CASE AND COMMENT

BANKRUPTCY—PUBLIC EXAMINATION OF DEBTOR—REFUSAL TO ANSWER INCRIMINATING QUESTIONS.—In the case of *In re Paget: Ex parte Official Receiver*.[1] The Court of Appeal in England (Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.), held that the object of a public examination under the Bankruptcy Act (1914), s. 15, ss. 8, was to obtain a full and complete examination and disclosure of facts relating to the bankruptcy, not only in the interests of the creditors of the debtor but also in those of the public. The debtor is therefore not entitled to refuse to answer a question put to him on the ground that the answer to it might incriminate him.

In the Canadian case of *Re Ginsberg*[2] it was held that:—

"Upon the examination, under sec. 38 of the Assignments and Preferences Act, R.S.O. 1914, ch. 134, of a person who has made an assignment for the benefit of creditors under the Act, he has no right to refuse to answer questions put to him, on the ground that his answers would tend to criminate him—the privilege to refuse to answer which formerly existed has been abrogated by legislative enactment, now contained in sec. 7 of the Ontario Evidence Act, R.S.O. 1914, ch. 76, and recognised by the Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 5 (2).

The contention that this privilege was part of the criminal law, and could not therefore be abrogated or restricted except by legislation of the Parliament of Canada, and that the provincial legislation which assumes to take it away is *ultra vires*, is not well-founded.

Chambers v. *Jaffray* (1906), 12 O.L.R. 377. approved.

The privilege is a civil right, and may be taken away by a Provincial legislature as to matters with respect to which it has authority to legislate, as it has to the matters dealt with by the Assignments and Preferences Act."

C. M.

* * *

WORKMEN'S COMPENSATION—INDUSTRIAL DISEASE—LEAD POISONING.—In *Blatchford* v. *Staddon and Founds*,[1] the House of Lords (Viscount Sumner, Lord Atkinson, Lord Wrenbury, Lord Blanesburgh and Lord Carson) reversed the Court of Appeal, which had followed *Dean* v *Rubian Art Pottery, Ltd.*,[2] in a case where a painter

[1] (1927) 1 W.N. 151.
[2] (1917) 40 O.L.R. 136.
[1] (1927) 63 L.J. (N.S) 447.
[2] (1914) 83 L.J.K.B. 799.

(appellant) claimed compensation from the respondents who are builders and decorators, in respect of disablement caused by the nature of his employment. The appellant, who was a painter by trade, had contracted lead poisoning before he entered the respondents' employment. He began such employment on October 23rd, 1924, and remained in it until December 12th, 1924, when he left owing to illness. He obtained a certificate from a surgeon on July 13th, 1925, that he was then suffering from lead poisoning. At the trial of the action before a County Court Judge, the Judge held that the appellant had failed to discharge the onus of proving that the disease had been brought to a head owing to his employment with the respondents. The Court of Appeal affirmed the judgment of the County Court Judge.

The House of Lords remitted the rehearing of the case to the County Court, to find the amount of compensation due. The Judges held, differing from the decision in *Dean* v. *Rubian Art Pottery, Ltd.*, (*supra*), that it was not necessary for the workman to prove, under sec. 8 of the Workmen's Compensation Act, 1906, that it was the employment with the last employer which in fact caused his disablement, but it was sufficient for him to prove that his work with his last employer during the twelve months immediately preceding his disablement was of the same nature and character as the work to which his disease was due. Lord Blanesburgh expressed the opinion that the *Dean* case ought to be definitely overruled.

NOTE:—Compare section 8 of the English Workmen's Compensation Act, 1906, with sec. 100 of the Ontario Workmen's Compensation Act, 1914. In *Dean* v. *Rubian Art Pottery Ltd.* (*supra*) Cozens-Hardy, M.R. said that section 8 of the English Act "is probably the most difficult and obscure section in this very exceptional Act."

C. M.

* * *

NEGLIGENCE—PERSONAL INJURIES SUSTAINED ON GOLF COURSE—DAMAGES.—A case—*Cleghorn* v. *Oldham*—of much interest to the golfing section of the Bar was tried before Mr. Justice Swift and a Common Jury in the English Court of King's Bench recently. At the moment of writing we have to depend upon a report of it appearing in the daily edition of *The Times*. The facts showed that the plaintiff was carrying the bag of another young woman who was playing a game of golf with the plaintiff's brother. At one of the tees this young woman undertook to instruct the plaintiff's brother how he should drive. In performing this officious act the player

accidently struck the plaintiff in the face with her club, as a result of which the plaintiff was knocked down and became unconscious. She was then taken from the links and was obliged to be placed under a doctor's care for a week at her home. Subsequently she returned to work, but was unable to continue in her employment as a clerk in the actuarial department of an insurance office, for some thirteen months. She sued for one hundred and fifty pounds damages and costs. The defendant denied negligence, and pleaded contributory negligence on the part of the plaintiff.

The questions left to the jury, with their answers, were:— (1) Was the defendant guilty of negligence which brought about the accident? Yes. (2) Was the plaintiff herself guilty of negligence? No. (3) Did the plaintiff by going on to the course as a spectator in the way she did take the risk of such an accident? No. (4) Damages, if any? £150.

His Lordship then reserved the case for legal argument.

