CASE AND COMMENT

ESCHEAT AND BONA VACANTIA.—The Supreme Court of Canada in the case of *Attorney-General of Canada and Attorney-General of Alberta*[1] has upheld the decision of the Appellate Division in Alberta to the effect that the right to *bona vacantia* arising in that province is vested in the Crown in right of the Province. The decision of the Appellate Division was discussed in the CANADIAN BAR REVIEW last year.[2]

The Supreme Court, however, overturns the decision of the Alberta Court so far as regards escheat of land which was patented after the date of the creation of the province, the result being that such land, in common with land patented before the province was constituted, falls to the Crown in right of the Dominion when there are no heirs.

It was pointed out in my previous note that this case raised another (and a very interesting) question, viz., whether The Ultimate Heir Act of Alberta, providing that the University of that province should be the ultimate heir and next of kin of intestates dying without leaving other heirs or next of kin, was *intra vires*.

In so far as land is concerned, the Supreme Court of Canada holds this legislation to be beyond the powers of the Provincial Legislature. The Court took the view that this legislation was not truly an exercise of the provincial legislative authority in relation to the law of inheritance, but was an attempt to appropriate to a provincial institution land which vested in the Crown in right of the Dominion from the moment of the death of the owner.

Presumably there can be no objection to The Ultimate Heir Act in its operation on personal property.

A. H.

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RECIPROCAL ENFORCEMENT OF JUDGMENTS.—A statute of Alberta dealing with this subject came up for consideration in *Fraser* v. *Wainwright Dome Oil Co. Ltd.*,[1] where the defendant asked for security for costs, the plaintiff residing in Saskatchewan, which grants reciprocal rights. The point had previously arisen in two

[1] [1927] S.C.R. 136; [1927] 2 D.L.R. 194.
[2] 4 C.B. Rev. 407.
[1] [1927] 2 D.L.R. 314.

cases, *St. John* v. *Rath et al.*,[2] and *Henry* v. *Henry*,[3] and had been differently decided in Alberta and British Columbia respectively. In the *Fraser* case, Walsh, J., ordered security, following the rules of court where he said:—

"If because of this reciprocal legislation it is thought that the reason upon which our practice was founded no longer exists as against plaintiffs living within a jurisdiction which enjoys reciprocity in this respect with Alberta, the rules should be amended accordingly."

The matter was dealt with in The Judgments Extension Act of 1868 (Imp.) by a provision that security for costs should not be required unless the court or a judge made an order on special grounds.

The legislation in question in these cases has something of a history. The Act of 1868 was passed to simplify procedure for enforcing in one part of the United Kingdom judgments obtained in other parts. A proposal was made at the Colonial Conference of 1887 to apply the principle to the Empire as a whole, and the matter was discussed for thirty years without much progress being made. At the Imperial Conference of 1911, however, it came up again and was made the subject of a resolution in the following terms:

"That the Imperial Government should consider in concert with the Dominion Governments whether, and to what extent, and under what conditions, it is practicable and desirable to make mutual arrangements with a view to the enforcement in one part of the Empire of judgments or orders of the courts of justice in another part, including judgments or orders for the enforcement of arbitration awards."

In consequence of this resolution a Bill was drawn in 1916 and submitted to the overseas Dominions with a request for an expression of their views.

Before anything further had been done, a number of eminent persons, representing the London Chamber of Commerce, the London Court of Arbitration, the London Corn Trade Association and other important interests, presented a petition to the Lord Chancellor in 1918 asking for various legal reforms; and, among others, the enactment of appropriate legislation in conformity with the resolution above mentioned. In response to this petition the Lord Chancellor appointed a Committee, with Lord Sumner as its Chairman, which, after inquiring into the question from all points of view, presented an elaborate report wherein they laid down the lines that legislation should, in their opinion, follow. Their recommendations were embodied in Part II of The Administration of Justice Act, 1920, but, although the Imperial authorities have urged that similar laws should

[2](1926) 3 W.W.R. 726.
[3](1926) 3 W.W.R. 250.

be adopted in the overseas Dominions, only one province of Canada has so far responded.

