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HON. MR. JUSTICE LATCHFORD.

Hon. Francis Robert Latchford, of the Ottawa Bar, takes the seat in the Chancery Division of the High Court of Justice for Ontario vacated by Mr. Justice Mabee, now Chief Commissioner of the Board of Railway Commissioners for Canada. Mr. Latchford held the position of Commissioner of Public Works and subsequently that of Attorney-General in the Ross Government in the Province of Ontario, so that much of his time has of late years been devoted to the field of politics, which is not in all respects desirable as a training ground for a member of the Bench, though it has some advantages even in that regard. It is therefore difficult to form an estimate of what Mr. Latchford's judicial future is likely to be. We congratulate him, however, upon his appointment, and wish him all success in his new and responsible position.

WORKMEN'S LIEN—DEFECTIVE DRAFTING OF STATUTE.

Another noteworthy illustration of the mischievous results which are constantly being produced by the imperfections of the present arrangements for drafting statutes has been furnished by a recent decision of the Manitoba Court of Appeal (a).

The point involved was, whether certain workmen, hired at the rate of so much an hour, were entitled under ss. 3 and 4 of the Builders' and Workmen's Act (Rev. Stat. Man. (1902) c. 14), to a lien on a building which their employer, an independent contractor, was erecting for the owner. It was held that the claimants were not within the purview of that statute, as it was applicable by its express terms only to

(a) *Dunn* v. *Sedziak* (1808), 7 West. Rep. 563.

workmen employed "by the day or the piece." The brief judgment in which this conclusion was announced does not afford any definite information regarding the grounds upon which it was based. Presumably the theory adopted was that a contract by which a person is engaged at so much an hour imported an engagement by the hour, and that the words of the statute in question could not, even by the most liberal construction, be made to cover an employment on this footing. Neither of these principles, it is manifest, is open to exception. Abstracted from any direct evidence with respect to the duration of a contract of hiring, the circumstance that the amount of the remuneration was defined by a stipulation to the effect that he was to receive a certain sum for each period of a specified length during which he should continue to work, undoubtedly requires the inference that the parties intended to contract for that period and no more (*b*). Nor can any objection reasonably be made to the second of the grounds upon which we assume the court to have founded its decision. Both in legal parlance and every day speech, the phrase, "employed by the day," bears a well-understood meaning, and to have treated it as covering an employment by the hour would manifestly have been wholly unwarrantable.

But while the decision itself is not obnoxious to adverse criticism, the same cannot be said of the enactment under construction. Considering the objects of that enactment, it is quite impossible to suppose that the legislature really intended to restrict its benefits, so far as servants engaged upon a time basis are concerned, to workmen employed "by the day." No one would seriously contend that the protection afforded by statutes of the kind under review is needed by workmen of this description in any such special degree as would justify granting them privileges denied to workmen performing similar services under

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(*b*) In support of this well-established doctrine it will be sufficient to refer to the explicit statement of Buller, J., in *R*. v. *Newton Toney* (1788) 2 T.R. 453, that "if the payment of weekly wages be the only circumstance from which the duration of the contract is to be collected, it must be taken to be a weekly hiring."

contracts of a duration longer or shorter than a day. The only reasonable hypothesis applicable to the circumstances would seem to be, that it was the purpose of the legislature to create a lien in favour of workmen hired either *by time* or by the piece, and that, owing to the inadvertence or ignorance of the draftsman and other persons concerned in the framing of the statute, the more restricted phrase, "by the day," was inserted.

If the form in which this provision of the Act was passed is to be explained in this manner,—and the explanation is apparently the only one which is available to preserve the Manitoba House of Assembly from the imputation of having deliberately made an arbitrary, not to say absurd, distinction between one particular class of workmen and others equally deserving of protection,—the perpetration of an error so easily avoidable, and productive of so much disappointment to those whom it has prejudiced, affords a very striking proof of the urgent need for improving the system of Parliamentary drafting in this country.

