversionary interest in a sum of £4,700 which had fallen into possession since his death, and which was still outstanding in the hands of the trustees of the will of the husband's father. The wife was also, under a gift from her husband, entitled to a reversionary interest in a certain fund which, as the Judge found, was caught

by the wife's covenant. Subject to his widow's interest for her life in the £4,700, it was held in trust for the husband absolutely—and the ultimate residue of the wife's fund was held in trust for her statutory next of kin—there being no issue of the marriage; the question therefore resolved itself into the simple point whether the trustees of the marriage settlement ought to take proceedings to enforce the covenant and agreement to settle the after-acquired property for the benefit of the next of kin of the husband and wife respectively, and Eve, J., held that they ought not, because the next of kin were not within the consideration of the marriage, and were mere volunteers, and as such not themselves entitled to enforce the covenant and agreement, and therefore the Court ought not to direct the trustees to take proceedings to enforce the covenant and agreement so as to do indirectly, what it would not do directly.

ARBITRATION—ACT GIVING ARBITRATORS FULL DISCRETION AS TO COSTS—POWER TO ORDER SUCCESSFUL PARTY TO PAY COSTS.

Gray v. *Ashburton* (1917) A.C. 26. In arbitration proceedings under a statute which gave the arbitrator discretion as to costs, and which directed that, in the exercise of such discretion, the arbitrator was to take into account, *inter alia*, "the reasonableness or unreasonableness of the claim of either party in respect of amount or otherwise," the Court of Appeal (1916) 2 K.B. 353 held that the discretion ought to be exercised as is the discretion of the Court in actions, and, therefore, that a successful party could not properly be ordered to pay costs. The House of Lords (Lords Loreburn, Haldane, Atkinson, and Shaw) hold that the discretion of the arbitrator is unlimited, and that, in the absence of proof of misconduct, or want of jurisdiction, the award could not be set aside. In arriving at this conclusion, considerable doubt seems to be thrown on *Foster* v. *Great Western Ry.*, 8 Q.B.D. 515; and inferentially on *Higgins* v. *Higgins*, 1916, 1 K.B. 640.

Reports and Notes of Cases.

Province of Ontario

SUPREME COURT.

Middleton, J.] C. v. C. [33 D.L.R. 151.

Conflict of laws—Foreign divorce.

The exercise by a foreign Court of the general jurisdiction it is admitted to have under principles recognized by English law will not be inquired into in proceedings in English Courts.

See *Pemberton* v. *Hughes*, [1899] 1 Ch. 781.

Bain, K.C., *White*, K.C., and *M. L. Gordon*, for plaintiff; *Dewart*, K.C., and *Harding*, for defendant.

ANNOTATION ON ABOVE CASE FROM D.L.R.

The Illinois statute requires residence in the State for one year *next before* the commencement of proceedings, to give jurisdiction, or commission within the State of the offence complained of, or whilst one of the parties resided there. In this instance the complaint made was of an offence committed in Chicago whilst the parties resided there, but this had been condoned by subsequent cohabitation in Ontario. The later offences if conclusively proved would revive the cause of action which had been abated by the condonation. (*Moorhouse* v. *Moorhouse*, 90 Ill. App 401; *Sharp* v. *Sharp*, 116 Ill. 509.) If no mention of the condonation and subsequent offence were made in the petition, a fraud was practised on the Illinois Court, by suppression of the truth, yet Middleton, J., says: "The offences complained of were committed in Chicago. . . . All the material facts were before the Chicago Court. . . . That subsequent offences were committed out of the State (after condonation of those complained of) seems to me immaterial;" that is, that it was immaterial to mention the condonation, and prove the offences which revived a lost right of action. The truth is, that unless later offences had revived the cause of action alleged, that cause was lost by condonation, and therefore the late offences were not only material, but without strict proof of them no decree could have been procured. In alleging these offences, Middleton, J., seems to have relied upon the undisputed evidence of the wife, on a point not at issue in *C.* v. *C.*; since it is unlikely that the husband in his evidence in *C.* v. *C.* was asked or admitted these later offences.

The question of domicile of choice was vital in this case, because the marriage was "English," in that sense of the word which makes the English Courts so jealously regard proof of acquired domicile. The marriage had been celebrated in Ontario, between parties domiciled there, who continued

to reside there for years, and returned there after a brief and unhappy residence in Chicago. The husband had gone to Chicago to get work, he gave up his job to wait upon the death of his father in Ontario, and he remained there in charge of property he then acquired, and was actually residing there when the divorce proceedings were commenced, going to Chicago for the purpose of being served with the papers which initiated the proceedings. Five days after the divorce was granted, the divorcee married again, and a few months later the divorced husband also married a woman he had met before the divorce. Middleton, J., said there was no proof of "collusion"; it can hardly be said there was no proof of mutual "accommodation." Middleton, J., also said: "There is much to lead to the conclusion that the husband never in fact changed his domicile of origin (Ontario). He seems to have been a rolling stone moving in the line of least resistance, making his abode where it was easiest to obtain a living." That language seems to very exactly describe the facts, yet, the Judge found that a domicile in Chicago had been acquired, and a domicile is required to be "permanent," "bonâ fide," "real" and "existing," to use the language of the ruling cases, in order to give jurisdiction which English Courts will recognise.