We extract the following report of the argument, and the observations of the learned Trial Judge in giving judgment, from *The Times*:—

MR. CROOM-JOHNSON submitted that the question whether there was or was not a duty upon the defendant to take care in the particular circumstances was a question of law and not of fact. The plaintiff had placed herself on a golf course and the risk of such a blow as she received was to be expected. On that view of the case, whether the plaintiff consciously assented to the risk or not, she could not be heard to complain if, after going on to a dangerous place, she got hit.

I contend that here there was no duty on the defendant to give any warning.

MR. JUSTICE SWIFT—Is there any difference between negligence arising from the playing of games and negligence arising from any other transaction?

MR CROOM-JOHNSON—My answer to that would be that in a game persons submit to the course of excitement arising during the game and to the normal incidents thereof and, indeed, to everything except violence or unfairness.

There was no evidence of negligence on the part of the defendant to go to the jury.

MR JUSTICE SWIFT, in giving judgment, said that counsel for the defendant had sought to draw a distinction between accidents arising from the playing of games and accidents occurring in other transactions of life. He could not see that any such distinction existed. In playing games, as in other transactions of life, a person must abstain from doing what a reasonable person would not do, and if a jury came to the conclusion that a person had done something which a reasonable player in the circumstances would

not have done and if injury had resulted therefrom, that person was liable in an action for negligence.

Games might be, and were, the serious business of life to many people. It would be extraordinary to say that people could not recover for injuries sustained in the business of life, whether that was football, or motor-racing, or any other of those pursuits which were instinctively classed as games, but which everyone knew quite well were serious business transactions for the persons engaged therein.

He could well understand that many accidents might happen in the playing of games, as in other transactions of life, for which no one could be held responsible, and the person who sustained the injury had then to bear the brunt of it. But where it could be proved that the accident was due to the negligence of the person who was sued as defendant, there was no reason why that person should be excused merely because the transaction in which he had taken place was recreation rather than work.

It had been suggested here that the plaintiff voluntarily undertook the risk. He had been inclined before his attention had been directed to the matter to think that the question was one of fact for the jury, and accordingly he left to them the question: "Did the plaintiff by going on to the course as a spectator in the way she did take the risk of such an accident?" and they returned the answer "No." If, however, it were to be regarded as a question of law, he was equally of opinion that the plaintiff did not undertake the risk. A person who went on to a golf course, just as a person who crossed the street, took certain risks inherent to the place where he was. A ball might be driven without negligence and strike a spectator or player. A club might break without any fault on the part of the person using it, and someone might be injured by the flying head. But if negligence could never be brought home to anybody, an injured person could not recover. No authority had been cited for the proposition that a person ever took the risk of anybody being negligent unless there was an express agreement on proper facts to that effect.

There was here no ground for saying that the plaintiff voluntarily undertook the risk of an accident such as she met with. There was clearly evidence to go to the jury, and judgment for the plaintiff must be entered, in accordance with their verdict, for £150, and costs.

NOTE:—In the case of *Biskup* v. *Hoffman*[1] (the St. Louis Court of Appeals, Missouri) held that where a boy of 12 years of age, having one and a half years' experience as a caddy, was injured by a golf ball negligently driven by a guest of the defendant in whose service the plaintiff was acting as a caddy at the time of the accident, the plaintiff was entitled to recover damages because the defendant had not warned him of the danger to be incurred. The evidence showed that the defendant was aware that his guest was playing poorly, and that he had not informed his caddy of the fact. The accident occurred while the caddy was proceeding ahead towards another ball which had been driven by the defendant. The court affirmed the doctrine that the degree of care which the law would expect from a child of the caddy's age is only that which under like circumstances would reasonably be expected from one of it's years and intelligence. The court further held

[1] 287 S.W.R. 865.

that although the caddy was in the general service of the Golf Club, yet when he was transferred to the particular service of a player he became the servant of the player with all the attendant legal consequences of the new relation. Compare *Aimer* v. *Cushing Bros.*[2] where Lamont, J.A., discusses element of inexperience of employee as related to accident.

C. M.

* * *

PATENT FOR INVENTION—INFRINGEMENT—PLEA OF INVALIDITY.—The English Court of Appeal (Lord Hanworth, M.R., Atkin and Lawrence, L.JJ.) in the case of *Tecalemit Ld.* v. *Ex-A-Gun Ld.*[1] held that where the defendant in an action for the infringement of a patent for invention pleads invalidity of the patent on the ground of misrepresentations made in the course of the application for the patent, but omits to give any particular instance of such misrepresentations in his Particulars of Objections, he may be ordered to comply with Ord. XIX, r. 6, and give particulars on application made therefor. In the course of his judgment Atkin, L.J., said on the point of misrepresentations in the application for the patent:—

"It appears to me that they have not at the present moment any basis, nor have they given to the Plaintiffs any reason at all for a charge of fraud, and their allegation it appears to me is entirely hypothetical. I think further that the parties are not allowed to do this, in the present action or anywhere else—I think it is a matter of common morality and it is not a matter that is confined to the procedure of these Courts—a man is not justified in making a charge of fraud against anybody else unless he has some grounds for doing it, and unless there is something to his knowledge which justified him in making such a serious charge. Those at any rate are the principles upon which the Rules of Court have been drawn; and I think further that it is the duty of a defendant if he is going to make a charge of misrepresentation or fraud against the plaintiff to define what the representation was, and to give particulars of the misrepresentation, which means that he has to state in substance what the representations are, and in what respects those representations are misrepresentations, with dates; and he ought to state, as far as he can, how they were made, to whom they were made and by whom they were made. It does not seem to me to be a case which is met by saying: 'Well, you must know what the facts are and upon discovery I shall be able to give you proper materials.' That sometimes happens in these cases, I agree it is not entirely confined to such cases, but it generally happens where there is a fiduciary relation between the parties and the party charging fraud has a right to know what his agent or trustee, or the person in fiduciary relation to him has been doing in respect of the matters where fraud is alleged.

