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SETTLEMENTS BY SOLICITORS AND COUNSEL.

The extent of the authority of a solicitor or counsel to bind his client by a compromise entered into on the client's behalf is a subject which is not without practical importance, and, under the earlier cases, was free from doubt. Some aspects of the question have, however, been thrown into uncertainty by the more recent decisions, and the principle, which apparently ought to govern, seems in danger of becoming obscured by the mists of those potent cloud-gatherers, "hardship" and "injustice." Under these circumstances, it may not be unprofitable briefly to draw attention again to this principle, and to see how far the apparent invasions of it have really extended.

It is well settled that a solicitor has authority, as such, in the absence of express instructions to the contrary, to bind his client by the settlement of an action which he has been retained to conduct. The latest statement on the point seems to be that of Farwell, J., in *Re Newen* (1903), 1 Ch. 812 at p. 818.

But this authority extends only to the real subject-matter of an action actually pending. It does not cover matters collateral to the action, and does not exist at all unless a writ has been issued: *Macauley* v. *Polley* (1897), 2 Q.B. 122.

The difficulty arises when a settlement, otherwise within the authority of the solicitor, is made in the face of the client's express prohibition; and it should be noted that an authority to settle on defined terms is equivalent to a prohibition against settling on any other terms: per Lord Halsbury, L.C., *Neale* v. *Lady Gordon-Lennox* (1902), A.C. at p. 469.

In such a case, if the prohibition be known to the person with whom the solicitor is dealing, of course the client will not be bound.

But, if the third person be ignorant of the prohibition, then, surely, on principle the client should be bound by the settlement, for the solicitor is his agent to conduct the action: *Prestwich* v. *Poley*, 18 C.B. (N.S.) 806 at p. 814, and no secret limitation of an agent's ostensible authority will avail against third persons dealing in ignorance of it. The illustration most pertinent to the present discussion is perhaps *Trickett* v. *Tomlinson*, 13 C.B. (N.S.) 663, where the principal was held bound by a settlement made by his agent, not a solicitor, although contrary to his express instructions. And a very recent case is *International Sponge Importers* v. *Watt* (1911), A.C. 279.

Accordingly, up to the year 1902, we find a line of English authority—uniform, but for the decision in *Stokes* v. *Latham*, 4 T.L.R. 305—upholding, as between the client and third persons, settlements made under these circumstances. It will be necessary to refer later to *Stokes* v. *Latham*, but it is submitted that the exception which it seems to indicate is more apparent than real.

It is unnecessary to review these cases in detail, since they will be found collected and approved in the exhaustive judgments of Lord Alverstone, C.J., and of the Court of Appeal in *Neale* v. *Lady Gordon-Lennox* (1902), 1 K.B. 838.

To the cause there cited, two Irish cases may be added:—*Brady* v. *Curran*, 16 W.R. 514, and *Berry* v. *Mullen*, Ir. Rep. 5 Eq. 368.

This view is supported by another class of cases, not noticed in *Neale* v. *Lady Gordon-Lennox*, those, namely, where the client has recovered substantial damages against the solicitor for having compromised contrary to his instructions. Of these it is sufficient to refer to *Butler* v. *Knight*, L.R. 2 Ex. 109.

If the settlement in question in these cases had not been binding on the client, only nominal damages could have been recovered against the solicitor. The Courts must therefore have considered that the settlements were binding. Indeed, the point was specifically raised in *Butler* v. *Knight*, where counsel for the defendant solicitor argued, in effect, that,

if the settlement was not contrary to the client's instructions, no action would lie, while, if it was, it was not binding on the client, who accordingly suffered no damage. But the Court considered the client entitled to £150 damages, and Kelly, C. B., and Piggott, B., at p. 114, expressed the opinion that the settlement was binding upon him.

In some of these cases the settlement in question was made by a solicitor, and in others by counsel, but there seems to be no reason for making any real distinction between the two. If any is to be made, the courts, at least in England, might lean more strongly towards a settlement made by a solicitor, since against him the client would have a remedy in damages, while against counsel he would have none. But perhaps the point has no substantial importance, though in *Hackett* v. *Bible*, 12 P.R. 432, the Chancellor indicated an opinion that the solicitor's authority in this respect is the wider of the two.

It would appear, therefore, that the judgment of the Court of Appeal in *Neale* v. *Lady Gordon-Lennox* was an inevitable tribute to principle and authority, which only some very exceptional state of facts would have justified them in refusing to pay. Nevertheless, counsel for the plaintiff boldly appealed from that judgment to the House of Lords. It will be desirable to glance at the circumstances which led him to do so, before discussing the result.

The situation was that, having brought an action for slander against her aunt, the plaintiff, at the opening of the trial, had given a written authority to her counsel, Sir Edward Clarke, to consent to a reference of the action to a barrister, on the condition that all imputations against her should be withdrawn by the defendant. A memorandum providing for the reference was prepared and signed by Sir Edward Clarke and by Mr. Rufus Isaacs, (as he then was), who appeared for the defendant, and a juror was withdrawn. But the memorandum contained no withdrawal of the slanderous statements complained of, and no announcement of any such withdrawal was made in

court. It was stated by Sir Edward Clarke on the subsequent argument that the omission was due entirely to an oversight on his part. After an interview with his client, Sir Edward Clarke moved to rescind the order of reference, and to have the case restored to the list for trial. The motion was opposed by the defendant.

After reviewing the previous cases, Lord Alverstone expressed his agreement with them, and said that, if the settlement had been a final one, the plaintiff would have been bound by it. But he considered that, as it provided for a reference, it was interlocutory only, and that to such settlements the rule established by the cases cited had no application. He therefore ordered that the action should be replaced on the list for trial.

But the Court of Appeal were of opinion that the distinction drawn by Lord Alverstone had no foundation. They accordingly applied the rule to its full extent, and, basing their decision on the ground that Mr. Isaacs had had no knowledge of any limitation of Sir Edward Clarke's authority, ordered a reference in accordance with the memorandum of settlement.

It was from this judgment that counsel for the plaintiff appealed, and it may be conjectured that his gratification at the result was not unmixed with surprise. Out of a sky apparently clear, except for a cloud no bigger than a man's hand, which an observant prophet might perhaps have noticed in *Matthews* v. *Munster*, 20 Q.B.D. at p. 143, one more bolt was hurled from the Olympus of the Lords upon the heads of those, already almost overwhelmed by similar missiles, who hold it more important that the law should be certain than that it should be just.

For the House of Lords reversed the judgment of the Court of Appeal, and restored that of Lord Alverstone, though on a different ground from that relied upon by him. Lord Halsbury thought that there was "a higher and much more important principle at stake than that involved in discussing whether a particular part of a bargain has or has not been within the

exact authority given to the learned counsel." The court, he said, was being asked for its assistance (*i.e.* for an order of reference) and "to suggest that a court of justice was so far bound by the unauthorized act of learned counsel that it was deprived of its general authority over justice between the parties" was, to his mind, "the most extraordinary proposition" he ever heard. In other words (per Middleton, J., *Lovejoy* v. *Mercer*, 23 O.L.R. at p. 32) he asserted the right of the Court "so to supervise and mould its own process as to avoid injustice."

It is submitted that this decision has no such extensive effect as has sometimes been attributed to it in altering the then existing law. The earlier cases, referred to in the judgments appealed from, were not overruled. On the contrary, Lord Halsbury says that he can very well adopt and feels that he could safely affirm every one of them, and further, at p. 470 he says: "Where the contract is something which the parties are themselves by law competent to agree to, and where the contract has been made, I have nothing to say to the policy of the law which prevents the contract being undone. The contract is by law final and conclusive."

The most noticeable limitation of the decision is that its authority is confined to cases where the court is asked for its assistance. There are observations which seem to be of a more general application, but, in view of the facts, they were unnecessary for the decision. This point is very clearly made by Bray, J., in the subsequent case of *Little* v. *Spreadbury* (1910), 2 K.B. at p. 663, where he says, "It seems to me to be quite clear that the ground upon which the Lord Chancellor based his judgment in that case was that the party seeking to uphold the arrangement was coming to the court to ask it to enforce by an order a certain thing being done, and that he excepts altogether the case of a contract which can be carried out by the parties without the intervention of the court for the purpose of saying that something shall or shall not be done."

The case, then, would appear to be authority for no more

than this, that where the court is asked for its assistance to enforce a settlement made contrary to the client's instructions, it has a discretion to refuse it, if it considers that the settlement is such that, "upon its general jurisdiction of doing justice between the parties the court would think that it was a case in which it ought to interfere" or one which "seems so gross an injustice, that . . . upon the general jurisdiction which every court has over its own procedure, it ought to refuse to allow that injustice to be committed" (Lord Halsbury), or is "itself in the opinion of the court not a proper one" (Lord Macnaghten), or is one "which the court would never have dreamt of making if the court had known the facts" (Lord Lindley).