The question of reversion to the domicile of origin was not dealt with by Middleton, J., except that he says: "The temporary absence of the *married pair* in Ontario, without intention of abandoning the Chicago residence, did not, I think, defeat the jurisdiction and beyond this, the offences or injuries complained of were committed in the State whilst both resided there." This seems misleading, for the wife "left him" in Chicago, and went to Ontario and they did not live together again until he came to Ontario. When she did return to Chicago, it was temporarily, for the sole purpose of getting a divorce. Furthermore, reversion to domicile of origin would result from the husband's abandonment of the Chicago domicile of choice, and while the fact that the offence was created in Chicago whilst the married pair resided there would give statutory jurisdiction to the Chicago Court to decree a divorce (see 2), English law does not recognise jurisdiction based on anything else than "domicile," within the English meaning of that word. The Judge therefore mixed two matters, in the words just quoted.

What the intention of the husband was in leaving Chicago, or what intention he had formed as to domicile, prior to the application for divorce, should be gathered from his acts and surrounding circumstances, and not from his own evidence, since the manifest necessity he was under of justifying his own conduct made his evidence untrustworthy (per Cairns, C., in *Bell v. Kennedy*, (1868) L.R. 1 Sc. & Div. 313). Middleton, J., says: "The husband inherited some property upon his father's death (February), and stayed in Ontario to manage it, and abandoned his intention of returning to Chicago. Divorce proceedings were instituted in March. Afterwards he lived some years in Ontario." The fact that the decision to remain in Ontario was caused by the need of caring for the property acquired in February, establishes almost conclusively that the intention to abandon the Chicago domicile was formed before the divorce proceedings were commenced in March. If so, the domicile of origin (Ontario) had revived, and English law would not recognise any jurisdiction in the Chicago Courts to decree the

divorce (6 Hals. 193). To admit that it was the coming of the property into his possession which caused him to decide to remain in Ontario, and then to postpone the date when he formed that intention until he had gone to Chicago to be served with the divorce paper, is too accommodating altogether. It seems quite clear that both parties wanted a divorce, that it would be difficult to get it from the Canadian parliament, and that to allege a continuing domicile in Chicago was very tempting.

The concluding remarks of Middleton, J., that because all the parties concerned knew what they were about when the divorce was obtained, there should be a conclusion favourable to the legality of the decree, suggests the existence of an estoppel against the defendant, but the public interest is the main thing to be guarded, and estoppel has nothing whatever to do with the matter. If all the parties knew what they were about, there could be no estoppel of one by the other. A marriage claimed and denied on the ground of an existing marriage; a foreign divorce pleaded, and its legality denied for want of jurisdiction; the question of law should be settled on principles aimed only to preserve the morality of married life.

The unusual directions as to costs given in the main judgment, considered in the light of the later explanation, evidence a very keen and not unnatural sympathy by Middleton, J., with the plaintiff, and suggest that his findings were influenced thereby. "Hard cases make bad law," and no harder cases arise perhaps than cases of this kind; judgments establishing the nullity of proceedings long before inevitably impose hardships; nevertheless preservation of the public interest in the binding nature of the marriage tie and strict examination of all foreign divorce, will in the end prevent more private suffering than will regard for the hardships of particular instances.

Province of British Columbia.

SUPREME COURT.

Murphy, J.] MILLER v. ALLISON. [33 D.L.R. 144.

Conflict of laws- Foreign divorce- Remarriage abroad.

Where a British subject domiciled in this country enters into a contract of marriage during a temporary visit to a foreign country, the question of the validity of marriage, as to essentials, not as to form, depends upon the laws of this country.

McDiarmid, for petitioner; *Higgins*, for respondent.

ANNOTATION ON ABOVE CASE FROM D.L.R.

The judgment in this action was wrong.

When she procured a divorce in Oregon, the respondent was domiciled in Idaho. The whole question of the validity of the divorce depends upon the law of Idaho in reference thereto.

"The English Courts will recognise the binding effect of a decree of divorce obtained in a State in which the husband is not domiciled if the Courts of his domicile would recognise the validity of the decree:" *Armitage* v. *A.-G.* [1906], P.D. 135.

The petitioner, a British subject, residing and domiciled in Victoria, B.C., went through a form of marriage with respondent in the State of Washington, U.S.A., and returned to Victoria to reside.

The respondent also resided in Victoria, B.C. prior to and at the time of the ceremony with petitioner, but her husband, during the same period, and at the time of the ceremony, was domiciled and resident in the State of Idaho, U.S.A.

Prior to the said ceremony the petitioner made transient visits to the State of Oregon, U.S.A., and succeeded in obtaining from the Courts of that State a decree of divorce.

