CASE AND COMMENT

SPECIFIC DEVISE OR BEQUEST—ADEMPTION.—Again the problem as to the effect of a testator selling or contracting to sell the subject-matter of his specific devise or bequest has come before a court. The recent case of *In re Calow, Calow* v. *Calow*,[1] further elucidates the law concerning the ademption of specific devises. The import of the doctrine of ademption is indicated by the word itself. Taken from the Latin *adimere*, it implies that something has been taken away. When the subject-matter of a devise or legacy has been destroyed or transferred or changed in substance so that it cannot pass under the devise or bequest, the result is denoted by the term ademption.[2] The specific subject-matter has ceased to be part of the testator's assets and the consequent ademption operates *de facto* as a revocation of the will as to it.[3]

The equitable doctrine of conversion, founded on the maxim, "Equity considers that as done which ought to be done," is often invoked to determine whether the subject-matter of the devise or bequest has been so changed in substance that ademption may result. If a testator has contracted to sell land and the contract is specifically enforceable, the beneficial interest in the land vests in the purchaser and the vendor has a right to the purchase money.[4] But it must be borne in mind that conversion arising out of a contract to sell is merely and exclusively the consequence of the right to specific performance. When there can be no specific performance there can be no conversion.[5]

The first approach to a case involving the question of ademption of a specific devise or legacy must be a determination of what is the subject-matter of the devise or bequest. In order to ascertain whether something has been taken away it is sound logic, as well as law, to determine what that something is. In the *Calow* case (*supra*) the testator, by his will made in 1925, devised all his freehold property at Dagenham to trustees upon trust to hold the same or the proceeds of sale thereof for his two sons. In 1921, the testator had

[1] [1928] Ch. 710.
[2] See *In re Slater, Slater* v. *Slater*, [1907] 1 Ch. 665, particularly at p. 675.
[3] See *Re Dods* (1901), 1 O.L.R. 7 at p. 9.
[4] [1923] 3 D.L.R. 1045; see Mignault, J., in *Church* v. *Hill*, [1923] S.C.R. 642 at pp. 648-9 quoted below.
[5] *Hoskin* v. *Toronto General Trusts Co.* (1886), 12 O.R. 480.

contracted to sell a part of this freehold to a third party. The purchase was not completed until some months after the testator's death. The Court held that, as *the land or the proceeds* of sale thereof was the subject-matter of the devise, the proceeds of the land contracted to be sold passed under the devise in question. No question was raised as to the devise affecting the balance of the land at Dagenham. That the decision of the Court is truly consonant with the expressed intention of the testator must be apparent. The courts have gone further and pronounced that where in a will made after a contract for sale, the testator knowing of the contract devises the specific property, the subject of the contract, a part of which is to be sold, that is a sufficient indication of an intention to pass to the devisee the whole of the testator's interest in the property.[6] This, in short, is an application of the "arm-chair" rule.[7] There is no necessity, in these cases, for a discussion of ademption for nothing has been taken away.

In *Hicks* v. *McClure*[8] a testator directed his executors to sell a certain farm and divide the proceeds between his two sons. The testator, however, sold the farm and took a mortgage back for a part of the purchase price. The Supreme Court of Canada held that the funds representing the property dealt with should go to the beneficiaries named in the devise in whatever form they might be found at the testator's death. The devise to the executors was not of the farm in specie but also of the proceeds and it is not defeated because the testator anticipated the sale which he ordered his executors to make. Nothing was taken away from the devise by the sale.

The case of *Church* v. *Hill*[9] presents an application of the doctrine of ademption of a specific devise. A testator, by his will executed in 1916, devised a certain lot of land to his daughter. In 1920, the testator entered into a contract to sell this lot to a third person, whereby the purchaser was to pay a part of the purchase price immediately and the balance in monthly instalments. As the will was made before the contract to sell, it could not be said that the testator did then intend that the devise of the specific lot should carry the proceeds of sale.[10] True the legal title of the lot in question had not been taken away, but by operation of the doctrine of con-

[6] *Emuss* v. *Smith* (1848), 2 De G. & Sm. 722; *Drant* v. *Vause* (1842), 1 Y. & C.C.C. 580; *In re Pyle*, [1895] 1 Ch. 724.