Now, first, what is meant by "asking the court for its assistance"? Lord Halsbury says that he "entirely repudiates the technical distinction between what is called an application for specific performance, and an order to be made that such and such things should be done." This remark is made obiter, and, on the other hand, he speaks of the assistance of the court being sought "as part of the arrangement," and that was the situation in the case with which he was actually dealing.

Taken in its broadest sense, the phrase in question, which appears to have been intended by Lord Halsbury as a limitation of his decision, would really have no such effect. The "assistance of the court," in the form of a judgment either for damages or for specific performance, would always have to be asked where the client refused to perform the settlement, and, even if the other party were a defendant, and, instead of relying upon the settlement as a weapon of offence, pleaded it as a defence, or as a ground for staying proceedings, he would still be asking for the assistance of the Court to give effect to his plea.

In short, any such broad interpretation of Lord Halsbury's meaning would give results in contradiction to the earlier cases, which he "adopts." Some limitation must therefore be given to his language, and it is submitted that this is

to be found in the words "as part of the arrangement." Apparently, these words indicate cases in which an application to the court would still be necessary, even though both parties were willing that the settlement should be carried out.

Given, then, the preliminary condition that the parties "as part of their arrangement" (whatever exactly that may mean), have to apply to the court at all, the question would appear to be left to be decided upon the facts of each case. The writer in 54 Solicitors Journal, p. 557, seems to go too far in suggesting that such assistance would be refused in every case where the settlement was made "against the express order of the client," but, at the same time, the House of Lords lay down no very definite principle to govern the exercise of the discretion which they assert. Indeed, it is not easy to rid oneself of a lingering suspicion that the "higher principle" of Lord Halsbury was in the nature of a tabula in naufragio, and bears some generic resemblance to that "unwritten law," of which so much is heard from time to time when a desperate situation requires its invocation.

But it may be submitted that the court would not refuse its assistance (if it were necessary) to enforce what can be described as a purely "business" settlement, that is, one into which such elements as the withdrawal of defamatory statements, or of charges of fraud, and the like, did not enter. Apart from other considerations, in such cases damages against the person responsible for the mistake would be an adequate compensation, and this might well have some effect upon the discretion of the court.

It appears from the judgments that some such consideration as this was not absent from the minds of the Law Lords. After discussing certain aspects of the question which might arise in connection with a money claim, Lord Halsbury says "but a wholly different state of things arises when a person's character is at stake," and, at the close of his speech (as reported in 18 T.L.R. at p. 792), "but the lady alleges that her character has been attacked, and it would be gross injustice to

deprive her of the right to vindicate herself in the fullest manner from the aspersions which she believes to have been cast upon her." Lord Brampton's judgment indicates a similar idea.

The question has been the subject of some discussion in Ontario. In *Vardon* v. *Vardon*, 6 O.R. at p. 736, Wilson, C.J., though he does not decide the point, indicates his agreement with the earlier English cases referred to in the judgments below in *Neale* v. *Lady Gordon-Lennox*, and in *Hackett* v. *Bible*, 12 P.R. 482, Boyd, C., in Divisional Court, laid down the rule in accordance with those cases.

But in *Watt* v. *Clark*, 12 P.R. 359, the Chancellor, again in Divisional Court, set aside counsel's settlement of a libel action on the application of his client, the defendant, who said that he had forbidden any settlement at all.

It is true that counsel for the defendant, in his reply, contended that the case was unlike any other reported case, but the foundation for this contention is by no means clear from the report, and the judgment is difficult to reconcile with the Chancellor's own earlier remarks in *Hackett* v. *Bible*.

However, in *Benner* v. *Edmonds*, 19 P.R. 9, the question again came squarely before a Divisional Court, this time the Common Pleas Division.

The action was one of slander, and the plaintiff had authorized a settlement upon the term of a withdrawal of all defamatory statements. The court considered that this involved a prohibition against settling on any other terms. Nevertheless, counsel made a settlement, which did not include such a withdrawal, and the Divisional Court, on the plaintiff's application, set aside the settlement.

By no means all the cases seem to have been cited in the argument, and the Court based its decision upon *Stokes* v. *Latham*, 4 T.L.R. 305, the exceptional English case above referred to.

But that case seems hardly a satisfactory foundation for a decision which is contrary to an otherwise uniform line of

authorities. It does not appear to be reported elsewhere, the judgments are not given verbatim, and the arguments are not given at all. It is not found in Mews' Digest nor, so far as can be discovered, is it referred to in any subsequent English case.

And there were in it some very special and peculiar circumstances. The action was brought by a bar-maid for breach of promise. She had apparently forbidden any settlement at all, but her solicitor made a compromise for £150, without costs. His bill amounted to £218, and, after making the settlement, he wrote to her, saying that he thought she would find it difficult to get out of it. "The truth," said Lord Esher, M.R., "seems to be that the solicitor became anxious about his costs" and the facts indicated very strongly that he had not acted in good faith. It can well be imagined that counsel for the defendant did not argue with any great earnestness in support of such a transaction, and that the court strove to set it aside. The decision, it is submitted, must be supported upon its special facts, and is not of any general authority.

Nor does *Neale* v. *Lady Gordon-Lennox* lend ex post facto support to the judgment in *Benner* v. *Edmonds*, for the Divisional Court was not being "asked" by the defendant "for its assistance" to enforce the settlement, within any reasonable meaning of these words, but set it aside on the application of the plaintiff. There was, therefore, nothing which enabled the court to exercise any discretion, or to invoke the "higher principle" relied upon by the House of Lords.

It is submitted, with deference, that settlements of actions by counsel or solicitors, made in spite of the client's express prohibition, which, however, is unknown to the other side, have been left by the authorities in this position:—

1. Such a settlement will not be set aside by the court on the application of either party, and can be successfully relied upon as a defence, or as a ground for staying proceedings.

2. The breach of, or refusal to perform such a settlement will in all cases support an action for any damages sustained thereby.

3. Specific performance of such a settlement is (as always, *Robinson* v. *Harris*, 21 S.C.R. at p. 397) discretionary, but (if otherwise applicable) will be granted, if the settlement be reasonably fair and of an entirely "business" character.

4. If, as part of the settlement, the assistance of the court be required, such assistance may be refused when, in the opinion of the court, justice requires such a refusal.

5. Such assistance never has been and should not be refused, if the settlement be reasonably fair and of an entirely "business" character.

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SUBJECT OR CITIZEN—IMPERIAL NATURALIZATION.

To many persons, the distinction between the terms above quoted, may seem of no importance or practical consequence; yet a right understanding of it is a necessary part of our political education, and lies at the very foundation of our national existence.

Canada forms part of a monarchy, not of a republic. It is to the Sovereign who represents the state, that our allegiance is due, and it is that personal tie between the Sovereign and his people that makes the difference between the subject of a King, and the citizen of a republic. So long as the monarchy endures subjects we must remain, nor is there anything in the term to disturb our self-respect, or threaten our liberty. By the theory of our constitution, the throne is the fountain of justice and of honour, and it is to the Sovereign that we look for the administration of the one and preservation of the other. Subjects we are to our King—that is the cord that binds us together as one great family; equal we are to each other in our right to the protection of the laws which govern alike the sovereign and his people—in that we have the guarantee of our liberty. Such is the theory.

Now is there anything in its results which should make

us feel ashamed of our position as subjects, and envious of those who claim to be citizens? We in Canada are in a position to answer this question. In our own land we have the working of one system—across the border to the south we see the operation of the other. Faults we have enough, errors enough we admit, corrupt are we in many things, but in the great matters which are embraced in the terms we are considering, personal freedom, the administration of justice, submission to rightful authority, and the respect which is due from one man to another, we find no trace of subserviency, no sign of personal or political inferiority.

Every British subject wherever situated has a right to, and always does receive protection against injustice no matter by whom inflicted, and in British territory has a right to the protection of the law of the land. But when we come to speak of privileges as distinct from right we are involved in a maze of conflicting rules and contradictory principles from which no satisfactory issue has yet been found. Such a choatic mass of races, languages, customs, and religions, ruled under so many forms of government, with material interests as diverse as their personal or political, bound together by no tie of nationality, and united only by their allegiance to a common sovereign, was never seen or heard of as is now to be found within the limits of the British Empire. How under such conditions to arrive at a definition of what is a British subject, which shall ensure uniformity of treatment, and equality of rights and privileges, throughout the Empire, is a task which may well try the ability and patriotism of the ablest amongst us. At the last colonial conference, the subject of the naturalization law was taken up in the hope of arriving at some uniform method; and, no doubt, at the next conference it will be again considered.