It was found as fact by Murphy, J., that by the law of Oregon, one year's continuous residence in the State is necessary to give its Courts jurisdiction to decree divorce, and that the petitioner had not so resided for the requisite time.

The jurisdiction of the B.C. Court to declare the form of marriage between petitioner and respondent null and void cannot be questioned, for petitioner was domiciled in British Columbia at the time of the marriage, and of the trial, and the respondent, who resided there, claimed to be domiciled there also, by virtue of the alleged marriage to petitioner.

The question, however, of what laws were to be regarded in deciding upon the validity of the ceremony of marriage is quite a different one from that of jurisdiction, and, with respect, it cannot be conceded that the reasoning by which Murphy, J., reached his conclusion was altogether sound.

He quoted *Brook* v. *Brook*, 9 H.L.C. 193, that the essential validity of a marriage is governed by the law of the domicile, not the law of the place of marriage, as authority for his holding that as the petitioner was domiciled in B.C., the Courts there could construe and apply the law of Oregon as to divorce, but that was a case in which the capacity of a person domiciled in England to contract a marriage outside of it was in question, and here there was no question whatever as to the capacity of the petitioner, the party domiciled in B.C., but of the respondent, whose domicile was in the State of Idaho at the date of the ceremony with petitioner. The question before Murphy, J., was not, was the petitioner capable of marriage, for that was undeniable, but was the respondent capable, and the answer to that depended upon the other question, had she been validly divorced according to the law of her domicile?

"The validity of a divorce depends upon the *lex domicilii*." (Eversley, 3rd ed., 482). "The domicile for the time being of the married pair when the question of divorce arises affords the only true test of jurisdiction to dissolve their marriage, and such a divorce will be recognised by the English Courts even if granted for a cause which would not have been sufficient in England." (*Bater* v. *Bater*, [1906], P.D. 209.) "The domicile of a married woman is the same as that of her husband." (Brown and Watts on Divorce, 8th ed., 7). The domicile of the respondent's husband at the time of her divorce was in Idaho. If the

divorce was legal there, it was legal in British Columbia. In that case, she had capacity to marry, according to English law, and the marriage in the State of Washington, if valid as to form, was valid in British Columbia, and petitioner became her husband.

Murphy, J., regarded as irrelevant, the question as to the law in the States of Washington and Oregon, except as to the statute of Oregon requiring residence by a petitioner, because of his reading of the decision in *Brook* v. *Brook* (*supra*), and gave no consideration whatever as to the law of Idaho. But this was the real question, was the Oregon divorce of a woman domiciled in Idaho legal by the laws of Idaho? That was, of course, a question of fact within the authority of Murphy, J., to decide, but no evidence concerning it appears to have been given at the trial, and therefore, upon appeal, this case should be sent back for a new trial. It is not unlikely that, according to the laws of Idaho, the divorce granted in Oregon, in this case, would be null and void, on the facts as found by Murphy, J., but Idaho Courts might consider that the apparent defect in the jurisdiction of the Oregon Courts, on the ground of non-residence for the statutory period, was cured by the appearance and submission of the husband, and the law of Idaho was a question of fact as to which evidence should have been given and a finding made by Murphy, J. To illustrate that this was the real point—suppose that by the law of Idaho, the Oregon divorce was good, the husband would be free to marry, and the wife also; *per contra*, if the law of Idaho were otherwise. Suppose Idaho refused to recognize the Oregon divorce of parties domiciled in Idaho, the husband would still be bound in Idaho, and the wife also, but according to the judgment of Murphy, J., the wife would be free in B.C. to marry again, if by the laws of Oregon the divorce were good. The question as to the validity of the divorce according to the laws of the State of Washington, where the form of marriage between petitioner and respondent was gone through, was of course unimportant, though much argued, apparently, by counsel for respondent, for the validity of the form gone through was not questioned. A foreign marriage, good as to form, will be recognised in our Courts, if not prohibited by consanguinity, affinity or previous marriage. (Eversley, 3rd ed., 105.)

DOMICILE.

In all actions involving the validity of foreign divorce an absolutely vital question is, what was the domicile of the husband at the time it was procured? No divorce is entitled to recognition in another State unless the Court had jurisdiction by reason of the *bonâ fide* and permanent domicile: *LeM.* v. *LeM.*, [1895] A.C. 531; *Re Sinclair*, [1897] A.C. 469.

"The domicile . . . when the question of divorce arises affords the only true test of jurisdiction to dissolve their marriage (*Bater* v. *Bater*, [1906], P. 209; *Ramos* v. *Ramos*, 27 T.L.R. 515).

"The English Courts will recognise as valid the decision of a competent foreign Christian tribunal dissolving the marriage of a domiciled native in the country where such tribunal has jurisdiction. (*Harvey* v. *Farnie* (1880), 5 P. 153 (1882), 8 A.C. 43).

It is recognised in *Bater* v. *Bater* (*supra*), at p. 217, that the question of nationality is of no importance. (See Eversley on Domestic Relations, 3rd ed., 483.)

