NOTES.

RECTIFICATION OF CONTRACT AND SPECIFIC PERFORMANCE.—Attention should be drawn to the recent cases of *Craddock* v. *Hunt*,[1] *Sweitzer* v. *Granger*[2] and *United States* v. *Motor Trucks Limited*,[3] which revive and perhaps settle a controversy of long standing in the Courts.

Amidst much fluctuation of opinion, judicial and otherwise, it has been debated for a long time whether, where by common mistake a contract required to be in writing under the Statute of Frauds omitted from the writing some term agreed upon by the parties, the Court could (or could not) rectify the writing by adding to it the oral term omitted and then grant specific performance of the written contract thus rectified. Generally speaking in the absence of some consent by the parties, the contract remained unenforceable where the Statute of Frauds was pleaded. Whatever doubt may have existed in England about this the debate was settled in the negative for us in Ontario in 1905 by *Green* v. *Stevenson*,[4] a decision of a Divisional Court written by Mr. Justice Anglin. The controversy however continued in England and very learned text writers, such as Sir Edward Fry in his work on Specific Performance, and Mr. T. Cyprian Williams in the second edition of his "Vendors and Purchasers," pp. 787 et seq., contended for the affirmative. This view was lately adopted and these writers quoted with approval by Lawrence. J., and the Court of Appeal in England in *Craddock* v. *Hunt* (*supra*) and in the preface to Volume II. of his third edition, published in 1923, Mr. Williams has the satisfaction of referring to this endorsation of his views. About the same time there were passing through our Courts the cases of *Sweitzer* v. *Granger* and *United States* v. *Motor Trucks* (*supra*). In the latter case Mr. Justice Kelly at the trial,[5] following some English cases, but not referring to *Green* v. *Stevenson*, granted rectification and specific performance. This judgment appears in full in Vol. 62 of the Printed Appeal Cases in Osgoode Hall library. The first Appellate Division reversed him on other grounds[6]; the judges differing somewhat widely in their views

[1] (1922) 2 Ch. 809, (1923) 2 Ch. 136.
[2] 54 O. L. R. 70.
[3] (1924) A. C. 196.
[4] 9 O. L. R. 671.
[5] See 20 O. W. N. 519.
[6] See 52 O. L. R. 262.

but none of them dealing with the point in question; and from this judgment the plaintiffs went direct to the Privy Council.

Before it could be decided there, however, *Sweitzer* v. *Granger* came before the second Appellate Division which waited for the judgment in *Craddock* v. *Hunt* in Appeal and on May 11th, 1923, followed *Green* v. *Stevenson* in our Courts distinguishing *Craddock* v. *Hunt*. The learned Chief Justice of the Common Pleas speaking for the Court treats the *nisi prius* judgment in *Craddock* v. *Hunt* as a case of part performance, thus distinguishing it, and as to the judgment in appeal merely says:—"That judgment * * * seems to be quite in accord with the decisions of the Court of this Province in many cases of which *Green* v. *Stevenson* is a prominent example." The element of part performance was also relied on in the judgment in appeal but it is difficult to see how it accords with *Green* v. *Stevenson;* because one of the grounds on which both Lawrence, J., and the majority in appeal relied was that notwithstanding some decisions to the contrary the law is that where by a mistake some term has been omitted from the writing the Court will rectify the writing by adding the omitted term and will specifically enforce it as rectified. Then on July 21st, 1923, came the judgment of Lord Birkenhead in the Privy Council. It is dogmatic and lucid like all his judgments. It restores Mr. Justice Kelly's judgment, adopts the reasoning in *Craddock* v. *Hunt* and in effect lays down the following propositions:—

(1) "The Statute of Frauds is not allowed * * * to become an instrument for enabling sharp practice to be committed."

(2) "The power of the Court to rectify mutual mistake implies that this power may be exercised notwithstanding that the true agreement of the parties has not been expressed in writing."

(3) "When the written instrument is rectified there is a writing which satisfies the statute."