"This is not such a case at all. It appears to me that there is no justification at present for the Defendants to make charges of fraud, unless

[2] (1920) 55 D.L.R. 611.
[1] 44 R.P.C. 62 at p. 68.

they have got some ground upon which they make such a statement. Therefore, they must say what those grounds are and particularise them."

C. M.

* * *

MOTOR-CAR—ACCIDENT INSURANCE—ASSURED DRUNK WHEN DRIVING—MANSLAUGHTER—PUBLIC POLICY.—In the case of *James* v. *British General Insurance Co., Ltd.*,[1] Roche, J., held that a driver of a motor-car insured against third-party risks who, in driving the car while he was in a state of intoxication, had collided with a motor-cycle and thereby killed one man and injured another was nevertheless not precluded on grounds of public policy from recovering against the insurance company such damages as he was obliged to pay by reason of the collision. The plaintiff had been convicted at the Assizes of manslaughter for the death of one occupant of the motor-cycle and had to pay damages for injury to the other. In connection with the point raised as to public policy Roche, J., said:—

"That was a question of very general importance, because if the contention of the defendants was right it cut at the root of a very large number of motor insurances. He could see no half-way house. The principle, if applicable at all, was applicable to all persons driving to the public danger. It would extend, moreover, beyond motor-car insurance. It would extend to workmen's compensation insurance in cases where workmen were injured by accidents caused by breaches of the Factory Acts . . . . . The doctrine of public policy should not be carried a step further than was necessary and Courts were very reluctant to extend it."

The learned Judge thought that the question had been concluded by the decision of Mr. Justice Bailhache in *Tinline* v. *White Cross Insurance Company*.[2] In that case it had been held that "the plaintiff could recover an indemnity, because, though he might have done what was unlawful he did not do it in circumstances in which it was manifestly unlawful or in which he knew it to be unlawful."

So far as the fact that the plaintiff was drunk at the time of the collision was concerned, Roche, J., thought that the plaintiff was not in any way worse morally than a person who in his sober senses drove to the danger of the public.

C. M.

[1] 43 T.L.R. 354.
[2] [1921] 3 K.B. 327.

THEFT OF MOTOR-CAR—HOTEL PARKING GROUND—LIABILITY OF HOTEL COMPANY.—The English case of *Aria* v. *Bridge House Hotel (Staines), Ltd.*, reported in the daily edition of *The Times* on the 11th May, is an interesting one for the owners of automobiles. It appeared that the plaintiff had gone to the defendants' hotel for dinner and was told by the porter that, as there was no room for his motor-car in the street outside the hotel, he should put it on a parking place which adjoined the hotel. Two sign boards on the parking ground bore the notices: "Bridge House Hotel. Park your cars free." While the plaintiff was having dinner the car disappeared. The defendants denied that the motor-car was lost through any breach of duty, default or neglect of themselves or their servants. They denied that they had represented to the plaintiff that the parking ground was a safe and proper place in which to park the motor-car, or that they were bailees of the motor-car. They alleged that the land on which the car was left was occupied by a sub-tenant of the defendants who allowed guests at the hotel to leave their motor-cars on this land, which was not under the defendants' control. Further, the defendants pleaded that they had complied with section 3 of the Inn Keepers Act, 1863, and, as the car was not lost through the wilful act, default or neglect of the defendants or their servants, and was not expressly deposited with the defendants for safe custody they were not liable to the plaintiff.

The trial took place before Mr. Justice Swift and a Common Jury. The Jury assessed the damages at £267 10s. the price paid by the plaintiff for the car a short time previous to its loss. Judgment was entered for the amount of damages so assessed by the Jury.

In delivering judgment Swift, J., said:—

> The case illustrates how the common law of England continued applicable to the changing circumstances of the everyday life of the people of this country. The long-established law with regard to an innkeeper's liability was to-day as applicable to chauffeurs and motor-cars as it formerly had been to people who rode on horses and drove in gigs.
>
> The defendants had admitted that they had taken no precautions to look after the plaintiff's car. They said that they had simply provided facilities for the "parking" of the motor-car. He had no doubt that when the motor-car was brought to the defendants' hotel by the plaintiff it was put into the custody of the servants of the defendants. The plaintiff, it was true, drove his own motor-car to the place where it was left, but he did so under the direction of the defendants' porter, and the defendants were just as responsible as if the plaintiff had got out of the motor-car at the door of the hotel and had left it to be taken or sent to the "park" by the hall

porter. If he had taken the latter course he (his Lordship) would have had no doubt that the defendants would have been liable.