The decree of a foreign Court, which has jurisdiction, can undo an English marriage on grounds short of those essential in England. *Bater* v. *Bater*, *supra*; *Harvey* v. *Farnie*, *supra*; *LeMesurier* v. *LeMesurier*, *supra*.

Three important considerations present themselves in each action involving domicile: (1) what is domicile; (2) how is it acquired; (3) how lost.

As to (1):— WHAT IS IT?

Domicile is residence at a particular place with intention to remain there permanently, or indefinitely. (Law of Domicile: Phillimore.) Residence in the place which is in fact the permanent home. (Conflict of Laws: Dicey). Habitation in a place with intent to remain there forever, unless some circumstance should occur to alter that intention. (*Whicker* v. *Hume* and others (1858), 7 H.L.C. 124.) Domicile is a combination of residence and an intention of remaining for an indefinite time. (*Lord* v. *Colvin*, 28 L.J. Ch. 366; Eversley, 3rd ed., 472.)

Domicile is sub-divided into three classes:—(a) of origin, (b) ascribed by law, (c) of choice.

(a) A person's domicile of origin is that which the father had at the birth of the person; not necessarily the place of birth, for the father may have been domiciled elsewhere. If the father be dead, the child takes the domicile of the mother. During minority, the minor's domicile is that of the parents. The last domicile of a minor continues after minority ceases until changed by his own act. No person can be at any time without domicile, or have more than one. If the domicile ascribed by law (that of the parents), or acquired by choice, be abandoned, the domicile of origin revives. It does so easily. (*Bempde* v. *Johnstone*, 3 Ves. 198; *Hodgson* v. *De Beauchesne*, 12 Moo. P.C. 285.) There is a presumption of law against an intention to abandon the domicile of origin (*Ibid*).

(b) Domicile is ascribed by law for married women and minors.

As to (2): HOW ACQUIRED.

(c) A domicile of choice is acquired by an independent person by residence in a place with an intention of remaining permanently, or for an indefinite time. There must be a fixed and settled intention of abandoning the domicile of origin. Mere length of residence abroad (and employment there) is not sufficient evidence of this intention (*Winans* v. *A. G.*, [1904] A.C. 287; *Huntley* v. *Gaskell*, [1906] A.C. 56). It is an inference of law, derived from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. (*Udney* v. *Udney*, L.R. 1 Sc. App. 441.)

In *C.* v. *C.* (*post*, p. 151), Middleton, J., said:—"Looked at in the light of all the events, there is much to lead to the conclusion that (the husband) never in fact changed his domicile of origin. He seems to have been a rolling stone, moving in the direction of least resistance, and making his abode where it was easiest to obtain a living, but this is not the way in which the matter (of domicile) should be approached." It is submitted that this was the very way to approach the matter, and that the conclusion, subsequently reached, that the husband acquired a domicile, was absolutely inconsistent with the doubt that he had abandoned his domicile of origin. No person can have two domiciles (Dicey), so that if that of origin had not been aban-

doned, one of choice was not acquired. The presumption is against abandonment of the domicile of origin, and the existence of a doubt about it should be conclusive against it. To say that a man is a "rolling stone" is equivalent to saying he had not an acquired domicile. How can "a rolling stone" have a permanent home?

Domicile is an inference of law, but intention a question of fact—the difficulty of deciding as to whether a domicile of choice has been acquired as in shewing the intention to remain where residence is taken up, or of relinquishing a domicile in existence. (*Re Stern*, 28 L.J. Ex. 22.) The onus of proving an intention to abandon a domicile of origin rests on those who assert it (*Briggs* v. *Briggs* (1880), 5 P.D. at p. 164; *Jones* v. *City of St. John*, (1899) 30 Can. S.C.R. 122; *Seifert* v. *Seifert*, 23 D.L.R. at p. 445; *Huntley* v. *Gaskell*, [1906] A.C. 56; *Winans* v. *A. G.* (*supra.*)

The question of intention being one of fact, it will be profitable to consider what acts have and have not been regarded as proving intention. In *Bater* v. *Bater*, *supra*, intention to acquire a permanent home in New York was based upon evidence that a husband had left England without an intent of returning, had rented and lived in a house in New York, and had become naturalised there. In *LeMesurier* v. *LeMesurier*, *supra*, it was held that a "permanent" residence was necessary to prove intention, and that *bonâ fide* residence alone did not give "the degree of permanence required." *Firebrace* v. *Firebrace*, 4 P.D. 63, may be usefully perused for its collection of facts regarded as of value in deciding as to intention.

English Courts were formerly inclined to rule that an English marriage was indissoluble by a foreign Court of the domicile. (*Lolley's* case, Russ. & Ry. 237; see arg. in *Harvey* v. *Farnie* (*supra.*) This rule has finally given place to the broader one, that "the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage" (*LeMesurier* v. *LeMesurier*, (*supra*); *Rex* v. *Woods*, 6 O.L.R. 41, 7 Can. Cr. Cas. 226).