The true principle should be that every British subject not criminally disqualified should be as free to go from one part of the Empire to another, as a man is free to go from Halifax to Victoria, and to seek his living wherever he may find it. So far is this from being the case that while we admit to this

country men of all European nations and of some Asiatic races under certain conditions, we refuse the right of entry to our Indian fellow-subjects for no better reason than the fear of their competition in the labour market, even where their help would be most beneficial. This is only one instance of the prevailing system or want of system. There is all over a variety in the laws of naturalization, and there is no certainty that naturalization in one part of the Empire will be accepted as valid in another. There is always the danger that the government of one part of the Empire may, in pursuit of some interest of its own, bring the central authority into difficulties with some foreign power or with some other portion of the Empire. This has already happened, and is always possible under our present system of independent administrations. The difficulties in the way of a settlement of these intricate problems are great and cannot be got over unless there is a willingness on all sides to recognize their mischievous tendencies and to make some conconsiderable concessions for the sake of the Empire of which we are so justly proud.

Selfishness and provincialism are the great obstacles in our way and unless in some way they ca be overcom. there can be little hope of a great and united Empire.

EXCHEQUER COURT.

In a recent number of the *Law Journal* we noted the appointment of Mr. L. A. Audette, K.C., the registrar of the Exchequer Court, to be assistant judge of that court, a position created by an Act of the last session of Parliament. As registrar of the Court for 25 years, with limited judicial functions, Mr. Audette earned an enviable reputation, which was properly recognized by the Government. It must also have been gratifying to the new judge to know that both sides of the House urged his appointment, a somewhat uncommon circumstance.

The promotion of the assistant registrar to the position vacated by Mr. Audette was expected. Dr. Charles Morse is

too well known by his work within and without the Exchequer Court to require any commendation here. His work on the digests of cases of the Supreme and Exchequer Courts, and as reporter of his own court speak for themselves. We expect equal success in his more extended sphere.

THE SHYSTER LAWYER.

The shyster lawyer has existed so long, and has been so generally referred to as "shyster," that it is a matter of some surprise to learn that the word itself is of comparatively recent origin. The shyster has lived in all ages and countries, yet the word is of United States origin, and even classed by the lexicographers as slang. The word, while not found in the older dictionaries, now has its place in the English language in this country to such an extent that it can no longer be regarded as slang, but must be classed as a legitimate, expressive word.

The origin of the word "shyster" is obscure and doubtful. Some authorities state that it is made from the word "shy," meaning sly, sharp; but as that meaning of "shy" does not obtain in the United States, Webster's suggestion that the word is from the German word meaning excrement, is more likely correct, and certainly more aptly and fully describes the reptile that lives among us. The shyster is indeed the excrement, the filthiness, of the legal profession. Sportsmen are familiar with a long, lanky, crane-like bird, popularly known and named for its nasty habits as "shyspook." It doubtless occupies the same place among birds as the jackall among brutes, the shyster among lawyers.

The Century Dictionary rather awkardly defines "shyster" as "one who does business without professional honour, *used chiefly of lawyers.*"

The word appears in the late law dictionaries, and is defined in two reported cases, in both of which it was held to be libellous per se.

Bailey v. *Kalamazoo Pub. Co.*, 40 Mich. 251, 256, was de-

cided in 1879, when the word was very young in the language, though the vermin was then very old in the human race. A man named Bailey was a candidate for Congress on the Prohibition ticket. A Kalamazoo newspaper, apparently opposed to his candidacy, published an article to the effect that the candidate had been convicted of stealing whisky fines while a justice of the peace, had lost his position as a minister on the charge of adultery, and was "a pettifogging shyster"; the article concluding with, "Pshaw, these reformers are pretty much alike." The court held that to call one a pettifogging shyster was libellous per se, saying:—

"We think, also, that the term 'pettifogging shyster' needed no definition by witnesses before the jury. The combination of epithets every lawyer and citizen know belongs to none but unscrupulous practitioners, who disgrace their profession by doing mean work, and resort to sharp practice to do it. The defendant successfully justified the charge by proof that such was plaintiff's general reputation."

In *Gribble* v. *Pioneer Press Co.*, 34 Minn. 342, 25 N.W. 710, a St. Paul newspaper called one "a half imbecile shyster." The Court said:—

"The word 'shyster' defined in Webster to mean 'a trickish knave, one who carries on any business, especially a legal business, in a dishonest way,' is evidently capable of having a reference to the professional character and standing of a lawyer."

We have already suggested that the word is new, but the thing itself very old. Dickens portrayed him, but did not call him shyster. "Pettifogger," the nearest real English word, is defined to be a lawyer dealing only with petty cases. The shyster of to-day hunts big game, and often scorns the little business of the pettifogger.

Thomas Fuller, the attractive English moralist of the seventeenth century, thus scolded the shyster of his time, known as the "common barrator":—

"A barrator is a horse leech that only sucks the corrupted blood of the law. He trades in tricks and quirks; his highway

is in by-paths, and he loveth a cavil better than an argument, and evasion better than an answer. There are two kinds of them; either such as fight themselves, or are trumpeters in a battle to set on others. Had he been a scholar, he would have maintained all paradoxes; if a chirurgeon, he would never have cured a wound, but always kept it raw; if a soldier, he would have been excellent at a siege; nothing but ejectio firma would out him. . . . As for the trumpeter barrator, he falls in with his neighbours that fall out, and spurs them on to go to law. A gentleman, who, in a duel, was rather scratched than wounded, sent for a chirurgeon, who, having opened the wound, charged the man with all speed to fetch such a salve from such a place in his study. 'Why,' said the gentleman, 'is the hurt so dangerous?' 'Oh, yes,' answered the chirurgeon, 'if he return not in post haste the wound will cure itself, and so I shall lose my fee.' Thus the barrator posts to the house of his neighbours, lest the sparks of their small discords should go out before he bring them fuel, and so he be broken by their making up. Surely, he loves not to have the bells rung in a peal; but he likes it rather when they are jangled backward, himself having kindled the fire of dissension amongst his neighbours."

And then this great moralist utters a truth that has been proved up to this good day:—

"He lives till his clothes have as many rents as himself hath made dissensions. I wonder any should be of this trade when none ever thrived on it."

It is a fact beyond dispute that no shyster, barrator, or ambulance chaser, by whatever name called, ever thrived long. He has made progress for a while, has amassed snug fortunes at times, but in the end dies a failure and disgrace, having not only ruined his own life, but brought reproach and dishonour upon the profession of the law.

It is the shyster who has made the legal profession the butt of so many puns and sallies, such as Ben Jonson's proposed epitaph of,

"God works wonders now and then;
Here lies a lawyer—an honest man."

Thought of the shyster prompted Lord Brougham to define a lawyer as "a learned gentleman who rescues your estate from your enemies, and keeps it himself."

It is the shyster who was responsible for the riots of 1870 in England, where siege was laid to the Inns of Court, with the intention of exterminating the whole race of lawyers, that "the skin of an innocent lamb might no longer be converted into an indictment."

It is the shyster to whom we largely owe the popular prejudice against lawyers of this day that is exhibited in the flings and alleged jokes of the press and stage. The shyster, with his pursuit of "skinning" friend or foe, adversary and client, with his effort to stir up litigation rather than to avoid it, to lengthen instead of end it, to hunt in place of shunning it, is largely responsible for the present ever-increasing misguided clamour of the people for the recall of judges.

The shyster of the present day is not always the product of dishonesty and viciousness. He is not confined to the breed of ignoramuses and rascals. He develops frequently with the law student, who starts out with good intentions and honest motives, but who fails to learn, observe, and cultivate the ethics of the profession.

The shyster of to-day appears in many varied forms and phases. We have the stupid, lazy shyster, whose chief offence is lack of knowledge and industry. He merely ekes out a living in the scums of the law. He is a disgrace, but not so dangerous as the smart, energetic shyster, who is able to hide his true character and keen enough to succeed.

We have the "ambulance chaser," who hangs around the house of the dead and injured, seeking employment as a tinker does trade. He preys upon corporations, and succeeds, not only in doing great injury to the defendant, but also his other victim, his client, whom he so frequently deprives of any share of the loot. Indeed, the most dangerous of shysters is not the man who himself seeks out his own cases, and stirs up his own litigation without fear or concealment, but it is the one who pretends

to respectability and secures his business secretively and furtively through the means of runners and hirelings. That shyster, by means of his apparent decency, is able to deceive and dupe the people, juries, and courts, where the common, open shyster would fail. Every community is infested with the shyster in all its forms and kinds, and every community has been infested with it since the beginning of the profession.

It is an easy matter for a young lawyer, who starts out in the pursuit of the law as a practice rather than a profession, who has always in mind fees and money as a first consideration, to slip into bad practices and little by little develop into a genuine shyster.

The shyster is indeed with us in large numbers. In this day of corporations and large moneyed interests, he is perhaps more numerous and prosperous than in any previous period of the history of our profession. He certainly tends more largely than all other things to disgrace and deprave the profession of law. He is far more harmful to the profession itself than to the community in which he practices. He should be eliminated from the profession and banished from the bar. That cannot be accomplished until public opinion condemns him; and the public will never condemn him until the bar itself does so. The lawyers can never mould public opinion against the shyster until they first get together themselves on the subject. It is a distressing fact that there are many lawyers of fairly good standing who are unfamiliar with professional ethics, and quite a number who care little about observing those ethics after making their acquaintance. The lawyer must first organize, and then as a body make open war on the shyster as a public enemy.