The desire of the British Government to have legislation of this kind placed upon the statute books of the Dominions was brought before the Commissioners on Uniformity of Legislation in Canada at an early date, but those gentlemen decided that the scope of their duties lay rather in the preparation of a measure confined to the provinces of the Dominion. A model Bill was accordingly prepared by them, and finally approved in 1924, which has been adopted in most of the provinces. The uniform Act is the one which came before the court in the cases above referred to, but it requires to be supplemented by a statute limiting the defences available in actions upon foreign judgments. Under section 4(g) no judgment is to be registered if it is shown to the registering court that the judgment debtor would have a good defence if an action were brought on the original judgment, and section 10 preserves to the judgment creditor the right to bring an action for the amount of his judgment instead of proceeding under the reciprocal Act.

In view of these and other similar provisions the matter was referred to the Ontario Commissioners with instructions to report on the law of the several provinces, and their report will be found at page 385 of the Proceedings of the Canadian Bar Association for 1925. "In Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island and Quebec, a common feature of the statutes or rules is that, as a general rule, subject to certain limitations, they permit a person who is sued upon a foreign judgment to set up defences which might have been set up to the original action." Obviously, as the report points out, the conference could not have intended, after having carefully defined, in clauses (a) to (f) of section 4, certain cases in which a judgment should not be ordered to be registered, to permit by clause (g) a judgment debtor to object in every case to the registration of the judgment on the ground that he would have a good defence to the original action.

In 1925, the conference requested the commissioners to ask their respective attorneys-general for instructions, and if it should appear that there was any likelihood of a general agreement the Ontario Commissioners were to prepare a draft Act. No further action was taken at the meeting of the conference in 1926, for want of time, so that the subject remains as committed in 1925.

It is to be hoped that a general agreement will be reached and a model Act prepared, for until this is done the Reciprocal Enforcement of Judgments Act will be shorn of much of its usefulness.

R. W. S.

BLASPHEMOUS LIBEL.—This is an offence which seldom comes before the courts either in Canada or in England, but which has lately attracted attention in both countries. Up to a recent date only two prosecutions are believed to have been held under the section of the Criminal Code dealing with it, namely *R.* v. *Pelletier*[1] and *R.* v. *Kinler et al.*[2] In March of this year, however, Ernest V. Sterry was prosecuted in Toronto for articles published in the 'Christian Enquirer' and was found guilty. As a result, no doubt, of this trial, a Bill was introduced into the House of Commons by a private member for the repeal of section 198 of the Code, but the bill had not got very far when Parliament prorogued. Sterry was sentenced on March 16th, and, by a strange coincidence, on that day the text was published of a Bill introduced in the British Parliament by Mr. George Lansbury, providing that no criminal proceedings should be instituted in any court against any person for schism, heresy, blasphemy, blasphemous libel or atheism.

The Code declares everyone guilty of an indictable offence and liable to one year's imprisonment who publishes a blasphemous libel, but it does not say what description of writing falls within that term. Whether any particular published matter is a blasphemous libel or not is a question of fact, but the statute goes on to provide that: "No one is guilty of a blasphemous libel for expressing in good faith and in decent language, or attempting to establish by arguments used in good faith and conveyed in decent language, any opinion whatever upon any religious subject."

This is, in fact, and long has been the law of England. In *Halsbury's Laws of England*,[3] blasphemy is defined as consisting in:

> "(1) Scoffingly or irreverently ridiculing or impugning the doctrines of the Christian faith; or (2) in uttering or publishing contumelious reproaches of Jesus Christ; or (3) in profane scoffing at the Holy Scriptures or exposing any part thereof to contempt or ridicule. It is not blasphemy with due gravity and propriety to contend that the Christian religion or any part of its doctrine, or the whole or any part of the Holy Scriptures, is untrue."

The modern view, substantially as above, was stated by Lord Coleridge in *R. v. Ramsay*,[4] and adopted by Lord Cozens-Hardy in the case of *In re Bowman, Secular Society Ltd.* v. *Bowman*,[5] his Lordship observing that:

[1](1900) 6 Revue Légale, N.S. 116.
[2](1925) 63 Que. S.C. 483.
[3]Vol. 9, p. 531.
[4]15 Cox C.C. 231.
[5](1915) 2 Ch. D. 447, at p. 462.