Nevertheless, it is important to note that the prevailing reason for this changeof view was that "the differences of married people ought to be adjusted in accordance with the laws of the community to which they *belong* (by domicile)" (*Bater* v. *Bater*, *supra*). In ascertaining what is the true domicile, English Courts construe that word in its English sense. In many States in America, residence and domicile are not clearly distinguished (*Bater* v. *Bater*, *supra*, at p. 214). In some States "residence" is by statute made sufficient to found jurisdiction to grant divorce. Such a divorce would not, it is suggested, be recognised in any English Court if the domicile were shewn to be elsewhere when the divorce action was instituted, unless, indeed, it was in a country which would recognise the divorce (*Armitage* v. *A. G.*, *supra*). Certainly it would not be recognised if the domicile were in any English jurisdiction.

In *Rex* v. *Wood*, 25 O.L.R. 63, 19 Can. Cr. Cas. 15, there was a prosecution for non-support of wife. The defence was a divorce obtained in the Ohio Courts. The defendant was married in Ontario, in 1903, and the divorce procured in 1910. The jury had found that the defendant did not acquire an actual and permanent domicile in Ohio. In the judgment of the

Court, delivered by Meredith, J.A., it is said: "There is nothing, in the decree or otherwise, to shew that the question of domicile was considered in the Ohio Court, or that the jurisdiction of that Court, to pronounce such decree, at all depended upon domicile; and, if there had been, I am far from thinking that such facts would have precluded the Courts of this province from inquiry into the fact, or from dealing with the rights of the parties upon their own findings respecting it.'

It follows from the jealous care which English Courts have always shewn for the parties to English marriages, from the slow growth of the rule which now recognizes dissolution by foreign Courts of such marriages, from the insistence that "domicile" shall not be confounded with "residence," but shall be construed in the English sense, and that it shall be "real," "*bonâ fide*," "permanent" and "existing" when the proceedings for divorce are taken, that the burden of proof upon one who asserts the validity of a foreign divorce is a heavy one, and that if doubt exists, it should be resolved against the divorce. *Wilson* v. *Wilson*, 2 P. 435; *Bell* v. *Kennedy*, 1 Sc. App. 307; *Wadsworth* v. *McCord*, 12 Can. S.C.R. 469; *Manning* v. *Manning*, L.R. 2 P. 223.

Residence alone is not sufficient for domicile. There must be the necessary *animus manendi*. The change of domicile must be with an intention to make the place the main and permanent establishment *sine animo revertendi*. *Hadlane* v. *Eckford*, L.R. 8 Eq. 631; *Hoskins* v. *Matthews*, 8 De G. M. & G. 13; *Atty.-Gen.* v. *Dunn*, 6 M. & W. 511; *Re Capdeville*, 2 H. & G. 985; *O'Meara* v. *O'Meara*, 49 Que. S.C. 334; *Adams* v. *Adams*, 11 W.L.R. 358.

Neither length of time nor intention, taken separately, will do to establish a change of domicile, although the two taken together may work a change. The residence of a travelling salesman for the period of one year and a month, coupled with his affidavit of his intention as to permanent residence, does not establish a sufficient change of domicile for jurisdictional purposes in a divorce proceeding. *Walcott* v. *Walcott* (1915), 23 D.L.R. 261, 48 N.S.R. 522.

In *Adams* v. *Adams*, 14 B.C.R. 301, the petitioner, in 1895, when aged about 19, came from Ontario to British Columbia, where he spent some 3 or 4 years in different places. In 1899 he married, and at once removed to the Northwest Territories. In 1907, satisfied of his wife's infidelity, he made her leave for New York. In autumn, 1908, he returned to Vancouver, and took a position in a mercantile house. In January, 1909, he filed a petition for divorce, alleging domicile in British Columbia. It was held that no domicile was acquired to enable him to sue for divorce.

Retaining property in the domicile of origin, or attending and managing the paternal estate therein, shews an intention not to abandon it. In *Lord* v. *Colvin*, 4 Drew 366, a person born in Scotland, resided many years in India, returned to Scotland and lived in his paternal estate for 6 years; then resided in France for 6 years. He was said to have preferred France, and to have been annoyed by his neighbours in Scotland. He had handsomely furnished apartments in Paris. He never let his paternal estate, and attended to the management of it. It was held that he had not abandoned his Scotch domicile. See also *Maxwell* v. *M'Clure*, 3 Macq. H.L. 852.

As to (3): REVERSION TO DOMICILE OF ORIGIN.

Slighter evidence is required that a man intends to abandon an acquired domicile than that he intends to abandon a domicile of origin. *Lord* v. *Colvin*, 28 L.J. Ch. 361. This is doubtless because the Courts of the domicile of origin have what may be called a natural jurisdiction, and inasmuch as they unwillingly concede loss of jurisdiction where a party has acquired a foreign domicile, they gladly assert a return to the domicile of origin, the burden of proof to establish an acquired foreign domicile disappears when an abandonment of it, and a return "home," is proposed.