The fight is a hard one at best with the lawyers organized and united, because every attack on the ambulance chaser in legislative halls, the courts, and before the people is met by the shyster with the very plausible defence that the attack is made in the interest of railroads and corporations, to prevent the common people from obtaining their just deserts.

Lawyers owe two duties to the profession and the public:

First, to decrease the number of shysters by driving them from the ranks of the profession; and second, to prevent their birth and increase.—*Yale Law Journal.*

INTERNATIONAL LAW.—THE SPY MANIA.

What is the real reason for the severity with which spies are treated? and why are they regarded as criminals and visited with ignominy? Why, again, is the culprit who spies out of deliberate design to injure a country more leniently regarded than one who spies for cash? It will probably be found that the two last phenomena are inconsistent. The reason usually given for the harsh treatment of the spy is that he is "annoying and insidious." "Most defences are embarrassing," said Lord Bowen, in another connection: most belligerent acts are "annoying," and many "insidious." There is no harm in an ambush. And although in recent years (as in the Russo-Japanese war, and in the Anglo-German spy campaign), the spy has been honoured, though interned or shot, that is quite a modern development. Older practice made no difference between the soldier-spy and the venal spy. Washington by no means fraternised with Andre before putting an end to him Ignominy was not inflicted—human nature never will disgrace itself by inflicting it—as a mere deterrent. It was inflicted, not because the spy was dangerous, but because the spy was loathed and hated. Why was the spy loathed? The answer is derived from the ancient chivalric conception of warfare. The spy took a mean, unfair, and underhand advantage of those with whom he ate and talked, in order to bring his hosts to destruction. He procured himself to be received into the camp as a friend; he betrayed the trust of his hosts. The doom of the traitorous slayer was his. Bear in mind that it was only the disguised combatant who incurred this penalty. Only he who by a lie invited the personal confidence of his enemy in order to betray it was thus guilty.

Why is this feeling of hatred no longer experienced? Because spying has came to be regarded as part of the game of war. It

is expected. It is almost legitimate. There is no breach of confidence, for none is extended. So spies were honourably shot in the war of 1904, and we may expect this usage to grow in the future. But suppose a spy were to introduce himself into the headquarters' staff in the guise of a neutral attache—were to mess with the officers, were to ride daily with them, were to be the confidante of all their indiscretions—we venture to doubt whether the patriotic singleness of his inner aim would save him from execration and short shrift. There is a limit even to patriotism. The betrayal of unsuspecting intimacy is a stain, whatever its object. And that was the offence of the ancient spy. —*Law Magazine and Review.*

SEDUCING SOLDIERS FROM THEIR DUTY.

Sir Rufus Isaacs, the Attorney-General, in the House of Commons on the 25th ult., in justifying his conduct in authorising the proceedings in the case of *Rex* v. *Bowman*, in which a prosecution was instituted and a conviction obtained for an attempt to seduce soldiers from their duty, said: "If the soldiers were induced to refuse to obey orders, the result would be that they would be rendered amenable to the gravest penalty, because under the Army Act, passed by this House of Commons year by year, if the men wilfully refuse to obey the orders of their superior officers, even now I say they would be liable to the penalty of death or other grave penalties after inquiry by a court-martial." Soldiers acting under the orders of their military superiors are placed in an awkward position. By the ordinary principles of the common law they are, speaking generally, justified only in using such force as is reasonably necessary for the suppression of a riot. By the Mutiny Act and Articles of War they are bound to execute any lawful order which they may receive from their military superior, and an order to fire upon a mob is lawful if such an act is reasonably necessary. An order to do more than might be necessary for the dispersion of rioters would not be a lawful order. If a soldier kills a man in obedience to his officer's orders, the question whether what was done was reasonably necessary has to be decided by a jury, probably, upon a trial for murder; whereas

if he disobeys the orders of his superior officer, the question whether they were unlawful as having commanded something not reasonably necessary would have to be decided by court-martial. Sir Fitzjames Stephen thus proposes to meet this difficulty: "The only line," he writes, "that presents itself to my mind is that a soldier would be protected by orders for which he might reasonably believe his officer to have good grounds. The inconvenience of being subject to two jurisdictions, the sympathies of which are not unlikely to be opposed to each other, is an inevitable consequence of the double necessity of preserving, on the one hand, the supremacy of the law and, on the other, the discipline of the army."—*Law Times.*

EXECUTION OF WORKS AUTHORISED BY STATUTE.

Where damage results from the execution of works authorised by the legislature to be done, the remedy is not by an action at law, but is under the statute which legalises what would otherwise be a wrong: (see *Mersey Docks and Harbour Board* v. *Gibbs,* 14 L.T. Rep. 677; L. Rep. 1 E. & I App. 93, at p. 112; and *Hammersmith and City Railway Company* v. *Brand,* 21 L.T. Rep. 238; L. Rep. 4 E. & I. App. 171, at p. 215). The general rule thus enunciated by Mr. Justice Blackburn and Lord Cairns respectively in those two cases is only applicable, however, to works carefully and skillfully executed. Should proper care and skill be lacking on the part of the persons by whom any work is executed, such negligence will give rise to an action for damages. The wide provisions of section 308 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), and the absence of all reference therein to negligence or unreasonableness, might lead one to suppose that a person damnified by the exercise of any of the powers of that Act would not be put to the necessity of shewing that the work done was improperly performed in order to entitle him to recover compensation. And such was the view sought to be maintained before the Divisional Court in the recent case of *Lingke* v. *Christchurch Corporation* (106 L.T. Rep. 376). Mr. Justice Darling, indeed, admitted that, if it had not been for the authorities which were cited to the Court,

he would have been very much inclined to adopt that view. For undoubtedly the language of the section, unqualified by any decisions to the contrary, would seem to entitle a person to recover compensation who has suffered damage and inconvenience by reason of the execution of works by a local authority—although in exercise of their statutory powers—without proof of negligence or improper conduct. In *Lingke's* case (ubi sup.), the plaintiff's allegation was that the defendants, in executing certain drainage works, had thrown up a heap of rubbish in front of her shop, inconveniencing her in the business which she carried on there. No negligence or improper conduct on their part was proved; but the judgment of Lord Westbury in *Ricket* v. *Metropolitan Railway Company* (16 L.T. Rep. 542; L. Rep. 2 E. & I. App. 175) was regarded as sufficient to render any such proof unnecessary. The defendants, in opposition to the plaintiff's claim for damages, relied on several authorities. None of them turned upon the provisions of section 308 of the Act of 1875; they were nevertheless capable of being applied by analogy. Thus, the nearest, which was that of *Herring* v. *Metropolitan Board of Works* (19 C.B.N.S. 510), decided in the year 1865, was founded upon sections 135 and 225 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120). It was there held that the mere temporary obstruction of access to premises, though it might cause some inconvenience and loss of business to the occupier, was not "damage" in respect of which he was entitled to claim compensation under those sections. Again, the case of *New River Company* v. *Johnson* (2 Ell. & Ell. 435; 29 L.J. 93, M.C.), a passage from the judgment of Mr. Justice Cockburn in which was read by Mr. Justice Darling in the course of his judgment, was of much assistance in support of the defendants' contention. The decision there was that a person injured by the execution of works authorised by statute—in that case a local Act incorporating the Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17)—is not entitled to compensation thereunder, unless the injury is such as, had the works been unauthorised, would have given a right of action.—*Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

TRESPASS BY TIPPING EARTH AGAINST WALL—OWNERS OF ADJOINING LAND—BOUNDARY—ERECTION OF WALL WITHIN A BOUNDARY LINE—ABANDONMENT OF POSSESSION—DISCONTINUANCE OF POSSESSION—STATUTE OF LIMITATIONS—REAL PROPERTY LIMITATIONS ACTS, 1833 AND 1874 (3 & 4 WM. IV. C. 27, SS. 2, 3; 37 & 38 VICT. C. 57, S. 1)—(10 EDW. VII. C. 34, SS. 5, 6, ONT.).

Kynoch v. *Rowlands* (1912) 1 Ch. 527 is a case which has some resemblance to a recent case in the Ontario High Court of *Rooney* v. *Petry*, 22 O.L.R. 101, although the result of the case was quite different. The plaintiffs and defendant were owners of adjoining lands physically divided by a dry ditch or channel of an ancient watercourse. In 1894 the plaintiffs built on their own side of the ditch an enclosing wall. In an action between the parties in that year it was judicially determined that the true boundary between the lands of the plaintiffs and defendant was the middle line of the ditch. The erection of the wall left unenclosed a narrow strip of land between the wall and the middle line of the ditch belonging to the plaintiffs, the real boundary though known to the parties remaining unmarked. In 1910 this action was brought to restrain the defendant from trespassing on the narrow strip and from tipping earth against the plaintiffs' wall; the defendant contended that by the erection of the wall the plaintiffs had abandoned the strip, and that the defendant had acquired a title thereto by possession under the Statute of Limitations. The only evidence of such possession offered by the defendant was that cattle belonging to his tenants had been allowed to graze such herbage as grew in the ditch and on the strip between it and the wall. Joyce, J., held that there had been no abandonment or discontinuance of possession of the strip in question by the plaintiffs and that they were entitled to judgment, and his decision was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Farwell, L.JJ.). In view of this decision, it seems open to question whether *Rooney* v. *Petry* was rightly decided.