[7] See James, L.J., in *Boyes* v. *Cook* (1880), 14 Ch. D. 53 at p. 56.

[8] (1922), 64 Can. S.C.R. 361. See also *Re Hamilton* (1927), 32 O.W.N. 282.

[9] [1923] S.C.R. 642.

[10] Cf. cases given in footnote 6, *supra*.

version, the subject-matter of the devise was changed in substance at the death of the testator. Therefore the Court held that the interest of the testator in respect to the property did not pass to the daughter. Mignault, J., said:

> The legal position here can be stated as follows: By reason of the sale agreement, any interest in the property in question of the vendor as against the purchaser, and so long as the latter made the stipulated payments, was converted into a claim for the purchase moneys. What the testator devised to the respondent was the property itself. What he had at his death—and it is then that the will speaks—was the right to the price and not the property. The devise therefore fails because its subject matter no longer existed at the testator's death.[11]

In an earlier part of his judgment the learned Judge, after considering what interest the purchaser acquired under the agreement, decided that it was one which equity would recognize, and one commensurate with the relief which equity would give by way of specific performance.

The doctrine of ademption was applied to a different set of facts in *Re Dods*.[11a] A testator bequeathed all his personal estate to his wife absolutely and devised his land to his executors on trust for her benefit during life or widowhood and then over. Between the date of the will and his death, the testator sold all his land and took back a mortgage for part of the purchase money. The mortgage was an asset of the testator's estate. It was held that the wife took the mortgage absolutely under the bequest of the personalty. Here as in *Church* v. *Hill* (*supra*) the testator died entitled to the legal title. In this case, however, the testator gave up his legal title upon the conveyance of the land but obtained it again by virtue of the mortgage. Yet equity considers that the mortgagee's interest in the mortgaged land is in essence merely a right to a security for money and the money when paid is part of his personal estate.[12]

The case of *Re Taylor*[13] affords an illustration of the ademption of a specific legacy. Certain stock was bequeathed to a legatee. Subsequently to the execution of the will, the testatrix contracted to sell the stock, but she died before delivery, transfer and payment had been made. The Court decided that the proceeds of the sale would not go to the legatee. The purchasers were entitled to the shares and, although the Court did not deal with the point, undoubt-

[11] [1923] S.C.R. 642 at pp. 648-9.

[11a] (1901), 1 O.L.R. 7.

[12] See Falconbridge: Law of Mortgages, p. 37; *In re Clowes*, [1893] 1 Ch. 214.

[13] (1927), 33 O.W.N. 14, 59.

edly they could have obtained specific performance of the contract. The subject-matter of the bequest had been changed in substance by virtue of the doctrine of conversion and the testatrix died entitled to a right to the purchase money.

S. E. S.

* * *

LEGITIMATION ACT—ESCHEAT—BONA VACANTIA.—The course of legislation, in Ontario, purporting to legitimatize children born out of lawful wedlock points a moral for legislative draftsmen. In 1921 there was passed The Legitimation Act,[1] which provided that if the parents of any child born out of lawful wedlock marry, such child shall *for all purposes* be deemed to be legitimate. In *Re W.*,[2] decided in 1925, the facts were that W was born out of wedlock and subsequently his parents married. W died in 1922, intestate and unmarried, leaving brothers and sisters born to his father and mother after their marriage. It was held that, as the Crown was not expressly mentioned in The Legitimation Act (*supra*), the estate of the intestate belonged to the Crown.[3] Section 10 of The Interpretation Act[4] reads: "No Act shall affect the rights of His Majesty, His Heirs or Successors, unless it is expressly stated therein that His Majesty shall be bound thereby." Then in Ontario in 1927, the 1921 Act was superseded by a new Act.[5] Section 3 of the present Act provides that "The parents and brothers and sisters of any child legitimatized by this Act shall inherit upon his death as though he had been legitimate." This provision was apparently prompted by the particular result in *Re W* (*supra*), yet one fails to find in the new Act any direct attempt to circumvent the difficulty, as to the rights of the Crown, presented by the reasoning in that case. Admitting the correctness of the result reached by the Court in *Re W*, in construing the Act of 1921, has the new Act made a child born out of wedlock legitimate *per subsequens matrimonium* for all purposes? Section 1 of *The Interpretation Act*[6] reads, in part: "The provisions of this Act shall extend and apply to every Act of this Legislature except in so far as any such provision is inconsis-