(4) "There seems no reason on principle why a Court of Equity should not at one and the same time reform and enforce the contract." And, since our Judicature Act, R. S. O., c. 56, s. 16(h), any former "controversy between the Chancery judges (on this point) has become obsolete inasmuch as * * * the Court can entertain an action in which relief will be given simultaneously for the reformation of a contract and for the specific performance of the reformed contract."

Mr. Justice Kelly at the trial also considered that there was a sufficient agreement in writing to obviate the need for verbal evidence though he admits and relies on that as well, but the Privy Council

bases its judgment on the right to hear verbal evidence of omitted terms. While, therefore, neither *Green* v. *Stevenson* nor *Sweitzer* v. *Granger* were cited in *United States* v. *Motor Trucks,* it would seem that both decisions must be relegated to that graveyard of judicial error known as the table of cases overruled.

SHIRLEY DENISON.

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CHAMPERTY.—The Province of British Columbia some years ago passed an amendment to The Legal Professions Act of that Province in the following terms:—

"Notwithstanding any law or usage to the contrary, any solicitor or barrister in the province may contract, either under seal or otherwise, with any person as to the remuneration to be paid him for services rendered or to be rendered to such person in lieu of or in addition to the costs which are allowed to said solicitor or barrister; and the contract entered into may provide that such solicitor or barrister is to receive a portion of the proceeds of the subject matter of the action or suit in which any solicitor or barrister is or is to be employed, or a portion of the moneys or property as to which such solicitor or barrister may be retained, whether an action or suit is brought for the same or a defence entered or not, and such remuneration may also be in the way of commission or percentage on the amount recovered or defended against, or on the value of the property about which any action, suit, or transaction is concerned."

The validity of this enactment came up recently in the case of *Taylor* v. *Mackintosh*[1] and it was held *ultra vires* by Morrison, *J.*, as trenching upon criminal law. Tremeear in his annotations to the Criminal Code points out that the laws of maintenance and champerty as they existed on November 19, 1858, are in force in British Columbia and, therefore, that an agreement for a champertous consideration is absolutely null and void and he refers to the cases of *Geigerich* v. *Fleutot,*[2] and *Newswander* v. *Geigerich.*[3] It was contended on behalf of the defendant in the case above referred to that the common law of England making champerty a criminal offence, "is now obsolete," but the Court did not agree with this view of the matter. The Judge said, referring to the provincial enactment above set out, that it was "an open invasion by the provincial legislature of the field of criminal law occupied exclusively by the federal parliament."

[1] (1924) 1 W. W. R. 859.
[2] 35 Can. S. C. R. 327.
[3] 39 Can. S. C. R. 354.

It is long since bargains of the kind under review first received the attention of the legislature. In the year 1300, in the reign of "our English Justinian," a law was passed, 13 Ed. I., c. 11, with the quaint title, "Nothing shall be taken to maintain any matter in suit." There it is said that "The King will that no officer nor any other (for to have part of the thing in plea) shall not take upon him the Business that is in suit."

Four years later the statute 33 Ed. I., c. 1, defines the offenders thus:—"Champertors be they that move pleas and suits, or cause to be moved either by their own Procurement, or by others, and sue them at their proper Costs for to have Part of the Land at Variance, or part of the Gains."

Centuries afterwards Yates, J., in *Millar* v. *Taylor*,[4] offered a reason for the law in these terms:—"The law is too tenacious of private peace to suffer litigation to be negotiable."

If public opinion has come to look upon champertous transactions with a more indulgent eye, the law remains unchanged, notwithstanding the activities of occidental legislators. R. W. S.

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NULLITY JURISDICTION IN ONTARIO.—It seems a little strange that no effort has been made in the last four years to apply the reasoning of the Privy Council in *Board* v. *Board*,[1] to the question of the jurisdiction of the Ontario Courts in nullity cases.

The earlier Ontario decisions are collected by Mr. Morine in his learned annotation to *Peppiatt* v. *Peppiatt*.[2] Shortly stated, they decide that the Ontario Courts have no jurisdiction to annul a voidable marriage, since no legislation has ever endowed any Ontario tribunal with the jurisdiction possessed by the English Ecclesiastical Courts or by the Divorce Court which succeeded them under the Act of 1857.