ADMINISTRATION—RIGHT TO FOLLOW ASSETS—SECURED CREDITOR—EQUITABLE RIGHT—DELAY NOT AMOUNTING TO LACHES.

In re Eustace, Lee v. *McMillan* (1912) 1 Ch. 561. This was an administration action brought in the following circumstances.

The plaintiff was mortgagee of lands, the mortgagor assigned the equity of redemption in 1897, and died, and his will was proved in that year. The interest on the mortgage continued to be paid by the owner of the equity of redemption up to 1910, when default being made the plaintiff called on the mortgagor's executor to pay off the mortgage, and on his failing to do so brought this action for the administration of the mortgagor's estate, which had been distributed in 1898, claiming to follow the assets into the hands of those who had received them. Eady, J., held that the plaintiff having been paid his interest by the proper hand up to 1910, was in no default, and was entitled to follow the assets of the deceased mortgagor as claimed.

ARBITRATION—LEASE—CONSTRUCTION—CLAIM FOR RECTIFICATION—ARBITRATION CLAUSE—STAYING ACTION—ARBITRATION ACT, 1889 (52-53 VICT. C. 49), S. 4—(9 EDW. VII. C. 35, S. 8, ONT.).

Printing Machinery Co. v. *Linotype* (1912) 1 Ch. 566. In this case an application was made to stay the action under s. 4 of the Arbitration Act, 1889 (see 9 Edw. VII. c. 35, s. 8, Ont.), in the following circumstances. In 1901 the plaintiff company leased its undertaking business and goodwill to the Machinery Trust for 21 years, subject to certain powers of determination and renewal. The lease contained a proviso giving the lessees and the Linotype Company an option to purchase the undertaking of the plaintiff company. It also contained an arbitration clause which provided that "any dispute, difference, or question which may at any time arise between all or any of the parties hereto touching the construction, meaning, or effect of these presents, or any clause or thing herein contained, or the rights or liabilities of the said parties respectively, or any of them under these presents or otherwise howsoever in relation to these presents shall be referred" to arbitration. In 1903 the Machinery Trust and the Linotype Company agreed to amalgamate, and, for that purpose, both companies were wound up and a new company, the defendant company, was formed and by a deed dated in 1905 made supplemental to the lease of 1901, the defendant company was substituted for the Machinery Trust and the Linotype Company, and undertook the obligations and became entitled to the benefits of those companies under the lease. Questions arose as to the option to purchase given in the lease of 1901, and the plaintiff company brought the present action claiming inter alia (1) that the option was void, (2) or if the option was not void

then in fixing the price to be paid thereunder, the value of a certain obligation should be taken on a particular voting; (3), and, as an alternative, the rectification of the lease. The defendant under s. 4 of the Arbitration Act (see 9 Edw. VII. c. 35, s. 8, Ont.), applied to stay the action, but Warrington, J., held that the question of the reformation of the lease did not fall within the arbitration clause, and also that the questions as to the construction of the option, and rectification were so closely connected that it was convenient that they should both be dealt with by the Court; the application was, therefore, refused.

TRADE NAME—COMPANY—SIMILARITY OF NAME—RIGHT OF INDIVIDUAL TO TRADE IN HIS OWN NAME—TRANSFER TO COMPANY OF USE OF INDIVIDUAL NAME.

Kingston v. *Kingston* (1912) 1 Ch. 575. This was an action tried without pleadings. The plaintiff company sought to restrain the defendant company from using the name of Kingston as part of its trade name. The plaintiff company (Kingston, Miller & Co.) was incorporated in 1897, to carry on the business of caterers formerly carried on by Kingston & Miller. The sole managing director of the company had a son named Thomas Kingston, who was associated as assistant in carrying on the business. In 1911 he left the employment of the plaintiff company and joined with a Mr. Wheatley and established a company which was incorporated as "Thomas Kingston & Co." for the purpose of carrying on a similar business to that of the plaintiff company, and of which new company Thomas Kingston was managing director. Warrington, J., who tried the action, although conceding that Thomas Kingston, in the absence of a contract to the contrary, had a right to carry on the business of a caterer in his own name, notwithstanding it might cause confusion between his business and that of the plaintiff, yet had no right to transfer the use of his name to a new company, where such use would be calculated to cause confusion between the two companies; and that it made no difference that his name carried with it the reputation of personal qualifications which he placed at the service of the new company.

WILL—LEGACY—SUBSEQUENT GIFT OF EQUAL AMOUNT TO LEGACY—ADEMPTION—LETTER STATING GIFT WAS INSTEAD OF LEGACY—EVIDENCE OF INTENTION—ADMISSIBILITY OF LETTER TO CONTRADICT WILL.

In re Shields, Corbould-Ellis v. *Dales* (1912) 1 Ch. 591. The question in this case was whether a legacy had been adeemed.

The testator by his will dated in 1908 bequeathed a legacy of £300 to the defendant Dales, who was his housekeeper and nurse. On 15 April, 1909, he wrote a letter addressed to her enclosing a cheque for £300, which he requested her to tell his executors was instead of the legacy. The contents of this letter were not, however, communicated to her; but the letter with the cheque were in her presence sealed up and placed in a drawer by the testator, who told her to open the envelope on his death. In December, 1910, he opened the envelope in the defendant's presence, took out the cheque and put the letter without the cheque into another envelope which he sealed up and told her to open it on his death. He subsequently sent the cheque or another for a similar amount to his bankers with instructions to place the amount to the joint credit of himself and the defendant with power to either party to draw against it, which was accordingly done. The letter was opened and read by the defendant for the first time on the testator's death. Warrington, J., who tried the action, held that there was nothing in the transaction to affect the conscience of the defendant, or to preclude her from claiming both the gift and the legacy. He also held that the letter of the 15 April, not having been communicated to the defendant before the testator's death, was inadmissible to prove that the testator intended that the gift should be in substitution for the legacy. He, therefore, held that the defendant was entitled both to the gift and the legacy.

VENDOR AND PURCHASER—OPEN CONTRACT FOR SALE OF LAND—"LEASEHOLD HOUSE"—TITLE OF VENDOR THAT OF UNDER LESSEE—PROPERTY SOLD PART ONLY OF PROPERTY COMPRISED IN HEAD LEASE—DEPOSIT.

In re Lloyd's Bank and Illington (1912) 1 Ch. 601. This was an application under the Vendors and Purchasers' Act. The contract in question was an open contract and the property offered for sale was described as a "leasehold house." A deposit was paid by the purchaser. On the delivery of the abstract it appeared thereby that the vendor's title was that of an underlessee, and that the property sold was only a part of the property comprised in the head lease. The purchaser objected to the title on the ground that she would be liable to eviction for breaches of covenant in respect of property not comprised in the under lease of the vendor. Warrington, J., held this to be a valid objection, and that the purchaser was entitled to a return

of the deposit. Whether a purchaser of a "leasehold house" could be compelled to accept an under lease was raised but not decided.

LANDLORD AND TENANT—DEMISE FOR "TWO YEARS CERTAIN AND THEREAFTER FROM YEAR TO YEAR"—WHEN TERMINABLE.

In re Searle, Brooke v. *Searle* (1912) 1 Ch. 610. In this case a lease for two years certain and thereafter from year to year until either party gives notice to determine the tenancy was in question, and the point to be determined was when it was terminable; and Neville, J., decided that it was not terminable at the end of the two years; but created a tenancy for three years at least, and that the term was only determinable by a three months' notice expiring at the end of the third, or any subsequent year.

WILL—CONSTRUCTION—GIFT FOR LIFE TO FOURTEEN PERSONS—SUBTITUTIONAL GIFT TO CHILDREN—GIFT OVER OF WHOLE ON DEATH OF SURVIVOR OF THIRTEEN ONLY—DEATH IN TESTATOR'S LIFETIME—IMPLICATION OF SURVIVORSHIP—INTESTACY.