The piece of land where the plaintiff left his motor-car was commonly used by guests at the hotel for "parking" their motor-cars while they took their meals, and for the purposes of the present case, it must, therefore, be taken to be part of the hotel. The relationship of innkeepers and guest existed between the defendants and the plaintiff, and the law had been plain for hundreds of years that an innkeeper was responsible for the safe custody of goods belonging to his guests which came on his premises.

He did not say that what had happened was the fault of the defendants. He decided nothing about negligence. His decision was based on the fact that the plaintiff's motor-car was lost from the defendants' inn. In those circumstances an innkeeper was liable for the goods which had been lost.

C. M.

* * *

TRADE-MARK—ASSIGNMENT—GOOD-WILL OF BUSINESS.—In the case of *Lacteosote Ltd.* v. *Alberman*[1] Clauson, J., sitting in the Chancery Division, decided that a person who had registered a trade-mark in England for goods manufactured by him abroad could not validly assign the trade-mark to his wholesale agent in England unless the assignment had been made in connection with the good-will of the business of importing the goods into England and selling them there. The learned Judge held that it had been established since the decision in *Leather Cloth Co.* v. *American Leather Cloth Co.*[2] that the purchaser of a mark becomes the owner of it only if he becomes at the same time the purchaser of the manufactory or the business concerned in the goods to which the mark had been affixed, and the first clause of sec. 22 of the Trade-Marks Act, 1905, which reproduced the corresponding provisions in sec. 2 of the Act of 1875, and sec. 70 of the Act of 1883 merely embodied that principle in statutory form (see *Pinto* v. *Badman*[3]).

In re Vulcan Trade-Mark[4] is a Canadian case in harmony with the above. Cassels, J., in the Exchequer Court of Canada, there said:—

"In *Smith* v. *Fair*,[5] a decision of the late Vice-Chancellor Proudfoot, there is dictum which would rather indicate that the Vice-Chancellor's view was that there must have been evidence of prior user in Canada. He also apparently is taken to have held that under our statute a trade-mark might be assigned in gross. This is merely a dictum and it was held the other

[1] (1927) 163 L.T. 276.
[2] 11 H.L. Cas. 523, at p. 534.
[3] 8 R.P.C. 181, at pp. 192 to 195.
[4] (1914) 15 Ex. C.R. 265, at p. 271.
[5] 14 O.R. 736.

way in the case of *Gegg* v. *Bassett*,[6] by Lount, J. I have no hesitation in adopting the view of Mr. Justice Lount. It is thoroughly in accord with the opinions of the English judges. It is quite true that the Canadian statute permits an assignment of a trade-mark, but it would be contrary to all rule applicable to trade-marks if a mark could be assigned to somebody who would use it upon goods neither manufactured nor sold by the owner of the trade-mark. It would have the effect of leading to misrepresentation."

The judgment of Cassels, J., was affirmed on appeal to the Supreme Court of Canada, but without mention of this particular point.[7] C. M.

* * *

LIMITATIONS OF ACTIONS—PROMISE OF REMUNERATION BY WILL FOR SERVICES RENDERED—CAUSE OF ACTION NOT ARISING UNTIL DEATH OF PROMISOR.—*A* recent judgment by Mr. Justice Lennox in the case of *Hunter* v. *Thompson*,[1] on appeal from the finding of a Local Master, to whom the action had been referred for trial, has re-opened an important question as to the Statute of Limitations, in actions where service had been rendered upon a verbal promise of remuneration by will, which has not been fulfilled. Before discussing this decision, it is desirable to consider the judgments in a series of similar cases commencing in 1890, as the opinions of the various judges have not been uniform.

In *Walker* v. *Boughner*,[2] the action was founded upon a verbal agreement to compensate the plaintiff for services rendered by her to the deceased in his life time, by providing for her in his will which he failed to do. The trial Judge declared the plaintiff entitled to a share of the estate which had been promised by the deceased. The Divisional Court varied this judgment by declaring the plaintiff entitled on a *quantum meruit*, to compensation for her services. Mr. Justice Street held, however, that, as the Statute of Limitations had been set up, she was limited to six years' arrears, though he gave no reasons for this. Chief Justice Armour did not deal with the question of limitations at all.

In *Cross* v. *Cleary*,[3] the evidence was that the deceased had said to the plaintiff:—"You give me a home as long as I live, and when I die you have what is left," to which she agreed. An action was brought for specific performance, or in the alternative, upon a *quantum meruit*, for eight years' maintenance. The Trial Judge

[6] 3 O.L.R. 263.
[7] 51 Can. S.C.R. 411.
[1] [1927] 2 D.L.R. 340, (1927) 60 O.L.R. 185.
[2] (1890) 18 O.R. 448.
[3] (1899) 29 O.R. 542.

dismissed the former claim, but gave the plaintiff judgment for $2,000.00. On appeal to a Divisional Court, Mr. Justice Street held that the contract was an implied promise to pay a reasonable sum per annum, and not a specific promise to pay at death, and that it did not give the plaintiff a right to recover more than six years' arrears.

In *Wakeford* v. *Laird*,[4] in which *Walker* v. *Boughner*, (*supra*), was cited, there was a verbal promise by the deceased that, if the plaintiff stayed on and worked he "would do for her at his death," but no mention was made of her in his will. Mr. Justice MacMahon gave judgment for the plaintiff on a *quantum meruit* for the eight years' service performed stating that "as payment was not to be made until the testator's death, the Statute of Limitations is not a bar."