[1] 11 Geo. V., c. 53.
[2] 56 O.L.R. 611.
[3] It is rather singular that the Court in *Re W.* considered that the Crown took personal property left by the intestate by virtue of the law governing escheat.
[4] R.S.O. 1927, c. 1, s. 10; R.S.O. 1914, c. 1, s. 11.
[5] 17 Geo. V., c. 52, now R.S.O. 1927, c. 187.
[6] R.S.O. 1927, c. 1.

tent with the intent or object of such Act." The object of The Legitimation Act is undoubtedly to make the illegitimate child upon a subsequent marriage of the parents legitimate for all purposes. Furthermore, it is apparently impossible to give section 3 any effect—unless it is to bestow upon the child a politer title for social purposes—without impinging upon the rights of the Crown, apart from this Act, to escheat or bona vacantia.[7] It may well be argued that The Interpretation Act does not apply and therefore resort must be had to the common law where it is considered that the Crown may be bound by an Act because of necessary intendment.[8] It is submitted that the necessary intendment to bind the Crown does appear in the present Act and consequently that *Re W* (*supra*) should today, at any rate, be decided in favour of the brothers and sisters of the legitimatized intestate. It is of some significance that the draft Legitimation Act prepared by the Conference of Commissioners on Uniformity of Legislation does not contain any express reference as to binding the Crown.[9]

It has been suggested in a learned annotation[10] that in any event The Interpretation Act in protecting the "rights" of the Crown should not have been applied in *Re W* (*supra*). The contention, there made, is that the Crown had no rights in the property of the intestate when he was legitimatized in 1921; the Crown's prerogative right, at common law, only arose upon the death of the intestate in 1922. Bearing in mind the wording of section 10 of The Interpretation Act—"no Act shall affect the rights"—the time of origin of these rights would appear to be an indifferent factor.

S. E. S.

* * *

Bill of Exchange—Effect of Accidental Alteration.—Is a bill of exchange avoided by accidental mutilation? In *Hong Kong and Shanghai Banking Corporation* v. *Lo Lee Shi*,[1] on appeal from Hong Kong to the Judicial Committee of the Privy Council, the plaintiff was the holder of two banknotes payable on demand to bearer. For safekeeping she put them in a pocket of an inner

[7] See The Devolution of Estates Act, R.S.O. 1927, c. 148, s. 26, which provides that no illegitimate child or relative shall share under that Act.

[8] See *Stewart* v. *Conservators of River Thames*, [1908] 1 K.B. 893.

[9] See Proceedings of The Conference of Commissioners on Uniformity of Legislation, 1920, p. 18.

[10] [1925] 4 D.L.R. 193 at p. 196.

[1] [1928] A.C. 181; 97 L.J.P.C. 35; 138 L.T. 529.

garment. Forgetting where she had placed the notes, she washed the garment and when she came to iron it, she discovered a lump in the pocket which turned out to be what was left of them. One note was restored to its original shape, while the number of the other could not be recovered. The bank paid the former but refused payment of the latter. The plaintiff then brought an action for recovery on the second note against the bank. It appears —none too clearly—that the Judicial Committee was of the opinion that the alteration of this note was not material. One might have expected that this holding would have put an end to the matter, but there is to be found in the judgment a further discussion as to the effect of the mode of alteration. At common law, if a material alteration be made after execution, in a deed by, or with the consent of, any party thereto, he cannot as plaintiff enforce any obligation contained in it against any party who did not consent to such alteration.[2] In *Master* v. *Miller*,[3] it was decided that a similar rule is applicable to negotiable instruments and other documents not under seal. The Bills of Exchange Act,[4] which is in force in Hong Kong, provides that where a bill or acceptance is materially altered without the assent of all the parties liable on the bill, the bill is voided, except as against a party who has himself made, authorized, or assented to the alteration and subsequent endorsers. The Judicial Committee held that the alteration in this case did not come within this provision. The alteration contemplated by the legislators, is one to which all the parties *might* assent. Here the fact that the alteration was accidental, in itself, negatives the possibility of assent. The Judicial Committee stipulated that the accident in order to have this effect must be an honest one. In determining such honesty mere carelessness is not decisive. In other words, the section of The Bills of Exchange Act, in question, relates only to alterations effected by the will of the person by whom or under whose directions they are made, and does not apply to a change due to pure accident. The Judicial Committee, in deciding in favour of the plaintiff, was careful to state that the members were not laying down any principle of law as to the evidence sufficient for the identification of a mutilated bill and re-