In re Hobson, Barwick v. *Holt* (1912) 1 Ch. 626. A peculiar will was in question in this case; the testator gave the income of his real and personal estate to trustees to divide amongst Sybil, the daughter of Charles Holt, and thirteen other named persons during their respective lives, and if any of them should die leaving children, the children were to take the parent's share, and he directed that after the death of the survivor of the thirteen (omitting the name of Sybil), the whole estate should then be sold and divided between the children of Charles Holt and the children of the thirteen named persons as might be living at the death of the last survivor of the thirteen, the children of any deceased child to take their parent's share. Two of the thirteen died in the lifetime of the testator, without leaving children, and Parker, J., held that the income of these two fourteenths had not been disposed of by the will and as to them there was an intestacy. His Lordship held that as the gift over was not on the death of all the first takers but only of thirteen of them, there was no survivorship, by implication, as to the shares in question in favour of the remaining twelve. He also held that the fact that those who were entitled under the gift over were also entitled to share in the estate prior to the period fixed for the distribution, also precluded the implication of survivorship.

PATENT — REVOCATION FOR NON-MANUFACTURE WITHIN UNITED KINGDOM—THREAT OF ACTION FOR INFRINGEMENT—EXCUSE FOR NON-MANUFACTURE—PATENT ACT, 1907 (7 EDW. VII. c. 29), ss. 24, 27—(R.S.C. c. 69, s. 38).

In re Taylor's Patent (1912) 1 Ch. 635. In this case the appellants were the owners of an English patent of invention issued in 1904. The Eriths Engineering Company were owners of another patent of which the appellants' patent was declared by a United States court to be an infringement. The appellants had made efforts to exploit their patent in England, but had been deterred by threats of the Eriths Engineering Company to bring an action for infringement, from proceeding to manufacture their patented article in England. In 1910 the Eriths Engineering Company applied to the Controller-General to revoke the appellants' patent for non-manufacture in England under s. 27 of the Patent Act (7 Edw. VII. c. 29) (see R.S.C. c. 69, s. 38), and the application was granted, but Parker, J., on appeal held that the threat of action was a sufficient excuse, and he cancelled the revocation.

TRADE MARK — REGISTRATION — DISTINCTIVE MARK — LETTERS — "W. & G."—MOTOR CABS—TRADE MARKS ACT, 1905 (5 EDW. VII. c. 15), s. 3; s. 9(5) (R.S.C. c. 71, s. 11).

In re Du Cros (1912) 1 Ch. 644. This was an application on the part of the owners of motor cabs to register the letters W. & G. in two forms, one in running hand with an exaggerated tail to the G., and the other in ordinary block letters. The registrar refused the application, and Eve, J., affirmed his decision; but the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Farwell, L.JJ.) held that the applicant should be allowed to proceed towards the second stage, with regard to the script mark, when after advertisements had been issued and opponents heard, the registrar would be in a better position to decide whether registration of that mark should be permitted. The court were somewhat divided in opinion. Farwell, L.J., was doubtful whether the application should be allowed to proceed even as to the first mark; whereas Moulton, L.J., considered it ought to be allowed to proceed as to both.

PARTNERSHIP—BUSINESS PREMISES OWNED BY PARTNER—NO SPECIAL PROVISION AS TO TENANCY—RENT TO BE PAID OUT OF PROFITS—IMPLIED TENANCY—TENANCY DURING CONTINUANCE OF PARTNERSHIP.

Pocock v. *Carter* (1912) 1 Ch. 663. A partnership was

formed between the plaintiff and the defendants. The plaintiff was the sole owner of the premises where the business of the partnership was carried on, there was no express agreement for a tenancy by the partnership of the premises, but the articles provided that all rents were to be paid out of the profits of the partnership before division. The owner of the premises brought an action in 1907 against her co-partners for an account, and pending the action she died in 1911, and the action was continued by her representatives, and the question arose, as to whether or not the partnership was liable for rent of the premises in question, and Neville, J., held that there was an implied tenancy of the premises by the partnership during the continuance of the partnership, and, therefore, that the partnership was liable for the rent up to the time of the dissolution of the partnership.

WILL — CONSTRUCTION — VESTING — GIFT TO CHILDREN AT 23— REMOTENESS.

In re Hume, Public Trustee v. *Mabey* (1912) 1 Ch. 693. In this case a will of a testatrix devised and bequeathed her property to trustees on trust to pay the income to her daughter Maria for life, "and after the death of the said Maria . . . in trust for all or any of the children or child of the said Maria who shall be living at her death, and being a son or sons shall attain the age of twenty-three years or survive the survivor of me and the said Maria for the period of twenty-one years, or being a daughter or daughters shall attain the age of twenty-three years or marry, and if more than one in equal shares." There were provisions enabling the trustees to make advancements out of the expectant or contingent, presumptive, or vested legacy or share of any grandchild for his or her maintenance, education, or benefit. The daughter Maria survived the testatrix and had two children, a son and daughter, both of whom attained twenty-three. A summons was taken out by the trustee to determine whether the legacies to the grandchildren were valid, and Parker, J., held that they were not, being void for remoteness, because the gifts to the grandchildren were not vested, but contingent on some of the class attaining twenty-three.

PRINCIPAL AND SURETY—SURETY FOR SERVANT—NON-DISCLOSURE TO SURETY OF PREVIOUS DISHONESTY OF SERVANT—IMPLIED REPRESENTATION AS TO HONESTY OF SERVANT—MATERIAL FACT OMISSION TO DISCLOSE.

London General Omnibus Co. v. *Holloway* (1912) 2 K.B. 72.

This is a case which illustrates the principle that in a contract of suretyship for the fidelity of a servant it is necessary for the master to disclose to the proposed surety all material facts within his knowledge affecting the proposed contract. In this case the plaintiff took from the defendant a bond as surety for the fidelity of a servant of the plaintiff, and the plaintiff omitted to disclose to the surety the fact, known to the plaintiff, but not to the surety, that the servant in question had been previously found guilty of dishonesty, and it was held by the Court of Appeal (Williams, Moulton, and Kennedy, L.JJ.) that the concealment of this material fact, though not due to any fraud on the part of the plaintiff, was, nevertheless, a bar to his recovery on the bond; because there is an implied representation in such a contract that the person whose honesty is guaranteed is not, to the knowledge of the person employing him, dishonest, and the non-disclosure of the servant's dishonesty, constitutes, in effect, a misrepresentation that it does not exist. Moulton and Kennedy, L.JJ., discuss the difference between a contract of suretyship for the fidelity of a servant, and contracts of insurance or of guarantee for the debt of another person, and conclude that while contracts of insurance, and guarantees of debts are not vitiated by the non-disclosure of all material facts, yet a different rule prevails in regard to contracts of suretyship for the fidelity of servants. The judgment of Lord Alverstone, C.J., was, therefore, affirmed.

COMPANY—RECEIVER AND MANAGER—BILL OF LADING—LIEN FOR PREVIOUSLY UNSATISFIED FREIGHT—RIGHT TO LIEN AS AGAINST RECEIVER.

Moss SS. Co. v. *Whinney* (1912) A.C. 254. This was an appeal from the decision of the Court of Appeal in the case of *Whinney* v. *Moss* (1910), 2 K.B. 813 (noted ante, vol. 47, p. 54). The plaintiff had been appointed receiver and manager of a company in a debenture holder's action, and in that capacity he had shipped goods of the company to be delivered to the company, care of its agents, in Malta; by the bill of lading it was provided that the shipowners were to have a lien on the goods for the freight due thereon, and also for any previously unsatisfied freight due by the company to the shipowners. The shipowners having refused to deliver the goods without payment of the previously unsatisfied freight, this demand was paid under protest and this action was brought by the receiver to recover the sum so paid. The Court of Appeal held that the plaintiff was entitled

to succeed, the shipowners knowing that they were dealing with him as receiver, and that it was immaterial whether they knew he had been appointed by the court. The House of Lords (Lord Loreburn, L.C., and Lords Halsbury, Ashbourne, Atkinson, Shaw, and Mersey) have affirmed the decision because, as the majority of their lordships held, the receiver and not the company was both shipper and consignee, and he owed nothing for back freights. Lord Atkinson considered that a contract by a receiver to give the shipowners a lien on the property of the company for past debts of the company would be invalid unless authorized by the court. Lords Shaw and Mersey, however, dissented, and were of the opinion that the company was a going concern carried on by the receiver, and that both the shipper and consignees of the goods were the company, and that the contract in question was a contract of the company by the receiver as its agent, and the goods in question were, therefore, bound by the lien for past due freight.

CONFLICT OF LAWS—IRISH MARRIAGE ACT (19 GEO. II. c. 13, s. 1) —MARRIAGE OF PROTESTANT BY ROMAN PRIEST.