Akin to this rule, and the reason for it, is the doctrine recently established, that "the rule that 'the domicile of the husband governs the jurisdiction in suits for dissolution of marriage,' may be departed from in proper circumstances," *i.e.*, where nullity has already been declared in the Courts of the domicile. *Ogden* v. *Ogden* [1908] P.D. at p. 82-3; *Stathatos* v. *Stathatos*, [1913] P.D. 46; *Montaigu* v. *Montaigu*, [1913] P.D. 154.

Province of Alberta.

SUPREME COURT.

Stuart, Beck and McCarthy, JJ.] [33 D.L.R. 1.

GRACE v. KUEBLER.

Vendor and purchaser—Payment of purchase money—Assignment by vendor—Notice—Caveat.

If notice of an assignment by the vendor of his rights under an agreement of sale of land has not been given to the purchaser, payment to the vendor of the balance due under the agreement will entitle the purchaser to a transfer of the land; a caveat filed in the Land Titles office after the assignment is not notice, as such, to the purchaser, who is not bound to search the register before making payment.

Grace v. *Kuebler*, 28 D.L.R. 753, affirmed.

A. H. Clarke, K.C., for plaintiff; *E. A. Dunbar*, for defendant.

ANNOTATION ON ABOVE CASE FROM D.L.R.

The very just and convenient rule of law laid down in this action might have been reached by reasoning less open to criticism, perhaps, than that which was based upon decisions upon the Ontario Registry Act.

The defendants in this action were purchasers under an agreement for the sale of land. A balance due the vendor had been assigned to the plaintiff,

and a transfer of the land to him, subject to the agreement of sale, had been executed, but not registered. He had filed a caveat in the Land Titles Office, setting forth that he was interested under a transfer, and subsequently the defendants, who had no actual notice of the assignment, paid to the vendor the balance due on the land. The plaintiff (assignee) sued the defendants (purchasers) for the said balance, and the defendants counter-claimed for a transfer, which was ordered. The real question at issue was, did the caveat constitute notice to the defendants of the assignment to the plaintiff?

The Land Titles Act makes this provision for a caveat: "Any person claiming to be interested . . under any instrument of transfer . . in any land, mortgage or encumbrance, may cause to be filed a caveat in form 'W' . . So long as any caveat remains in force the registrar shall not register an instrument purporting to affect the land, mortgage or encumbrance."

It will be noticed that no provision is made by the Act that a caveat shall, as such, be "notice" to anybody for any purpose, and it is maintainable that it is not even constructive notice to a person subsequently acquiring an interest in land, as registration under the Ontario Registry Act would be. Notice or no notice may be a question of fact only.

Sec. 41 of the Land Titles Act says: "After a certificate of title has been granted for any land, no instrument until registered under this Act shall be effectual to pass any estate or interest in any land (except a leasehold for 3 years or less) or render any such land liable as security for the payment of money." Therefore the parties in this action came before the Court in effect as persons claiming adversely, the defendants for a transfer and registration, the plaintiff to be paid before transfer or registration the balance due under the agreement for sale at the date of its assignment. As against each other they had equitable rights, and both being innocent, the only question was, which had the better equity?

The defendants could say to the assignee, "the moment there is a valid contract for the sale of land, the vendor becomes in equity a trustee for the purchaser (*Shaw* v. *Foster*, L.R. 5 E. & I. App. 321; *Raffety* v. *Schofield*, [1897] 1 Ch. 937), and upon completion of the payments is bound to convey the legal title (*Baldwin* v. *Belcher*, 1 Jo. & Lat. 26). When you took an assignment from the vendor with notice of the previous bargain and sale, you assumed the position of our trustee (*Taylor* v. *Stibbert* (1794), 2 Ves. Jr. 437), and hold the transfer for us. As assignee of the vendor's lien for an unpaid balance of purchase money, you have no claim against us or the land, for the money has been paid to the vendor, and we had not the notice you were bound to give, if you wished to bind us (*London & County Bank* v. *Ratcliffe* (1881), 6 App. Cas. 722, and see *Niola* v. *Bell*, 27 Vict. L.R. 82; *Queensland Trustees* v. *Registrar of Titles*, 5 Q.L.J. 46, and *Peck* v. *Sun Life Ins. Co.*, 11 B.C.R. 215).

Against this argument what had the plaintiff to offer except the suggestion that the caveat he had filed constituted notice to the defendants that he had acquired a right to the balance then unpaid, and even as to that he would have to admit that if anything had been paid between the date of the assignment and the filing of the caveat, he had no claim for it.