In *Johnson* v. *Brown*,[5] the plaintiff performed certain services for the deceased, at the request of the latter, and in the expectation that the deceased would do the right thing by him in her will. Mr. Justice Riddell found that the plaintiff had worked for upwards of 6 years, and that the services were worth $2.00 per week, in addition to board and lodging, and then added:—"Were it not for *Cross* v. *Cleary*, 29, O. R. 542, I should hold that the whole period could be recovered for. No action could possibly be brought before the death, and it would seem against principle that the Statute of Limitations should be held to begin to run at a time anterior to that at which an action could be brought. But I am bound by *Cross* v. *Cleary*, unless and until it should be overruled; and I must hold that payment for services going back to 6 years before the teste of the writ only can be recovered in this action."

In *Bradley* v. *Bradley*,[6] the defendant upon the death of his wife agreed with the plaintiff, who was his sister, that if she would take care of his household and children, she would have a home with him for her life, unless he predeceased her, and in that event he would have an insurance on his life effected for her benefit. The plaintiff lived with the defendant under these conditions for 13 years, when he remarried. It was held by the Divisional Court that the plaintiff was entitled, on a *quantum meruit*, for the last 6 years of her service.

In *Eastern Trust Co.* v. *Berube*,[7] the plaintiffs, as Executors of Senator Miller, sued the defendant on a mortgage, and the defendant

[4] (1903) 2 O.W.R. 1093.
[5] (1909) 13 O.W.R. 1212.
[6] (1909) 19 O.L.R. 525.
[7] (1914) 7 O.W.N. 114, at p. 118

counter-claimed for $1,000.00, which the deceased had promised to leave him by his will, in recognition of his services as his valet and nurse for over 15 years, or in the alternative for remuneration on a *quantum meruit.* Mr. Justice Lennox, after referring to the above mentioned cases of *Johnson* v. *Brown,* (*supra*), and *Cross* v. *Cleary,* (*supra*), said:—"I do not think these decisions apply. I am of opinion that there is no time limitation where, as here, upon the facts, if I am correct in my conclusions of fact, the defendant was not entitled to payment until the death of the mortgagee, and could not have sued in the meantime."

In Re Rutherford,[8] the claimant had worked for the deceased for 20 years upon a promise which was interpreted by the Surrogate Judge, as well as on appeal, to be one for compensation for her services by his will, but he died intestate. The Administrator refused to set up the Statute of Limitations, but the beneficiaries insisted on doing so. The Surrogate Judge allowed the claimant the rate of $2.00 per week for the entire time, amounting to $2,340.00. On appeal Mr. Justice Middleton said at p. 399:—"I think the Judge should have given effect to the Statute of Limitations, and that the allowance should be confined to 6 years. The learned Judge has taken the view that the administrator, who is friendly to the claimant and does not desire to plead the Statute of Limitations, can waive the statute, notwithstanding the wishes of those beneficially interested. It may be that, if the administrator had paid the debt before any contest had taken place in the Courts, the beneficiaries would be bound; but here the matter has been brought into Court, and the beneficiaries have, I think, the right to insist upon the statute."

In *Mather* v. *Fidlin,*[9] a daughter sued a father's estate to recover remuneration for her services for over 6 years, pursuant to an alleged contract. Mr. Justice Kelly found that the contract was not one for remuneration by will, and he therefore said:—"The defendants having pleaded the Statute of Limitations, the allowance should be confined to six years." This decision is referred to only because it is one of the two Ontario cases mentioned in *Hunter* v. *Thompson,* (*supra*).

In *Rycroft* v. *Trusts & Guarantee Co.,*[10] the plaintiff sued the administrators of his uncle's estate for specific performance of an agreement alleged to have been made by the deceased with the plaintiff, to devise a farm to him in consideration of his devoting himself

[8] [1915] 25 D.L.R. 782; (1915) 34 O.L.R. 395.
[9] (1916) 10 O.W.N. 229.
[10] (1912) 12 O.W.N. 240.

upon the farm to the support of his uncle, or in the alternative, to recover remuneration for services rendered to his uncle for 11 years before his death. Mr. Justice Clute held that the Statute of Limitations, which was pleaded by the defendants, applied, and the remuneration should be limited to six years.

In re Lockie,[11] the claimant was a cousin of the testator and lived with him as his house-keeper until his death. By the will she was given a legacy of $2,500.00, and she claimed $2,000.00 additional from the estate as remuneration for her services. Mr. Justice Middleton, reading the judgment of the Second Divisional Court said:—"The real bargain was that the remuneration should be fixed by the testator by his will. If he failed to implement his bargain, or if what he did was inadequate, the respondent, it may be, would not have been bound to accept it, and she could, at most, decline to accept the legacy and assert her claim for remuneration. If she did this and stood to be remunerated on the basis of a *quantum meruit,* she could recover only the value of 6 years' services, as the Limitations Act would bar any earlier claim."