Swifte v. *Attorney-General* (1912) A.C. 276. The appellant filed a petition under the Legitimacy Declaration (Ireland) Act, 1868, claiming a declaration that he was the lawful son of G. M. P. Swifte and Jane Anne Swifte. In 1833, G. M. P. Swifte being a domiciled Irish Protestant, went through a ceremony of marriage before a Roman Catholic priest with an Austrian Roman Catholic, at a place in Austria; and in 1845 while the Austrian lady was still alive, he married Jane Anne. Under the Irish Marriage Act, 19 Geo. II. c. 13, s. 1, it was declared that any future marriage between a Papist and Protestant, if celebrated by a Popish priest, should be null and void, and the petitioner contended that under this Act the marriage of G. M. P. Swifte with the Austrian lady was null and void; but the Irish Court of Appeal held that the marriage of the petitioner's parents was not a lawful marriage and dismissed the petition. The House of Lords (Lord Loreburn, L.C., and Lords Halsbury, Atkins, and Haldane), affirmed the decision, holding that the Act in question did not apply to marriages solemnized abroad.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Man.] SMITH *v.* NATIONAL TRUST CO. [March 21.

Adverse possession—Mortgagee's possession against mortgagor —Torrens system—Statutory rights—Power of sale—Transfer—Variation in form—Special covenants in mortgage.

Appeal from Court of Appeal, Manitoba. See 47 C.L.J. p. 311.

Held, 1. The title of a registered owner of land registered under the Torrens system or new system of registration in Manitoba is not extinguished by adverse possession of the land held by his mortgagee and persons claiming under him for the statutory period which by R.M.S. 1902, c. 100, s. 20, is applicable to lands not so registered. Compare s. 29 of the Ontario Land Titles Act, 1 Geo. V. c. 28; and see *Belize Estate* v. *Quilter*, [1897] A.C. 367.

2. While at common law the rights and powers of a mortgagee of land are incident to the legal or equitable estate vested in him as mortgagee, the statutory mortgage under the Torrens or "New System" registry law in Manitoba, R.S.M., 1902, c. 148, does not vest any estate in the lands in the mortgagee, but takes effect as a security only, with statutory powers for enforcement; the mortgagee's rights and powers are consequently dependent directly upon the statutory provisions, and any additional stipulations in a mortgage made under that statute, which purport to authorize the mortgagee or his assigns to sell the lands, are not effective to pass the registered title merely on a transfer by the mortgagee in purported exercise of the conventional power of sale without the judgment of a Court or the compliance with the statutory proceedings for enforcing the security. *Smith* v. *National Trust Co.*, 20 Man. R. 522, affirmed.

3. Where real property is mortgaged by an instrument executed in accordance with the Real Property Act, R.S.M. 1902, c. 148, known as the Torrens or "New System" registry law it

can be transferred by the mortgagee to a purchaser from him only in the manner prescribed by statute. *National Bank of Australia* v. *United Hand-in-Hand Co.*, 4 A.C. 405, applied; *Greig* v. *Watson*, 7 V.L.R. 79, referred to.

4. Mortgages of land which is subject to the Torrens or "New System" form of registration in the Province of Manitoba are permitted only in the form specified by the registration statute (the Real Property Act, R.S.M. 1902, c. 148), and the direction in the statutory form which permits of "special covenants" being added thereto is insufficient to cover an added power of sale or other stipulation whereby the mortgagor authorizes the mortgagee to execute an assurance or transfer of the mortgaged property and extinguish the mortgagor's title thereto; such a power of sale or stipulation is not in strictness a "covenant" even if framed as a covenant, and is not within the scope of the statutory form or consistent with the statutory provisions.

5. The "special covenants" which may be introduced into a statutory mortgage under the Torrens or "New System" title registration (the Real Property Act, R.S.M. 1902, c. 148), must not be such as are repugnant to the imperative provisions of the statute itself.

J. B. Coyne, for appellant. *C. P. Wilson,* K.C. and *A. C. Galt,* K.C., for respondents.

Ont.] NATIONAL TRUST CO. *v.* MILLER. [March 21.
SCHMIDT *v.* MILLER.

Mining Act—Grant of mining land—Reservation of pine timber—Right of grantee to cut for special purposes—Trespass—Cutting pine—Right of action.

The Ontario Mining Act, R.S.C. 1897, c. 36, as amended by 62 Vict. c. 10, s. 10, provides in s. 39, s.-s. 1 that, "the patents for all Crown lands sold or granted as mining lands shall contain a reservation of all pine trees standing or being on the lands, which pine trees shall continue to be the property of Her Majesty, and any person holding a license to cut timber or saw logs on such lands, may at all times, during the continuance of the license, enter upon the lands and cut and remove such trees and make all necessary roads for that purpose." By the other provisions of the section the patentee may cut and use

pine necessary for building, fencing and fuel and remove and dispose of what is required to clear the land for cultivation and for any cut for other purposes he shall pay Crown dues.

Held, IDINGTON and DUFF, JJ., dissenting, that, notwithstanding such reservation, or exception, a patentee of mining land has such possession of the pine trees, or such an interest therein, as would entitle him to maintain an action against a trespasser cutting and removing them from the land.

In this case the defendants cut and removed the pine timber from the plaintiffs' mining lands without license from the Crown, but claimed that they subsequently acquired the Crown's title to it and should be regarded as licensees from the beginning.

Held, IDINGTON and DUFF, JJ., dissenting, that even if the Crown could, after the trees had been cut and removed, take away by its Act the plaintiffs' vested right of action, the evidence shewed that defendants were cutting on adjoining land as well as on plaintiffs' location and did not clearly establish that the title acquired by defendants included what was cut on the latter.

Appeal allowed with costs.

Anglin, K.C., and *McIntosh*, for appellants. *J. H. Moss*, K.C., for respondents.

Province of Ontario.

HIGH COURT OF JUSTICE.

Riddell, J.] REX EX REL. MORTON *v.* ROBERTS. [April 16.

REX EX REL MORTON *v.* RYMAL.

Municipal elections—Sale of qualifying property after election but before declaration of qualification—Qualification as mortgage—Defect in declaration—Municipal Act, 1903.

Appeals by defendants from orders of the Junior Judge of the County Court of Wentworth declaring defendants to have lost their seats as councillor and deputy reeve for the township of Barton on the ground of having become disqualified since their election. The defendants were admittedly "qualified" at the time of election. Prior to making the declaration they con-

veyed their lands, taking mortgages for $4,100 and $4,500. The declarations omitted the word "and" between the words "have" and "had" in the third line of the form in section 311 of the Consolidated Municipal Act, 1903.

Held, 1. There are three pre-requisites to a de jure occupation of the office: (1) possession of property qualification; (2) election; (3) making the declaration prescribed. Because of the defect in the declaration neither respondent is de jure a member of the council, but the mere fact that a proper declaration was not made does not in itself compel the Court to declare the seat vacant.

2. There is nothing in principle or authority to prevent a mortgagee, who is assessed for the property, qualifying on his legal estate.

3. If the defendants make a proper declaration within ten days their appeal will be allowed without costs, otherwise it will be dismissed with costs; such permission to make a proper declaration being in the nature of an indulgence.

W. A. H. Duff, for the relator. *J. G. Farmer*, K.C., and *A. M. Lewis*, for the defendants.

DIVISION COURTS.

County of Middlesex.

Macbeth, Co.J.] HUNTER *v.* FITZGERALD. [April 24.

Negligence — P.O. delivery—Liability — Damages — Costs not paid, but payable.

The defendant, a postman, whose duty it was to deliver letters wrote "Dead" on a letter addressed to the plaintiff, without ascertaining if she were dead, and thereby caused the discontinuance of her pension from the United States Government. The plaintiff sued for damages for negligence. The defendant disputed the claim on the ground that there was no cause of action, and also disputed plaintiff's claim to recover as damages the costs incurred in engaging a solicitor to correspond with the pension authorities, on the ground that such costs had not as yet been paid.

Held, that the plaintiff was entitled to damages for the negligence, and also for her expenses incurred in having her pension restored, although not paid.

W. H. Bartram, for plaintiff. *R. K. Cowan*, for defendant.

Province of Manitoba.

KING'S BENCH

Mathers, C.J.] [April 2.

BRANDON ELECTRIC LIGHT CO. *v.* CITY OF BRANDON.

Waters—Public water supply—Meters—Clandestine taking of water—Presumption—Settlement of Claim—Ratification—Repudiation—Waiver—Estoppel.

Held, 1. Where the consumer continued to use water through a concealed pipe knowing that the supply so obtained was not going through the meter after a change made from a flat rate to a meter rate and the placing of a meter on another and visible supply pipe, he is liable to pay on the basis of the capacity of such concealed pipe for the entire time for the water so wrongfully taken through it unless he can prove the quantity actually used, and he must pay at the general fixed rate without regard to any reduced rate applicable to the metered service. *Lamb* v. *Kincaid,* 38 S.C.R. 516, and *Armory* v. *Delamirie,* 1 Strange 505, applied.

2. In computing the amount of damages recoverable for clandestine use of a water supply the maxim "omnia præsumuntur contra spoliatorem" applies. *Lamb* v. *Kincaid,* 38 S.C.R. 516, specially referred to; see also *The King* v. *Chlopek,* 1 D.L.R. 96.