[2] See *Pigot's Case* (1614), 11 Rep. 26, and authorities collected in Williston, Contracts, (1920), § 1881 *et seq.* for instances of the particular application of this general rule.

[3] (1791), 4 T.R. 320. See also Falconbridge: Banking and Bills of Exchange, 4th ed., p. 785 *et seq.*

[4] See R.S.C. 1927, c. 16, s. 145.

covery thereon[5]. There was no doubt in this case that the pieces belonged to one of the bank's notes and no suggestion was made that the missing particles could be used in building up another note.

S. E. S.

* * *

LORD'S DAY ACT—SUNDAY SELLING—WORK OF NECESSITY.—What can be sold on Sunday, keeping within the provisions of the Lord's Day Act?[1] One answer to this question is given, regarding certain articles, in the headnote to a recently reported case, *R.* v. *Ninos*,[2] from Nova Scotia, which states that "sale of articles of food and drink on Sunday is lawful, but not the sale of cigarettes." However, on perusal of the judgment on which this headnote is based, it seems that the first part of the headnote states a broader principle than was intended by the judgment and thus does not give an accurate idea thereof. If the headnote were correct, grocery stores, wholesale and retail, could operate at full blast all Sunday as on any other day.

Sales of goods are expressly forbidden by the Act except in cases of necessity and mercy. Magistrates' courts have many times been called upon to decide as to the necessity of sales of different articles on Sunday, and in 1925 the question regarding certain articles reached the Appellate Division of the Supreme Court of Alberta. This Court decided in the cases of *R.* v. *Kent*,[3] and *R.* v. *Cummings*,[4] respectively, that the sale on Sunday of apples and candy is not, but the sale of gasoline is, a work of necessity and mercy. In the former case it appears that after being purchased, the apples and candy were carried off the vendor's premises before being consumed. In the *Ninos* case (*supra*) it appears from the judgment that the bananas and drink were bought for consumption on the vendor's premises and in deciding the case the learned County Court Judge evidently had in mind this fact as distinguishing it from the Alberta case of *R.* v. *Kent* (*supra*), as he states that his opinion is in line with the opinions expressed in the Alberta cases. Following these decisions it may safely be stated that sales of food

[5] As to when an indemnity may be required from a person bringing an action upon a lost or destroyed bill, see Falconbridge: Banking and Bills of Exchange, 4th ed., p. 797, *et seq.*

[1] R.S.C. 1927, c. 123.

[2] (1928), 50 Can. C.C. 155.

[3] 43 Can. C.C. 261.

[4] 43 Can. C.C. 254.

and drink are lawful on Sunday only when sold for consumption on the vendor's premises, and that gasoline enjoys the privilege of being the only article, the sale of which on Sunday for use or consumption off the vendor's premises has been approved.

R. E. INGLIS.

* * *

CRIMINAL LAW—FALSE PRETENSES—REPRESENTATION—The annotation[1] to the case of *Rex* v. *Robertson*,[2] states that the definition of false pretenses in section 404 of the Criminal Code[3] is "a contradiction in terms and if strictly construed, as it ought to be, meaningless. A fact strictly speaking cannot be false, neither can a representation of a fact. For the moment a representation of a fact is false, it ceases to be a representation of the fact, it becomes a representation of something which is not the fact."

