REPORTS OF CASES IN HOUSE OF LORDS AND PRIVY COUNCIL, WHICH, THOUGH NOT ORIGINATING IN SCOTLAND, DEAL WITH QUESTIONS OF INTEREST IN SCOTS LAW.

HOUSE OF LORDS.

Tuesday, July 29, 1919.

(Present—Lords Finlay, Atkinson, Shaw, and Sumner.)

LONDON AND NORTH-WESTERN RAILWAY COMPANY *v.* J. P. ASHTON AND COMPANY.

(On Appeal from the Court of Appeal in England.)

Carrier — Railway—Reparation—Carriage Partly by Land, Partly by Sea—Loss of the Goods—Value of the Goods Undeclared—Onus of Proof where the Loss Occurred—Carriers Act 1830 (11 *Geo. IV. and* 1 *Will. IV, c.* 68), sec. 1.

To give a carrier the benefit of the provision of the Carriers Act 1830 limiting liability on the part of the carrier, he must prove that the loss of the goods occurred during transit by land.

Decision of the Court of Appeal, 1918, 2 K.B. 488, *affirmed.*

Le Conteur v. *London and South Western Railway Company*, L.R., 1 Q.B. 54, *explained.*

Counsel for the respondents were not heard.

Lord Finlay—In this case there were parcels of furs delivered on three occasions by the respondents to the appellants, the London and North-Western Railway Company, who carry goods between London and Belfast. The carriage of these goods is, of course, effected partly by land, as far as Holyhead, and from Holyhead it is effected by sea as far apparently in this case as Greenore, and thence the goods, I suppose, go to Belfast by land. When the furs were delivered to the company they of course would become liable on a contract to carry from London to Belfast, partly by land and partly by sea. The Carriers Act 1830 exempts a carrier from liability in certain cases, and section 1, omitting the immaterial words, provides—"No . . . common carrier by land for hire shall be liable for the loss of . . . any . . . goods . . . contained in any parcel or package which shall have been delivered . . . to be carried for hire . . . when the value of such . . . articles . . . contained in each parcel or package shall exceed the sum of ten pounds unless at the time of the delivery thereof at the office . . . of such . . . common carrier . . . the value and nature of such . . . articles shall have been declared by the person . . . sending or delivering the same; and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package."

And then section 2 makes provision for an increase of payment in respect of such articles.

The carriers, the London and North-Western Railway Company, the appellants, claim the benefit of this section, and it is for those who plead the section to aver and prove that the section applies, and it does not apply unless the loss took place by land; it does not apply if the loss took place by sea. It is for the carriers who, having entered into a general contract of carriage from London to Belfast, desire to get the benefit of the Act, to show that the facts bring them within that protection, and the facts do not bring them within that protection unless the loss took place by land.

It was said that there were two contracts. I cannot accept that view. The case of *Le Conteur* v. *London and South-Western Railway Company* (L.R., 1 Q.B. 54) which was relied upon seems to me to show nothing of the kind. On the contrary the Court there treated the contract as one contract, but said that being a contract for carriage, partly by land and partly by sea, the contract might be divisible as regards the extent of the liability by land as compared with the extent of the liability by sea.

This case has been before six judges already, and each of them has arrived at the same opinion. I desire to express my entire concurrence in the opinion which has been formed by every judge before whom this case has come, and I think the appeal must be dismissed.

Lord Atkinson—I concur. I think this case is perfectly plain. Section 1 of the Carriers Act is directed to the protection of carriers by land against being liable for the loss of goods of a certain value, no declaration being made. That obviously means that it protects them while they are acting in that character, and when a loss is sustained while they are acting in that character. This necessitates its being proved

by them that the loss occurred on the land portion of the journey, for it is only on the land portion of the journey that they were acting in the position of common carriers. Therefore it appears to me that when they want to excuse themselves from liability they must prove that the loss occurred while they were acting in that character — namely, during the course of the land journey.

LORD SHAW—I concur.

LORD SUMNER—I concur.