The Land Titles Act (sec. 97), says that registration of a caveat shall have the same effect, as to priority, as registration of the instrument under which the caveator claims. But suppose the plaintiff had filed his transfer from the vendor, would not a Court have been bound to decree, under the circumstances, that he held the land as trustee for the defendants, and was bound to transfer to them? McCarthy, J., says that had the plaintiff registered his title, he could not have been deprived of it except, under sec. 114 of the Act, for fraud, and the plaintiff had not been guilty of fraud. But, aside from the point that registration by the plaintiff with intent to hold the land as his own would have been fraud (*McDonald* v. *Leadley*, 20 D.L.R. 157), the Court would have power to order the plaintiff as trustee for the defendants to make a transfer to them, and action under sec. 114 would not be necessary (*Tucker* v. *Armour*, 6 Terr. L.R. 388).

McCarthy, J., referring to the fact that the land was subject to certain mortgages, which the purchasers had agreed to assume, argued that a duty was thereby cast upon the purchasers, to search the registry, and a search would have disclosed to them that the plaintiff had filed a caveat, and upon the assumed existence of such a duty he based the contention that the caveat was notice to the defendants. The statement of the argument seems to answer it; if it were good, notice or no notice by caveat would depend upon the existence of circumstances creating a duty upon the part of the person it was supposed to notify. The alleged duty of the defendants was to themselves, not to the plaintiff; if they trusted the vendor implicitly, it did not lie in the mouth of his assignee to reproach them. If he could not say, you trusted me, it was your duty not to do so, therefore by paying me imprudently, you have lost your money, how could his assignee say so, charged, as he was, with the same equities and having, as against the purchasers, no right of his own prior to notice to them of the assignment?

Discussing the Ontario cases referred to by the other Judges, as settling that the Registry Act of Ontario did not make registration of an assignment of a mortgage notice to the mortgagor, McCarthy, J., said, that—they were based upon the words of the statute, and that "the registered title is in a mortgagor, whereas a purchaser has no registered title," and therefore should search the register. The fact is, of course, that the rule that "an assignment will not bind the person liable until he has received notice" (Anson on Contracts 8th ed. 293; *Stocks* v. *Dobson*, 4 De G. M. & G. 11, 15, (43 E.R. 411), was established where and when there were no Registry Acts. The cited Ontario cases merely (1) decided that a mortgagee discharging a first mortgage was not affected with notice of a second mortgage (*Trust & Loan Co.* v. *Shaw*, 16 Gr. 448), and (2) suggested that a mortgagor was, perhaps, not affected with notice of an assignment of a mortgage by the registration thereof (*Gilleland* v. *Wadsworth*, 1 A.R. (Ont.) 82). These decisions, it is true, rested upon the words of the Registry Act, but in this sense only, that but for the words thereof there could have been no doubt whatever that registration was not notice.

The suggestion by Moss, J.A., was not essential to the judgment, and has, therefore, no binding force.

Stuart, J., referring, apparently, to the fact that the vendor had executed a transfer to the assignee, expressed the opinion that it was reprehensible

for vendors so placed to so "transfer the land," though quite proper to assign the debt due, for, said he, the vendor thereby puts it out of his power to fulfil his contract, and, perhaps, the purchaser has entered into the contract on the strength of his faith in the personality of the vendor, and the assignee may be a person more difficult to obtain a title from. Later on he said, "the vendor has no right to convey the legal estate to the assignee (*i.e.*, no power, in equity), and he proceeded to question whether any interest in the land would be conveyed by a (registered) transfer made under such circumstances, upon the ground, apparently, that the vendor had in equity parted with the title by the agreement to sell. We venture to think that this opinion and the arguments upon which it is based will not be assented to generally. As already pointed out, the agreement of sale did not confer upon the purchaser any interest in the land under the Land Titles Act (sec. 47). Aside from the Act, the agreement conferred only an equitable interest (or claim?). Either under or apart from the Act, the vendor could legally and effectually transfer the land to any person; to a stranger for his own benefit, to one with notice of the agreement for the benefit of the trustee and for his own protection. We have not hitherto seen it suggested that after an agreement for sale, the land could not effectually be transferred to a third party. On the contrary, the practice has been general (*Brown* v. *London Necropolis Co.*, 6 W.R. 188), and its results clearly defined—that an assignee without notice takes a complete title, and one with notice becomes a trustee (Fry, Specific Performance, 4th ed., p. 98). As to the moral right, that would of course depend in each case upon the question of fact whether the vendor was conscious that the purchaser was damaged by the assignment; and generally whether if he were, it was not a risk he voluntarily assumed. A purchaser who knows that a vendor may legally assign land cannot reasonably complain if an assignment be made which he might have prevented, by a caveat or otherwise. Besides, it by no means follows as a fact in general practice that a transfer can be obtained from a vendor more conveniently than from an assignee with notice. The purchaser has in fact neither legal nor moral right to count upon no change being made in the habitat of the vendor before he desires to obtain his transfer—at least no such right as the law should aim to preserve. The vendor may remove to a foreign land, or may die, and nobody would suggest that he should refrain from death or removal because the purchaser would thereby be inconvenienced. The purchaser under an agreement of sale has a right or interest in the land which he can protect by a caveat; the vendor is under a personal liability also; if the purchaser chooses to depend upon the latter, the personal liability remains even after the vendor has assigned the contract, unless the purchaser has assented to the assignment (*British Waggon Co.* v. *Lea*, 5 Q.B.D. 149). What moral reason can there be why a vendor should not assign his rights?