With regard to the above stricture, it may be noted that section 404 of the Criminal Code does not say that a fact may be false. Obviously, a fact in itself cannot be true or false — the words, true or false, are simply not applicable to the word fact. Nor does section 404 say anything about a false representation of fact. What it does say is that "a representation of a *matter or fact* * * * which *representation* is known to * * * be false. "Matter of fact" is defined by Spencer Bower[4] to mean "either an existing fact or thing, or a past event." The same writer defines representation as "a statement made by, or on behalf of, one person, to, or with the intention that it shall come to the notice of, another person, which relates, by way of affirmation, denial, description or otherwise, to a *matter of fact*."[5]

Even if, as the commentator supposes, the Code had used the phrase "false statement of fact," it would still be able to muster a goodly band of approvers. From Buller, J., in *Pasley* v. *Freeman*,[6] who made use of the expression "false assertion," down to Lord FitzGerald in *Derry* v. *Peek*,[7] who said "false statement" and to Lord Herschell in the same case who spoke of "false representation," and ever since 1889, such phrases, or phrases of identical import, have been used by English and American judges. Salmond[8] employs

[1] (1928) 50 Can. C.C. 180.
[2] (1928), 50 Can. C.C. 179.
[3] R.S.C. 1927, c. 36.
[4] Actionable Misrepresentation, 2nd ed., p. 1.
[5] *Ibid.*, p. 30.
[6] (1789), 3 T.R. 51.
[7] (1889), 14 A.C. 337.
[8] Law of Torts, 7th ed., chap. xv.

the phrase "false statement of fact," and Holmes in his "Common Law"[9] uses "false representation," "false statement" repeatedly to refer, presumably, to matters of fact.

It might be suggested that section 405 of the Code stands in greater need of revision than section 404. The later section uses the words "Everyone * * * who with intent to defraud, by any false pretense, * * * obtains anything * * *." If the words "intent to defraud" in section 405 have the same meaning as "fraudulent intent" in section 404, then the words first quoted in this sentence are superfluous. The state of mind described by them is included in the meaning of the words "false pretense" as defined in section 404. If the phrases do not mean the same thing it is unfortunate that they are expressed in language so similar.

A. L. MacDonald.

* * *

Licensor and Licensee—Trap—Nature of Duty of Each Party.—In *Coleskill* v. *Lord Mayor, etc., of Manchester*[1] the plaintiff, in daylight, walked along the side of a road which was under construction by defendants, but which was not a public road. Returning over the same ground when it was growing dark, he chose to walk on the middle of the road, rather than on the side of it, and he fell into a ditch which defendants had left unguarded and unlighted. The Court of Appeal held that the plaintiff was a licensee, and that on the facts, there was no question to leave to the jury.

The decision seems to be unquestionable. It is noted here because it is one of several recent decisions that have called attention sharply to the duty of licensees or invitees. There has been a tendency to over-emphasize the duties of occupiers of premises, and to forget that a licensee himself must notice dangers that are obvious to the reasonable man using reasonable care, while an invitee must use reasonable care for his own safety. Unless licensees and invitees can reach the standards indicated, then no question can arise as to the occupier's liability.

The case of invitees is dealt with in a masterly judgment of White, J., delivering the opinion of the Supreme Court of New Brunswick in *Guilfoil* v. *McAvity*.[2] In that case the plaintiff was held to be an invitee. The Court felt that no jury properly instructed

[9] Lecture iv.
[1] [1928] 1 K.B. 776.
[2] [1927] 3 D.L.R. 672.

as to the law could reasonably find that he had used reasonable care. Therefore he could not bring himself within the scope of the generally accepted formula laid down by Willes, J., in *Indermaur* v. *Dames*.[3] That being so, it was vain for him to say that the defendant could not bring himself within it.