Returning now to *Hunter* v. *Thompson, (supra)*, it will be seen from the report, that the promise made in this case, by the deceased to the plaintiff, was for remuneration by the latter at his death, by means of a bequest or provision in his will at least equal to the value of the plaintiff's services. The only cases mentioned by the Local Master were *Mather* v. *Fidlin* and *Re Rutherford,* above referred to. Mr. Justice Lennox very properly points out that *Mather* v. *Fidlin, (supra)*, could not be relied upon as an authority in support of the applicability of the Statute of Limitations to this case, because in the *Mather* case there was no postponement of the payment until any future time. Of the *Rutherford* case the learned Judge says:—"I find nothing in the evidence quoted to suggest that Rutherford made any representation or promise that he would make a provision for the claimant by his will." The Judge of the Surrogate Court in that case said:—"I find from the evidence adduced that the claimant was persuaded to remain at the home of the deceased, and to perform the services that she did perform, on the understanding and with the expectation and intention of both parties that the deceased would compensate the claimant by his will." The judgment of Mr. Justice Middleton on appeal confirms this view of the facts, as he said:—"I think the Judge was amply justified in inferring that what was intended was that the claimant

[11] (1924) 27 O.W.N. 177, at p. 178.

should be provided for, not only during Rutherford's lifetime, but also by his will."

Mr. Justice Lennox adopted the Local Master's finding of the facts in the *Hunter* case (*supra*), but reversed his finding on the law, and held that the Statute of Limitations did not begin to run against the plaintiff until the death of the deceased. Apparently this decision cannot be reconciled with the views of several of the Ontario Judges in the cases above referred to, in which the findings of fact are similar. On the other hand, the citations from Halsbury's Laws of England and other English text books and decisions referred to by Mr. Justice Lennox, but which are too lengthy to repeat, seem to support his view of the law. In these circumstances it would seem to be advisable that the decisions of our own Courts should be re-considered, with a view of reconciling them with the English authorities, as well as with each other. Possibly this could be worked out under the provisions of section 32 of The Ontario Judicature Act. M. J. G.

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VENDOR AND PURCHASER—SUMMARY SETTLEMENT OF DISPUTES.—*Re Cairns and McNairn*,[1] illustrates the use which may be made of summary proceedings under the Vendor and Purchaser Act, R.S.O. cap. 122, s. 4, as extended in 1913 by C.R. 602, 603, 604, 605 and 606. The parties had agreed to exchange lands, to build a house and to raise money on it by first and second mortgages. Both had done much under the contract but both were in default. Litigation resulted in which, in appeal, the plaintiff failed because of her default. The action being dismissed "without prejudice to any further or other action which either party may be advised to take," the plaintiff cured her default and applied by originating notice under C.R. 605 for an order determining her rights under the contract.

The Appellate Division decided that there were no material facts in dispute, that the applicant had cured her default and the respondent had received or had been offered all the benefits to which he was entitled under the agreement, and that under this Rule the Court could order the respondent to fulfill his obligations. The respondent had filed an affidavit disputing in general terms the applicant's specific allegations, but the Court considered that a general denial of this kind did not raise any real issue upon the facts. No doubt the Court was influenced by the expense and futility of the earlier litigation and sought by this means to bring it to a close.

[1] (1927) 60 O.L.R. 194; [1927] 2 D.L.R. 444.

The combined effect of the Statute and the rules should in time reduce the number of cases arising out of the land transactions which formerly went to trial and then through the various Appellate Courts, generally with small benefit to either litigant and often with expenditure of time and money out of all proportion to value of the subject-matter in dispute. Recently judgment was given in an Alberta case (*Wilkin* v. *Brown*),[2] in which the Writ had been issued twelve years ago, and the learned trial judge urged the parties to settle to save themselves from further trouble and expense, which he foresaw must still be incurred if the proceedings were to continue. Goodwill and commonsense exercised by both lawyers and litigants before the dispute goes too far are still the most effectual methods of avoiding the scandal of useless and protracted litigation; but where these do not obtain on both sides the Ontario lawyer who is really anxious to limit the dispute and save money for his client should always consider whether it is possible by summary proceedings under this legislation to avoid going through all the motions of a law-suit and a trial. Section four of the Statute allows a summary application respecting any requisition or objection or any claim for compensation or any other question arising out of or connected with the contract, except a question affecting the existence of validity of the contract. This exception is important because it precludes an application where one of the parties contends that no contract was ever made, but it does not preclude the Court from deciding whether a contract validly made has been subsequently validly rescinded.[3]

The Statute standing alone merely affords "a convenient and inexpensive way of getting the opinion of the Court on isolated points arising out of or connected with the contract." (BOYD, C. *In Cameron* v. *Hull*),[4] and where some interpretation of a document forming part of the chain of title in doubtful (*Re Cameron and Hull*),[5] or where the law is in doubt (*Re Morris and Chertkoff*)[6] the Court will not force the title upon a purchaser in the absence of the person who might afterwards sue him in respect of a doubtful claim. The Court will not compel the purchaser to buy a law suit.