That is precisely the argument which was unsuccessfully addressed to the Privy Council in the case of *Board* v. *Board*. The respondent there argued that the Alberta Courts had no divorce jurisdiction since no legislation had ever conferred upon them the jurisdiction of the English Divorce Court, which was omitted from the list of tribunals enumerated by the statutes. The decision overruled this reasoning by saying in effect that "where there is a right there is also a remedy." The English substantive law of divorce, as it stood in 1870, having been introduced into Alberta by a Dominion

[4] (1769) 4 Burr. Part IV, p. 2385.
[1] [1919] A. C. 956.
[2] (1916) 30 D. L. R. 1.

statute, it necessarily followed that the Alberta Courts must have the right and duty to administer the law thus introduced. To have decided otherwise would have been, in effect, to permit the Province to repeal the law enacted by the Dominion.

Substituting nullity for divorce, exactly the same reasoning applies to Ontario. That Province took over by statute the English law as it stood in 1792, and at that date the right to have a marriage annulled for certain specific reasons was part of the general law of England. The fact that the remedy could only be obtained in the Ecclesiastical Courts did not make it any less a part of the English law, since it was a right available to every subject without distinction of creed. Since the present High Court of Justice in Ontario has a general jurisdiction to administer the whole law of the Province, it would necessarily seem to follow that it has jurisdiction to annul a voidable marriage for any cause recognized by the English Ecclesiastical Courts in 1792.

H. A. S.

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DAMAGE TO CARGO AND SEAWORTHINESS.—In *Elder Dempster & Co. Ltd.* v. *Paterson, Zochonis & Co. Ltd.* (March 29th, 1924), the House of Lords (Viscount Cave, Lord Dunedin, Lord Sumner and Lord Carson, Lord Finlay dissenting) allowed an appeal from the Court of Appeal ([1923] 1 K.B. 420) affirming Rowlatt, J., at trial. The question was whether a certain damage to cargo carried by a steamer under charter to one of the appellants was due to unseaworthiness of the ship or to bad storage. If the former, then the charterers were protected from liability by conditions in the bill of lading; if the latter, then the charterers had no such protection.

The action was brought by the shippers against the charterers and the shipowners in respect of damage done to a cargo of palm oil in casks carried from two West African ports to Hull in the steamship *Grelwen*, and was founded on breach of contract, or alternatively on negligence or breach of duty. Elder, Dempster & Co. ran to West African ports a line of produce carrying steamers. These vessels had their holds fitted with 'tween decks so that goods stowed in the lower part of the hold might be relieved from the weight of those stowed in the upper part. In need of another steamer for this trade, they chartered from the Griffiths Lewis Steam Navigation Co. the *Grelwen*, containing deep holds but no 'tween decks. This steamer proceeded to two West African ports and loaded at one port 297 casks and at the other 147 casks of palm oil belonging to the plaintiffs. These

casks were properly stowed at the bottom of the holds, but on each occasion the holds were filled up with a very heavy cargo of palm kernels, superimposed upon the palm oil, with the result that the casks began to break before the vessel left port and a great part of the oil was lost or damaged.

Viscount Cave[1] said it was well settled that a shipowner or charterer who contracted to carry goods by sea warranted that the ship and her equipment should be reasonably fit for receiving the contract cargo and carrying it across the sea; but there was no rule that if two parcels of cargo were so stowed that one could injure the other during the course of the voyage the ship was unseaworthy. Applying these principles, he came to the conclusion in the present case that the damage complained of was due not to unseaworthiness but to improper stowage. At the time of loading the palm oil the ship was fit to receive and carry it safely, and if the palm kernels could not have been stowed without endangering the safety of the ship the master could have refused to accept some part of the kernels. On the question whether the shipowners were entitled to the protection afforded by the bills of lading, they took possession of the goods on behalf of and as agents of the charterers, and though they were not directly parties to the contract, in his opinion they could claim the same protection as their principals.

This decision is in line with such cases as *The Thorsa* [1916] P. 257. In Maclachlan on Shipping (6th ed., 1923, p. 332) it is laid down that "bad stowage is not unseaworthiness, unless it endangers the safety of the ship."

C. M.

[1] See a report of the case in [1924] W. N. 110.