A. L. MacDonald.

* * *

Pleading—General Denial—Setting Forth Facts.—The provisions of Rule 142 of the Consolidated Rules of the Supreme Court of Ontario, 1913, that the defendant when pleading "shall not deny generally the allegations contained in the statement of claim, but shall set forth the facts upon which he relies," which have been said by Mr. Justice Riddell to be "horrifying to the Common Law Pleader" have once more been the subject of judicial explanation in *Richard* v. *Hall*.[1] Mr. Justice Middleton (who prepared the Consolidated Rules in question) restates the object of the provisions and condemns their infringement as follows:—

> At one time pleading was, in practice, a scientific method of concealing thought, but the thought was present; the more modern theory is quite different. The rule-making body desires a simple statement of facts upon which the party pleading relies and prohibits the general denial. The solicitor pleading frequently attempts to frustrate this legislative attempt, and to substitute some subterfuge not so much to conceal thought as to cloak the complete absence of thought. Instead of putting before the court the defendant's real contention, the defendant seeks to place himself in the position of a person accused of crime and to plead "not guilty," leaving the plaintiff to prove the case as best he can, and leaving it open to the defendant to take advantage of anything that may develop. To such the endeavour is not to "aid" in administering justice but to win a game even if the rules of the game are violated.

H. W. A. Foster.

* * *

Law of Animals—Horses and Dogs—Scienter.—Two interesting cases on the law of animals have recently come to notice—the first *Glanville* v. *Sutton*,[1] respecting the friend of man, the second *Norton* v. *Fitzgerald*,[2] a dog case.

In the English case damages were claimed for injury sustained from an attempt to bite the plaintiff by a muzzled horse left unattended at the curb on Ludgate Hill. To prove scienter it was

[3] (1866) L.R. 1 C.P. 274 at p. 288.
[1] [1928] 3 D.L.R. 189 at p. 190; (1928), 62 O.L.R. 212.
[1] [1928] 1 K.B. 571.
[2] [1928] 3 D.L.R. 474 (1928), 62 O.L.R. 314.

shown that the defendant was aware of the horse's propensity to bite others of its kind and though the jury found the defendant knew this and that the horse was dangerous to human beings, the County Court judge (Shewall Cooper) held that the findings of fact as to the defendant's knowledge that the horse was dangerous to mankind and his negligence in leaving it unattended were not justified by the evidence, and dismissed the action. His judgment contains an excellent review of the leading English cases in point.

On appeal by the plaintiff Lord Justice Scrutton, in approving the judgment of the lower Court, contradicted the principle argued by Mr. Patterson, counsel for appellant, that an animal known to be dangerous in one respect must be considered dangerous in other respects and cited the judgment of Atken, L.J., in *Manton* v. *Brocklebank*:[3] "The owner of a dog is not liable for its trespass and damage without proof of scienter and a special mischievous propensity to do such damage" as exactly defining the kind of scienter that must be proved.

In *Norton* v. *Fitzgerald* (*supra*), damages were sought for a broken leg and other injuries sustained by the plaintiff from a fall caused by the defendant's dog, which was shown to be of an irritable and mischievous disposition and to have attacked but not bitten two other persons previously. The dog was in the habit of rushing against people and knocking them down and this habit was known to the defendant's wife. Scienter being thus clearly established damages were awarded and the judgment sustained on appeal. The leading cases are also reviewed in the judgments of the Divisional Court.

In Canada the law of scienter has had an interesting development. The Quebec cases *Bernier* v. *Genereux*,[4] *Matte* v. *Meldrum*,[5] *Collas* v. *Langevin*,[6] may be excluded as they follow Art. 1055 of the Civil Code which originates in the Roman law the provisions of which made the owner of an animal liable for damages caused by it irrespective of scienter.

In Alberta *Layzelle* v. *Proctor*[7] the common knowledge of mankind as to the vicious nature of stallions was held to constitute scienter where a horse was injured by a kick from a stallion in a shoeing forge.

[3] [1923] 2 K.B. 212 at p. 231.
[4] 12 Que. K.B. 24.
[5] Que. R. 33 S.C. 396.
[6] 40 Que. S.C. 121.
[7] 8 A.L.R. 156.

Scienter as to the habits of bees, *Lucas* v. *Pettit*,[8] as to barking dogs, *Carlson* v. *McEwen*,[9] *Birdsall* v. *Merritt*,[10] and horses, *Nadeau* v. *City of Cobalt*,[11] has been successfully established but the evidence necessary seems to vary widely.