3. Where a settlement of a claim for water rates by a municipal corporation against a consumer is made by unanimous resolution of the council, and the terms of the settlement are in part carried out by payment to and acceptance by the treasurer of the municipal corporation of successive instalments of money due to the municipality under the settlement, there is such ratification of the contract as to preclude a successful attack upon it by reason of the settlement not having been formally adopted by the council.

4. The voluntary acting under an agreement for five months after knowledge of facts afterwards set up to prove that the agreement was obtained by fraud, duress, undue influence or

extortion, is such an unequivocal affirmation of the contract as to amount to a waiver of the complainant's right to rescind the contract upon these grounds even if proved.

5. When one party makes against another a claim in the existence and amount of which he has an honest belief, and the other agrees to pay it without investigation, such agreement, made in good faith, cannot afterwards be repudiated on the ground that the amount is excessive. *Dixon* v. *Evans*, L.R. 5 E. & I. Ap. 606, applied; *Smith* v. *Cuff*, 6 M. & S. 160, distinguished; see also Leake on Contracts, 6th ed., p. 259, and *Lindsay Petroleum Co.* v. *Hurd*, L.R. 5 P.C. 240.

C. P. Wilson, K.C., and *J. F. Kilgour*, for plaintiffs. *J. E. O'Connor* and *S. H. McKay*, for defendants.

Macdonald, J.] SIEMENS *v.* DIRKS. [April 9.

Registry Act—Deposit of mortgage with registrar—Statutory requirements of registration.

The mere deposit of an instrument with the registrar does not amount to a registration under the Manitoba Registry Act, R.S.M. c. 150, s. 50; the certificate of the registrar is required to be endorsed on the instrument to make the registration complete; the registrar must endorse the actual date of the registration and the endorsement of an erroneous date of registration will not give priority over an instrument which had been previously registered.

Harris v. *Rankin*, 4 Man. R. 115, distinguished.

An action by Siemens the mortgagee against Dirks the mortgagor and Long a subsequent purchaser from Dirks without notice of the mortgage, claiming payment of the amount due for principal and interest and in default for foreclosure. The defendant Long counterclaiming for rent of the premises from the date of his purchase.

The plaintiff's action was dismissed against the defendant Long, and the counterclaim was also dismissed.

Williams and *Tench*, for plaintiff. *Hoskin*, K.C., and *Montague*, for defendant.

Province of Alberta.

SUPREME COURT.

Full Court.] THE KING *v.* BLEILER. [April 13.

Evidence—Authority to perform marriage ceremony—Foreign law—Bona fides—Bigamy.

Held, 1. In a prosecution for bigamy the clergyman who performed the marriage ceremony is competent to testify that he was an ordained minister and therefore authorized to perform such ceremony.

2. In a prosecution for bigamy the clergyman who, in a foreign country performed the marriage ceremony is competent to give expert evidence regarding the statute from which he derived his authority. See also Phipson on Evidence, 4th ed., p. 356, Wharton's Cr. Evid., 10th ed., p. 114.

3. An honest belief on the part of the defendant that he was divorced constitutes no defence to the charge of bigamy either at common law or under secs. 16 and 307 of the Criminal Code (1906). *R.* v. *Brinkley*, 14 O.L.R. 434, followed; *R.* v. *Sellars*, 9 Can. Cr. Cas. 153, disapproved.

W. J. Loggie, for the accused. *L. F. Clarry*, D.A.-G., for the Crown.

Full Court.] BALKE *v.* CITY OF EDMONTON. [April 13.

Negligence—Collision with street car—Duty of drivers on streets—Contributory negligence.

Held, one driving upon city streets knowing that there are crossings where street cars are passing, but owing to the darkness is ignorant as to where the crossings exactly are, is bound to keep a good lookout and to be on guard as to conveyances coming his way, and his failure so to do and his blindly trusting to those driving ahead of him constitutes contributory negligence precluding him from recovering for injuries caused by collision with a street car even though those in charge of the car were negligent in its management. See, to same effect,

Carleton v. *City of Regina*, 1 D.L.R. 778, and Annotation to same, ante pp. 783-786.

H. A. Mackie, for plaintiff (appellant). *J. C. F. Bown*, for defendant (respondent).

Full Court.] RUMELY CO. *v.* GORHAM. [April 13.

Accord and satisfaction—Agreement to accept without promise to give consideration—Mutuality—Consideration.

Held, 1. To constitute a bar to an action on an original claim or demand the accord must be fully executed, unless the agreement or promise, instead of the performance thereof, is accepted in satisfaction. See also 7 Halsbury's Laws of England, p. 443; *Stewart* v. *Hawson*, U.C.C.P. 168, and *Macfarlane* v. *Ryan*, 24 U.C.Q.B. 474.

2. A document, made after the execution of an executory agreement for the sale of an engine, stating that it was mutually agreed between the seller and the purchaser that whereas the purchaser complained that the engine was defective in certain specified parts and whereas the seller, while not admitting the alleged defects, desired to adjust all differences, therefore in consideration of the seller supplying the purchaser with certain specified new parts of the engine and crediting him with a specified sum on his account, the purchaser admitted full satisfaction of his complaint as to defects and the complete fulfilment of all warranties made by the seller and thereby released and waived all liability on the part of the seller, arising out of the original transaction, such document, however, not containing any promise on the part of the seller to supply the parts or to give the credit mentioned, will not operate as a satisfaction of the purchaser's right of action under the original contract in default of the actual delivery and acceptance of the engine parts, but merely as an "accord" that if the seller did supply the parts and give the credit, then the document should operate as a release to the seller of the claims of the purchaser arising from any defects in the engine.

G. F. Adams, for plaintiffs. *C. A. McGillivray*, for defendant.

Flotsam and Jetsam.

DRAFTING STATUTES.—Those who pass criticisms upon the form in which statutes of modern times are drafted in their final shape will find much to interest and support them in the remarks of the Court of Appeal recently in the case of *Rex* v. *Templer*. The Act in question was the Workmen's Compensation Act, 1897—an enactment designed by its promoters to avoid litigation. Lord Justice Vaughan Williams expressed the opinion that the words of the statute were so ambiguous, or, rather, so equivocal, as to be equally consistent with both of the rival constructions which had been put forward. Lord Justice Farwell said that he could see no reason for preferring either the one or the other of the two rival constructions, and that he was only too glad to acquiesce in the decision of the Divisional Court. No blame can be laid at the door of the Parliamentary draftsman for many of the section of Acts which it is impossible to elucidate with any certainty. Bills are so altered and amended in their course through Parliament that they bear but a small resemblance to the original draft, while in other cases legislation by reference assists to bring about difficulties. It seems a pity that some form of final revision cannot be adopted before the measures are placed on the statute book.—*Law Times.*

On the 2nd inst. there was received in the Middle Temple the ancient practice of holding moots in the Hall after dinner during term time. More than 200 years ago the practice was common, and formed part of the regular course of the training of a young barrister, but at the beginning of the eighteenth century it fell into disuse. This revival of the moot is due to the energy and enterprise of Dr. Blake Odgers, K.C., the Director of Legal Education, who is Lent Reader at the Middle Temple. He arranged the moot with a committee of students and barristers, and all the ancient ceremonial was observed. After the evening meal, attended by members of the society in Hall, the moot began. The Masters of the Bench who took part in the moot were Dr. Blake Odgers, K.C., in the chair, Mr. English Harrison, K.C. (Chairman of the General Council of the Bar), and Mr. Muir Mackenzie (Official Referee). There were also present Mr. H. D. Greene, K.C., (ex-Treasurer), Mr. Scott Fox, K.C. (Chancellor of the County Palatine of Durham), and other

Masters of the Bench and many barristers and other members of the society. The case propounded was one which in one form or another has agitated legal opinion for many years—namely, that of a passenger on a railway who has deposited his bag in a cloak room, receiving a cloak room ticket, which is afterwards stolen, and the thief by means of the stolen ticket obtains the bag: the question being whether the original owner of the bag can maintain an action for the value of the bag against the railway company.—*Law Times.*

She was a lady visitor to the prison, kindly, and well-meaning, and as she chatted with a burglar who had been sentenced to six months' imprisonment, she thought she detected signs of reform in him. "And now," she said, "have you any plans for the future, on the expiration of your sentence?" "Oh, yes, ma'am," he said hopefully. "I've got the plans of two banks and a post-office."—*The Argonaut.*

The "Knave" in the *Oakland Tribune* has published several anecdotes about the late Dennis Spencer, of Napa, who was noted as a lawmaker, orator and lawyer. The following story is particularly good:

One day there entered his office in Napa a bright-looking, well-dressed Chinaman. He took a chair and proceeded straight to the point:

"You Mr. Spencer, the big lawyer?"

"Yes."

"How much you charge to defend a Chinaman?"

"For what crime?"

"Murder."

"Five hundred dollars."

The Chinaman said he would call again.

A few days later he returned to Spencer's office, gravely placed $500 in coin on the desk before the astonished attorney, and said:

"All lite. I kill 'im."

Spencer defended and acquitted him.