To obviate this difficulty an attempt was made in *Re Cameron and Hull* to join the possible claimant under the document in dis-

[2] (1927) 2 D.L.R. 87.
[3] 25 Hals. 391. *Re Dames and Wood* (1885) 29 Ch.D. 626. *Re Jackson and Woodburn's Contract* (1888) 37 Ch.D. 44.
[4] (1913) 4 O.W.N. 581, p. 583.
[5] (1912) 3 O.W.N. 807.
[6] (1924-25) 56 O.L.R. 665.

pute and thus bind him by the decision, but there was then no procedure permitting this. When the Consolidated Rules were passed in 1913 this power was supplied by Rule 602. Its history is given in *Re Goldenberg and Glass*,[7] with the following judicial comment "Since the passing of this Rule the practice has been to give notice to all adverse claimants, so that the purchaser is protected not merely by the opinion of the Court as to the state of title, but by a decision binding upon the adverse claimants, so that, whether a decision is right or wrong, the matter becomes *res judicata* and the purchaser is completely protected.

"It is true that the Rule is not obligatory in its terms, but the protection of the purchaser calls for notice in all but exceptional cases."

The Court may, but generally it will not, under either this or the subsequent rules *in pari materia* summarily decide controverted questions of fact (*Re Garvie and Smith*),[8] but Rule 606 gives power to direct an issue so that the facts may be tried and finally determined.

Another of these Rules is 603, which, while it does not deal with disputes between vendors and purchasers, does sometimes enable rival claimants to an interest in lands to have their dispute settled in a summary manner. The Rule provides that where a person claiming to be owner does not wish to have his title quieted under the Quieting Titles Act he may have any particular question which would arise in an application under that Statute determined by an originating notice. This Rule has been invoked to determine disputes between adjoining owners respecting the validity of restrictive covenants. *In Re Keyser and Daniel J. Mc A'Nulty Realty Co., Ltd.*,[9] the Judge of first instance held that under it he could deal with the application though there were conflicting affidavits. In appeal it was thought that the matter should not be so dealt with in view of the dispute as to the facts, and the parties were left to settle their rights in an action. While this was the opinion of the majority of the Court, Mr. Justice Hodgins dissented.

In *Re Rowan and Eaton*,[10] the procedure was again invoked, and there being no facts really in dispute both the Court of first instance and the Appellate Division decided the matter upon a summary application. Mr. Justice Orde, in 59 O.L.R., at p. 384, considered the point, holding that a building restriction is a defect in

[7] (1924-25) 56 O.L.R. 414, p. 417.
[8] (1927) 31 O.W.N. 226.
[9] (1923-24) 55 O.L.R. 136.
[10] (1926) 59 O.L.R. 379; 60 O.L.R. 245.

title, that there was no reason why upon an application under Quieting Titles Act the question should not be dealt with, and that being a single question it could be disposed of on motion under this Rule.

Again in *Re Wheeler*,[11] without apparently any objection being taken to the procedure, both the Judge of first instance and the Appellate Division decided in proceedings taken under Rule 603 that a restrictive covenant was no longer binding. Where, however, an attempt was made to have it declared that an Agreement for Sale was null and void and that the purchaser had no further interest in the land, Mr. Justice Mowat held that the Rule applied only to the determination of some particular question and was not intended to settle a dispute about the existence of an agreement of sale. *Re Linton and Hadden*.[12]

SHIRLEY DENISON.

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CHATTEL MORTGAGE—"FLOATING CHARGE"—ONTARIO BILLS OF SALE ACT.—In *Gordon McKay Limited* v. *J. A. Larocque Company, Limited*,[1] the Supreme Court of Canada, on appeal from the Appellate Division of the Supreme Court of Ontario, had to deal with the question of whether or not it is necessary in Ontario to register under the Bills of Sale and Chattel Mortgages Act of that Province, an instrument which mortgaged the whole undertaking of an incorporated company subject to a proviso that the company was to be at liberty to sell or otherwise deal with the mortgaged property in the ordinary course of business. The instrument was described as "a floating charge," but was in fact a mortgage.

The case furnished a good opportunity for the Court to lay down some clear and definite rule respecting the matter in controversy—but while the majority of the Court (Duff, Mignault and Newcombe, JJ.) allowed the appeal, Anglin, C. J., and Rinfret, J., delivered dissenting judgments, and it is hard to say from the judgments of the majority whether or not they agree with the reasons of Fisher, J., although they affirm his decision. Mr. Justice Fisher arrived at his conclusion on the very clear and intelligible ground that the instrument in question was in fact a mortgage and it could not be converted into "a charge" by merely calling it by that name, and that being in truth and in fact a mortgage of chattels,

[11] (1926) 59 O.L.R. 223.
[12] (1926) 30 O.W.N. 257.
[1] [1926] 1 D.L.R. 551; 58 O.L.R. 305; 4 C.B. Rev. pp. 409 and 508.

then the Bills of Sale and Chattel Mortgage Act applied, and the instrument must be registered as required by that Act; but if the instrument had been in fact merely "a charge" and not an actual transfer of the property, then it would not be within the Act, and there would be no necessity to register it. Perhaps this is really the effect of the decision of the Supreme Court of Canada, but the Court does not explicitly say so.

That a "charge" is one thing and a "mortgage" is another is a proposition which seems indisputable—and while a charge may create an equitable interest in property which may by the help of a Court of Law be enforced specifically against property in respect of which it is created, yet it does not of itself operate as a transfer of the property charged; whereas a mortgage does operate as an actual transfer of the property mortgaged and entitles the mortgagee to various remedies to enforce his rights against the mortgaged property without the assistance of any Court. The Bills of Sale and Chattel Mortgage Act is by its terms applicable to "mortgages" and nothing is said therein to extend its application to instruments by way of "charge," and the numerous cases cited by the learned Chief Justice seem to warrant the conclusion that the Act can not be extended to a class of instruments not mentioned in the Act, and to which it cannot reasonably be inferred it was ever intended to apply. This was the result of the case of *Johnson* v. *Wade*;[2] but it can hardly be said that the Supreme Court of Canada have definitely affirmed that decision. A "charge" may be defined to be: The imposition of an obligation on property unaccompanied by any transfer to the chargee of the property charged.