The broad principle appears to be that knowledge of the owner, his wife or his servants, as to the particular vice or habit of animals *mansuetæ naturæ* must be clearly shown although he who merely harbours an animal known to be vicious may become himself liable for its damages, *McKone* v. *Wood*,[12] and likewise if he loose it, *Leame* v. *Bray*.[13]

But as to animals *feræ naturæ* scienter is not a necessary element, *Andrew Baker's* case,[14] and *Baker* v. *Snell*,[15] also *Andrew* v. *Kilgour*.[16]

One judge appears to have regarded the vicious actions of dogs almost as a breach of the peace for in *Smith* v. *Pelah*,[17] Sir William Lee, Chief Justice of the King's Bench, says, "If a dog has once bitten a man and the owner, having notice thereof, lets him go about or lie at his door an action will lie against the owner at the suit of a person who is bitten subsequently for it was owing to his not hanging the dog on the first notice. And *the safety of the King's subjects ought not afterwards to be endangered.*" The underlying idea of the "Pax Regis" is clear.

But Tray has not always been the shuttlecock of plaintiff and defendant. On one occassion at least he has been produced as evidence, for in the case of *Line* v. *Taylor*,[18] a dog, powerful and playful, but free from vice, was the best witness for his master, and aided by the powerful eloquence of Sergeant Ballantine triumphantly justified his owner's confidence.

A. M. LATCHFORD.

* * *

DIPLOMATIC PRIVILEGE—ACTION AGAINST MEMBER OF GERMAN EMBASSY IN ENGLAND FOR RENT—LIABILITY.—The House of Lords has reversed the decision of the Court of Appeal in *Mussman* v.

[8] 12 O.L.R. 448.
[9] 3 D.L.R. 787.
[10] 38 O.L.R. 587.
[11] 3 O.W.N. 1126.
[12] 5 C. & P. 1.
[13] 3 East 593.
[14] Hale. Placita Coronae 350
[15] [1908] 2 K.B. 352, 825.
[16] 19 Man. R. 545.
[17] 2 Stra. 1264.
[18] 3 F. & F. 731.

Engelke, noted in the CANADIAN BAR REVIEW, Vol. 5 at p. 533. In a short note of the case in 166 *Law Times*, p. 48[1] it appears that the House of Lords (Lords Buckmaster, Dunedin, Phillimore, Blanesburgh and Warrington), held that for the purpose of determining the status of any person who claimed the benefit afforded to ambassadors and other accredited representatives of foreign countries by the Statute 7 Anne, c. 12, the statement of the Attorney-General on the instructions of the Foreign Office was, for that purpose, conclusive. The majority of the Court of Appeal were of opinion that the question of diplomatic privilege was one of fact to be established by evidence, and should not rest on a statement by the Attorney-General that the Foreign Office had reported that the defendant was privileged.

C. M.

* * *

INSURANCE—FIRE—VACANCY FOR LESS THAN THIRTY DAYS—DESCRIPTION OF PROPERTY.—The case of *Cooper* v. *Toronto Casualty Insurance Co.*[1] has caused a great deal of comment in the newspapers and among insurance managers, adjusters and lawyers and very likely may be the subject of future legislation; and so it may be of interest to examine the case and see what basis there is for the severe criticism it has undergone. It has been suggested that the case would have gone further had it been possible to do so, but as only a small amount was involved this was impossible. (It was an appeal from a Division Court). A careful review of the case does not seem to warrant the suggestion which has been made that the case should have been carried further. The decision seems to be in accord with the authorities and to be inevitable.

The loss in question was by fire upon a building which was vacant at the time of the fire, but the vacancy had not continued for thirty days, and it was alleged that under statutory condition no. 5 (d) vacancy for thirty days was permitted, and yet the decision was that the vacancy was fatal to the assured's claim.