Finally, sec. 101 of the Land Titles Act, providing that notwithstanding anything to the contrary in the contract an agreement for the sale of land shall be assignable, seems to set the seal of the statute law upon trading in land agreements, and renders rather inexplicable the language of Stuart, J., in this connection.

The decision under discussion tends to convenience. The mortgagor or purchaser who had to search the registry every time he made a partial

payment would be very unhappily placed. Partial payments far outnumber all others, and all are protected to some extent by the simple equitable rule that an assignee must notify those affected by the assignment; if the contrary rule prevailed, the inconvenience and uncertainty would seriously hamper the sale of land. Those who do not care to depend upon this rule alone, can register their agreements, or file caveats, as the law may permit, unless the agreements stipulate otherwise. In the case under discussion the plaintiff was the victim of his own negligence.

War Notes.

LAWYERS AT THE FRONT.

The following is a list of those members of the profession who have been reported killed in action, died of wounds, or died in military service, not as yet given in this journal. (See pp. 242, 304, 1915: pp. 200, 239, 328, 405, 1916: and p. 119, 1917):—

Harold Staples Brewster, Lieut. R.F.C., Brantford. Second Year Student. Killed December, 1916.

Samuel Leslie Young, Lieut., Eadengrove. First Year Student. Killed 11th November, 1916.

Harold Gladstone Murray, Lieut. C.F.A., Fort Frances. First Year Student. Killed December, 1916.

Henry Stuart Hayes, Sergeant 26th Battery, C.F.A., Trenton. First Year Student. Killed December, 1916.

William Vincent Carey, Lieut. 19th Battalion, Hamilton. Barrister. Killed 30th September, 1916.

Stewart Cowan, Lieut. 24th Battalion, Sarnia. Barrister. Killed October 1st, 1916.

Walter Gerald Lumsden, Lieut. 38th Battalion, Hamilton. Barrister. Killed 18th November, 1916.

Guy Pierce Dunstan, Lieut. Imperial Army, Toronto. First Year Student. Killed 1st July, 1916.

Duncan Donald McLeod, Captain 49th Battalion, Kitchener. Barrister. Died of wounds, June 8th, 1916.

Maurice Fisken Wilkes, Lieut. 19th Battalion, Brantford. Second Year Student. Killed 15th September, 1916.

Fred Holmes Hopkins, Lieut.-Col. 17th Battalion, Lindsay. Barrister. Accidentally killed January, 1916.

David Wesley Jamieson, Major, Toronto. Barrister. Died 17th July, 1916.

Geoffrey Lynch-Staunton, Lieut. 13th Hussars, B.E.F., Hamilton. First Year Student. Killed in Mesopotamia, 5th March, 1917.

Ernest Reece Kappele, Lieut. 75th Battalion, Toronto. Second Year Student. Killed April, 1917.
Cecil Johnstone Bovaird, Corporal, 82nd Howitzer Battery, Toronto. Barrister. Died of wounds, May, 1917.
Duncan Steuart Storey, Major 162nd Battalion, Midland. Barrister. Died of cancer 25th March, 1917.
George Taylor Denison, Lieut.-Col. Can. Reserve Cyclists, Toronto. Barrister. Killed May, 1917.

The Government has at last decided to do what should have been done long ago, preferably when war was declared, namely: to bring into force the Canada Militia Act with probably some desirable changes. It is also stated that legislation will be introduced to prevent those liable to compulsory service from leaving the country. This would have been of some use a year ago, but now it is like "locking a stable door after the horses are stolen."

We notice in the list of prohibited publications sent to us by the Chief Censor for Canada that one of the prohibited books is entitled "Defeat: the truth about the betrayal of Britain." One can only express surprise that this small volume, an eminently sensible and appropriate publication, should be put on the black list. It is compiled by two of the most loyal and well-informed citizens of the Empire. It has been issued by the hundred thousand in England, and it is said that a large edition is being printed for distribution in the United States. If it is good for English and American readers it cannot be very bad for Canada. The public will insist upon this ban being removed. The objection to it is said to be that it advocates a "dry canteen" in England and commends the action of the Province of Ontario in its recent temperance legislation, and claims that in some way it would injure recruiting. This is absurd, at the present time, for voluntary recruiting has ceased to be.

The war drags on and new and difficult problems present themselves as the weary days go by. As to this we are not surprised to hear the question asked: how can a professedly Christian nation expect victory when there is no sorrow for and no turning away from national sins and a strange indifference to the religious point of view? Is not the statement in the Old Book true to-day: "Behold, the Lord cometh out of His place to punish the inhabitants of the earth for their iniquity"? These are days for sober thought for all of us, as well as days of bitter sorrow for many of us, and increasingly so as the casualty lists come in.