It is an equitable right and it is governed by equitable principles, including those relating to notice and priority, and the chargee by no means stands in the same position as a mortgagee in regard to the property charged; but there is the equitable maxim, "Qui prior est in tempore, potior est in jure," which may prove fatal to the rights of opposing creditors.

As we said before, there was an opportunity for the Court to make a clear and definite deliverance as to the point in controversy, and with all due respect to the Court we regret that it was lost. Duff, J., in fact throws doubt on the correctness of the view that a "charge" is something distinct from a mortgage, because he says: "I have not been able to satisfy myself that you cannot have a floating security by way of mortgage," but whether he intends the

[2] (1908) 17 O.L.R. 372.

words "floating security" to be the equivalent of "floating charge" it is hard to say; and Newcombe, J., refers apparently with approval to a dictum of Buckley, L.J., to the effect that "a floating charge" is a mortgage subject to a license to carry on business, and seems to consider that whether a mortgage is, or is not, a "floating charge" depends on whether or not there is a period of "dormancy" between the execution of the instrument and the time when it can be actively enforced.

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DISCLOSURE IN A CONTRACT—WHERE DOES THE DUTY STOP?—The judgment in *Canadian Farm Implement Co.* v. *Alberta Foundry & Machine Co.*,[1] goes a goodish long way. Vendors must grow more wary all the time. *Caveat emptor* seems sick, if not dying.

The defendant company had as its agent one Davies, and Davies negotiated a sale of his Company's whole assets to the plaintiff. Davies' own part in the bargaining was none too savoury, and he was quite justly made a defendant as well. But had Davies tricked the purchaser into that bargain? And, if so, had the vendor to answer for such trickery? The learned judge gave Davies the benefit of the doubt. But he did find that the sale had been induced by a representation that was at least incomplete. Davies had informed the purchasers that the vendors held an agreement for a certain Tractor with its manufacturing and patent rights, and that that important asset could be bought by the purchasers from the patentee under the said binding agreement for $17,000.

That story was true, so far as it went, and at one time. But it had ceased to be true before the bargain was formally concluded, and yet Davies kept repeating it. Was the purchaser bound to make his own subsequent enquiries? Or was he safe in protracted negotiations without testing and keeping his information up to date? Ford, J., struck for the fuller protection of the purchaser, and granted recission.

G. C. T.

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MARITAL INTERCOURSE—MAY ONE SPOUSE GIVE EVIDENCE OF NON-ACCESS?—The judgment in *Russell* v. *Russell*,[1] still resounds. It occupied the attention of Mr. Justice Mitchell of Alberta in the recent divorce case of *Roberts* v. *Roberts*,[2] and was then eluded—or

[1] (1927) 1 W.W.R. 1025; [1927] 2 D.L.R. 871.
[1] [1924] A.C. 687.
[2] (1927) 1 W.W.R. 993.

elucidated. Mrs. Roberts had made admissions involving her misconduct and a pregnancy of which her husband, by her own statement, was not (and could not have been) the cause. The husband sought divorce. "But," said the lady's advocate to the Bench, "Whatever we may have said, you are not entitled to admit any evidence of non-intercourse during the marriage; that is against public policy, and the rule of *Russell*."

The retort was—"Here that can't apply: the rule is not in favour of the erring wife, but of the innocent infant. He is not to be bastardized. Here there is no infant and there won't be, for the woman is at this moment not even pregnant: *she* can't invoke the *Russell* judgment." And the husband had his way, and his freedom.

G. C. T.

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NOTICE OF TRIAL—BLOOMAERT'S CASE AGAIN.—This instructive case was referred to in the April number of the CANADIAN BAR REVIEW, at page 293. The problem there expiscated was whether a Judge sitting with a jury could, of his own motion, dismiss that jury and continue the case alone.

Back the problem comes to the Appeal Court from a different angle of fire. (*Bloomaert and Bloomaert* v. *Dunlop*).[1] The plaintiff had originally given notice of trial by jury, the Judge had dismissed that jury in the middle of the trial, and the Judge had been held wrong. A new trial therefore became necessary. The plaintiff had advanced the jury money, and that money was still in court. But, perhaps from oversight, or because of the long vacation, plaintiff had not within the six weeks given notice for the re-trial; and on 3rd September defendant gave notice. "But," reasoned defendant—"Plaintiff may give notice of trial with a jury: the Court says that is his privilege. But I want a trial without a jury, and now that the chance of giving notice for trial comes to me, my notice shall stipulate no jury."

This ingenious argument was knocked on the head with a club laden with three sets of costs (before the local Master, the Judge in Chambers, and the Appeal Court). The defendant may jump ahead of the plaintiff and bring on his trial, but only in the mode that the statute and the court prescribe.

G. C. T.

[1] (1927) 1 W.W.R. 911; [1926] 4 D.L.R. 273.