The reason for the criticism is that although the building was insured "only while the premises are occupied as a private dwelling," and was undoubtedly vacant at the time of the fire, it had not been vacant for thirty days and, therefore, it is said the plaintiff should recover, as vacancy for thirty days is allowed by statute. It was also urged that, in any event, it was a stipulation upon which

[1] Also reported, [1928] A.C. 433.
[1] [1928] 2 D.L.R. 1007; (1928), 62 O.L.R. 311.

the rate of premium had been based within the meaning of section 96 of The Insurance Act of 1924[2], which section required notice in writing separate from the policy to be given to the insured. Admittedly this was not done. (By the way, this section is no longer in effect and is now somewhat differently set out in section 102 of The Insurance Act,[3] the principal feature of which is that notice by the company is not required now, but the stipulation must be just and reasonable as before).

The decision of the Second Divisional Court of the Appellate Division is delivered by Riddell, J.A., with whom Latchford, C.J., and Orde, J.A., agreed, as did Middleton, J.A., who added a note in which he suggested a remedy by statute.

Mr. Justice Riddell, in his judgment, did not give effect to the contention of the plaintiff in regard to it being a stipulation within the meaning of section 96, and said it was not a stipulation but a description of the property insured as a risk. He held that the Court was bound by the decision in a line of cases holding that such expressions as "only while the premises are occupied as a private dwelling, etc.," are part of the description of the property insured and limit the duration of the risk and exactly define the thing insured. In this view the statutory condition allowing vacancy for thirty days could not alter this. One of the cases holding that such words are part of the description of the risk is *The London Assurance Corporation* v. *The Great Northern Transit Co.*,[4] which is known as the *Baltic* case. The S.S. Baltic was only insured "whilst running on the inland lakes and canals during the season of navigation," and not at other times or places, and so the plaintiff could not recover. Another case is *Ross* v. *Scottish Union and National Insurance Co.*,[5] where the words were "while occupied by * * * as a dwelling," and recently *Moffa* v. *Law Union and Rock Insurance Co.*,[6] where the exact words were "only while occupied as a private dwelling," in both of which cases it had been held that vacant houses were not insured.

It is obvious that the Court was bound to follow these decisions and that the plaintiff's house was not insured as it was not "occupied as a private dwelling" when vacant. The only plausible argument advanced against this conclusion was that the intention of the policy,

[2] Ont., 14 Geo. V., c. 50.
[3] R.S.O. 1927, c. 222.
[4] (1899), 29 Can. S.C.R. 577.
[5] (1918), 58 Can. S.C.R. 169.
[6] (1924), 26 O.W.N. 88.

read as a whole, could not be to that effect in view of statutory condition no. 5 (d) which is printed on the policy which provides for vacancy without a permit for thirty days. In answer to this, the Court pointed out that the statutory condition is one which is deemed to be contained in all policies and, therefore, not presumed to have any special effect upon the words which happened to be used as a description of the risk in this policy. It was not a wording adopted by the parties to the contract and so could not be deemed to affect the plain words describing the risk. This conclusion seems sound.

In regard to the suggestion of Mr. Justice Middleton that there should be remedial legislation, it may be that the situation calls for legislative interference because it is somewhat contradictory to have thirty days vacancy allowed by law and yet have this defeated if the buildings are only insured while occupied. But Mr. Justice Middleton in remarking[7] that "it is contrary to the policy of our statutes that an insurance company should be able to cut down a risk by a few words in inconspicuous type printed so that they are unlikely to be observed" overlooks the inherent right of every company to insure only what it likes and that there is no compulsory insurance at all. There does not seem anything "peculiarly vicious" in such a policy.

Possibly there might have been some basis for a claim for rectification of the policy to make it conform with the application and invoking for that purpose statutory condition no. 2 which provides that after application for insurance, if the same is in writing, it shall be deemed that any policy sent to the insured is intended to be in accordance with the terms of the application and it is very unlikely that the application would be limited to a request for insurance only while occupied, etc. Of course, there may have been no application in writing and consequently the statutory condition no. 2 may have been inapplicable but in any similar case, arising before the threatened legislation, it would be advisable to see if the circumstances permit of invoking this statutory condition.

A. C. HEIGHINGTON.

[7] (1928), 62 O.L.R. 311 at p. 313.