> "This is one of those subjects in which there have undoubtedly been great changes of opinion within the last 100 years, and I think within the last half-century. It is really a question of public policy, which varies from time to time. It is to my mind almost shocking to hold in the twentieth century that the publications of Positivists, and other schools of philosophers, who do not admit, and probably even deny, the existence of a God, are necessarily blasphemous. I think the older view must now be regarded as obsolete, and any decision to that effect ought no longer be followed."

The older view was that, Christianity being part of the law of the land, denial of its doctrines was an offence and should be punished, and it made no difference that the denial was couched in temperate language. Sir James Stephen, in his *History of the Criminal Law of England,* 1883 edition, reviewed the earlier cases and concluded that "they all proceed upon the plain principle that the public importance of the Christian religion is so great that no one is allowed to deny its truth." In criticism of Lord Coleridge's statement of the law in *R.* v. *Ramsay* (*supra*) he makes this remark:

> "To say that the crime lies in the manner and not in the matter appears to me to be an attempt to evade and explain away a law which has no doubt ceased to be in harmony with the temper of the times."

However, the law is now settled in the opposite sense, as we have seen, and it is not the heterodox opinion but the form of its expression which constitutes the offence.

In an essay on "The Theory of Persecution," published in 1882, Sir Frederick Pollock said:

> "The simple denial of cherished doctrines may shock a believer's religious feelings, but what we mean by blasphemy is language which denies with studious insult, or insults without caring to deny. Now it is a broad fact of human nature that, next to mens' own persons and families, their religion is the point where they are most easily touched; and it should seem that wanton offence on that point is no less fit to be punished by the law than attacks on personal honour and reputation."

Judge Coatsworth, addressing the jury in the *Sterry* case,[6] said: "We look upon the Bible as the basis of every good law in our country." Of course the judge did not mean that Christianity, or any other form of religion, is part of the constitution. Sir Matthew Hale spoke of Christianity as "parcel of the laws of England," but that it is so can no longer be affirmed, since, in the *Bowman* case, the Court of Appeal upheld a trust for the benefit of an association one of whose objects was: "(a) to promote, in such ways as may from time to time be determined, the principle that human conduct should be based upon natural knowledge and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action."

[6] The Judge's charge to the jury in this case is printed in full *ante* p. 362.

Sterry's offence was found to lie in the flippant tone with which he discussed sacred subjects, referring to "this touchy Jehovah" as "an irate old party," etc. Here we have the "offensive levity" of which Odgers speaks. John Morley, in his defiant youth, spelled God with a small "g," and a popular writer of the present day refers to the deity of the Old Testament as "Mr. G." Are these instances of blasphemous libel? Whether they are or not is a question of fact for the jury, and in such cases the jury will presumably decide in accordance with the prevailing sentiment of the comunity at the time.

R. W. S.

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SPECIFIC OR ASCERTAINED GOODS.—The case of *In re Waite* [1] is interesting for two reasons. In the first place it shows a wide divergence in the minds of common law and Chancery judges when dealing with what is essentially a mercantile point; and, secondly, the opinion of Lord Westbury in *Holroyd* v. *Marshall*,[2] may be cited in support of one side or the other according to which report, either House of Lords Cases or Law Journal, reference is made. The point in the case was whether, where there has been a contract of sale of an unappropriated portion of a specific bulk of goods, that is a contract of sale of specific or ascertained goods within the meaning of sec. 52 of the Sale of Goods Act, 1893. Under sec. 62 of that Act "specific goods" means "goods identified and agreed upon at the time a contract of sale is made." The learned County Court judge took the view that a contract for the sale of 500 tons of wheat out of a specific 1,000 tons of wheat was not a sale of specific or ascertained goods. Mr. Justice Astbury and Mr. Justice Lawrence were of opinion that although there was no appropriation, the goods had been indentified and agreed upon, and so an order for specific performance could be made under sect. 52. This view was apparently taken by Lord Justice Sargant, who considered that the agreement was for the sale of specific goods and amounted to an equitable assignment. The Master of the Rolls, and Lord Justice Atkin, however, agreed with the County Court judge that it was impossible to hold the 500 tons of wheat were specific or ascertained goods, and this clearly must be so, for the words "ascertained," "unascertained," and "specific" must have the same meanings in sects. 16, 17, 52, and 62 of the Act of 1893. The