Appeal dismissed.

Counsel for the Appellants — Disturnal, K.C. — Schiller, K.C. — Russell Davies. Agent—M. C. Tait, Solicitor.

Counsel for the Respondents—Mackinnon, K.C. — Kyffin. Agents — Ballantyne, Clifford, & Hett, Solicitors.

PRIVY COUNCIL.

Tuesday, October 21, 1919.

(Present—The Right Hons. Lords Haldane, Buckmaster, and Dunedin.)

CRAIG *v.* LAMOUREUX.

(ON APPEAL FROM THE SUPREME COURT OF CANADA.)

Succession—Will—Validity—Allegation of Undue Influence—Burden of Proof.

When once it is proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence rests on the party making the allegation, as the principle applicable to the case of gifts *inter vivos*, that a person who is instrumental in framing or obtaining the deed under which he obtains a bounty has the burden of proving the righteousness of the transaction, does not apply in the case of wills.

Appeal from a judgment of the Supreme Court of Canada (ARCHAMBEAULT, C.J., dissenting) dated the 3rd February 1914, reversing a judgment of the Court of King's Bench for Quebec (Appeal side), which had reversed a decision of BRUNEAU, J., in the Superior Court.

Their Lordships' considered opinion was delivered by

LORD HALDANE—This is an appeal from the Supreme Court of Canada, which reversed — the Chief-Justice dissenting—a judgment of the Court of King's Bench for the Province of Quebec. That Court, in its turn, had reversed the judgment of the Superior Court for the Province delivered in an action which was brought to set aside a will. The claim was made against the appellant as defendant, and was based on the contention that as the appellant, who was the husband of the testatrix, was the sole beneficiary under the will and had been instrumental in preparing it, the *onus* lay on him to show that he had not procured its execution by undue influence and misrepresentation and that this *onus* he had failed to discharge.

Their Lordships feel bound to express their regret at the course which the litigation has taken. The amount of the testatrix's estate is small, and the costs of determining the issue raised must be out of all reasonable proportion to the sum at stake. But the judgments given have been successively reversed, and there is no course open to this Board but to deal with the matter without regard to consequences.

The respondent, the plaintiff, was an unmarried sister of the testatrix. The latter had been married to the appellant for twenty-four years, and the husband and wife had lived together through that period in the house of the appellant's father near Montreal. They were married with a contract providing for separation of property, under which the surviving spouse would not on intestacy take any interest in the property of the predeceasing spouse — a situation which they had, according to the evidence, only realised immediately before the death of the wife.

The events which have given rise to the controversy between the parties are shortly as follows:—The testatrix was seized with a serious illness on Saturday the 1st July 1911. Doctors who were called in thought her condition one of danger. The trained nurse who was in attendance finally suggested to the testatrix that she should see the parish priest, and he was summoned accordingly by the husband's father Joseph Craig. The latter had heard the appellant and the testatrix talking with the idea that the survivor of them would succeed to the property of the other, and having doubt whether they realised that from the nature of their marriage contract this could not be without a will, he spoke first to his son and then to the priest. The priest, after administering the rites of his Church to the testatrix, mentioned the point to her, but, according to his evidence, without suggesting that she should leave her property to her husband. When the priest had left her the testatrix told the nurse to ask her husband to come to her room as she had something to say to him. He came, and the nurse left the room. According to the husband's testimony his wife asked him how it was that their affairs were not in order as she had always been told by him, and she requested him to get them arranged, so that, as they had always agreed when she was in health, the property should go to the survivor. The husband then went to his brother, who lived in the house, and who was a lawyer. The latter wrote out a will in the following words—"Par mesure de prudence, et sans me croire nullement dangereusement malade, je prends à tout évènement les présentes dispositions: Je donne et lègue, sans restrictions, à mon époux, Isaie Craig, tous mes biens tant immeubles que meubles, sauf les cadeaux qu'il jugera à propos de faire à mes proches comme souvenirs."

The husband read this will to his wife, who asked him, according to his account, if