[1] [1926] Ch. 962.
[2] 10 H.L.C. 191.

actual goods sold must be ascertainable at the time of the contract of sale, and how can this be said to be so when half the bulk of goods of like nature form the subject-matter of the contract? Selection and appropriation of the actual goods sold must take place before either the property passes or the remedy of specific performance is available for the buyer on a breach of the contract. In *Holroyd* v. *Marshall* (supra) Lord Westbury is reported to have said in 10 H.L.C., "but a contract to sell five hundred chests of the particular kind of tea which is now in my warehouse in *Gloucester*, is a contract relating to specific property, and which would be specifically performed." But in the report of the same case in 33 L.J. Ch. 196, that sentence is thus stated, "but a contract to sell the five hundred chests of a particular kind of tea which 'are now in my warehouse in Gloucester,' was a contract relating to specific property, and which would be specifically performed," and this certainly would not conflict with the view taken that now prevails.

F. E. H.

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CARRIER—CONSIGNEE—DELAY—DUTY TO NOTIFY SHIPPER.—
In the case of *Lownsborough* v. *Canadian National Railway Company*,[1] an interesting point was dealt with by the Second Appellate Division in its judgment delivered by the Honourable Mr. Justice Riddell, on the 3rd December, 1926.

A carload of turnips was shipped from Elora, Ontario on the 7th January, 1924, on a bill of lading to the order of the plaintiff at Worcester, Massachusetts, "notify W. H. Clodgett & Son at Worcester," Clodgett being a *lapsus calami* for Blodgett.

Upon arrival at Worcester the car was put on the Blodgett siding on the 12th January, and at the same time notice was sent to Blodgett to whom the turnips had been sold by the plaintiff's Boston agent. On the 17th January Blodgett looked at the turnips and found them to be frozen. He left the car until the 19th January and then rejected it. At the trial the plaintiff recovered on the ground that the defendants were negligent in allowing a car of perishable goods to stand so long on the track without any notice to the plaintiff to whose order it was consigned. Sec. 6 of the Bill of Lading provides that:—

"Goods not removed by the party entitled to receive them within forty-eight hours . . . after written notice has been sent . . .

[1](1926-27) 31 O.W.N. 211.

may be kept in car . . . subject to . . . the carrier's responsibility as warehouseman only."

It was held that the name of the party to be notified, Blodgett & Son, was as much part of the contract as the name of the consignee or destination. "Under the statutory contract the carrier became a warehouseman; and with that found it is not contended that the plaintiff can recover." The appeal therefore was allowed and the action dismissed.

A. MacM.

EDITOR'S NOTE-BOOK.

De Senectute.

That charming essayist Robert Lynd, who writes for the *New Statesman* every week over the initials Y.Y., announces in the last number that he has arrived at his forty-eighth birthday, and is at great pains to convince us that he is not feeling as old as he might. Thus our essayist moralizes:—"As I write, I, the wreck of my former self, am celebrating my birthday . . . I have abandoned hope of seeing the world made perfect in my own lifetime; but the belief in the perfectibility of man is probably an illusion and better discarded. On the whole, one does not feel as old at forty-eight as, when one was twenty, one expected to feel."

Really, Mr. Lynd should be told that no one can possibly become old at forty-eight. At least no lawyer could give voice to such an idea without committing a contempt of court. Think of those who mew their mighty youth on the Bench at nigh twice that tender age! For instance, there is the Honourable Oliver Wendell Holmes, one of the most distinguished Judges of the Supreme Court of the United States, who celebrated his eighty-sixth birthday on the 8th of March last, and is still exercising his office. In that great Court also Chief Justice Marshall, Mr. Justice Story and Mr. Justice Harlan each served for thirty-eight years; while Mr. Justice Brewer ran the full orb of forty years. In England, Lord Mansfield held office as Chief Justice of the King's Bench for thirty-two years, Lord Eldon was Lord Chancellor for twenty-five years, and both Baron Parke and Lord Blackburn exercised their judicial functions for a period of twenty-eight years. And men do not ascend the Bench as a rule until they are quite a bit older than Mr. Lynd now confesses himself to be.