The existing arrangements in some of the provinces are far from being satisfactory. Mistakes of the kind here adverted to would seldom occur, if adequate skill and care were expended in the selection of the phraseology to be used in enactments which alter the existing law. The exercise of such skill and care can be secured only in one way, that is to say, by utilizing expert knowledge to a much greater extent than at present. No statute should be framed without the assistance of a specialist who is qualified not merely to supply the language which will render it a clear and complete expression of the will of the legislature, but also of appreciating thoroughly the operation of each of its provisions with reference both to other enactments and to the departments of case-law which it affects. It is also desirable that a specialist should keep a close watch upon each measure during its progress through the legislature, so that the persons who have it in charge may be kept fully informed as to the consequences of any amendments that may be admitted in the course of the debates. Under the improved system to which these

observations point, it would be an extremely important part of the duties of a draftsman to call the attention of the legislature to any alterations which in his opinion would be productive of obscurity or inconsistency.

Specialists capable of performing the responsible and difficult work which has been outlined above can be secured only by the offer of a liberal remuneration. But salaries sufficiently large to attract barristers even of the highest standing would not be an excessive price to pay for services which would certainly obviate the necessity for a very considerable portion of the expensive litigation which is traceable under existing conditions to the defective drafting of statutes.

C. B. LABATT.

THE DEVOLUTION OF ESTATES ACT.

The very grave and serious questions which Mr. Betts raised in his paper published in this journal on December 1st last, seem to call for the serious attention of the legislature.

We may remind our readers that nearly all the difficulties he points out have been caused by the fatal departure from the fundamental principle of the Act as originally passed.

The plan of shifting and re-shifting the title to realty by omitting to register or by registering cautions was no part of the Act as originally passed. That is the result of tinkering.

It has been pointed out in this journal more than once that the original Act contemplated that in every case the title should be traced through the personal representative. The Act was beginning to work satisfactorily when at the instance of a country solicitor who happened to be a member of the legislature, it was fatally marred by grafting on it the old principle of a direct devolution of the estate from the testator or intestate to the beneficiaries.

The incorporation of this principle creates all the difficulties to which Mr. Betts refers. Is not the obvious course to retrace

our steps and revert to the scheme of the Act as originally passed?

One defect certainly did exist in the original Act and that was the omission to provide for the vesting of the estate during any interval which may elapse between the death of an owner and the grant of probate or letters of administration.

In every case there must be a hiatus between the death and the grant of probate or administration. Where is the estate in the meantime? We do not mean the land, but the legal title?

In some of the Australian colonies they have provided for this by the appointment of a public functionary in whom the title to all estates vests subject to be divested on the grant of probate or administration. Is not that our proper remedy?

The sole reason of the recent amendment to the Act was to save the expense of conveyances from the personal representative to the beneficiaries. This might easily have been got over by some simple method which would not have invaded the fundamental principle of the Act.

One method which might be suggested would be a general vesting order vesting land in the beneficiaries according to their respective interests grantable at small expense by a County Court judge with the consent of the personal representative whenever the estate was below a certain value and in other cases by a judge of the High Court.

This is another illustration of the evils resulting from want of a careful supervision of legislation as it passes through its various stages by some specialist appointed for the purpose; the need of which is enlarged upon in another place.

SUNDAY OBSERVANCE AND GOLF.

Whilst we trust that the glamour of golf has not swayed the judicial mind, we can scarcely concur in some of the utterances from the Bench in relation to this (shall we say) recreation, for we are told by some of these learned gentlemen that it is not "a game." It seems to be in their estimation a sort of

solemn function which is held to be outside existing provisions for the preservation of the sanctity of the Lord's day, at least so far as the law in the Province of Ontario and in Cape Colony is concerned.

As to the former, it was decided in *Reg.* v. *Carter,* 31 C.L.J. 664, that, though it is not lawful for any person on that day "to play at skittles, ball, foot-ball, racquets, or any other noisy game," there was no objection to playing golf, as the word "ball" (which the learned judge euphemistically described as a "sphere") does not include a ball used in golf, and also that golf is not a "noisy game."

This function has also come up for judicial discussion, with the solemnity appropriate to the occasion, in Cape Colony (*Rex* v. *Ochley,* 27 S.A.L.J. 117). Under the Sunday observance ordinance in force there since 1838 it is "lawful for any magistrate, police officer, etc., to disperse all persons gathering together on the Lord's Day in any public or open place for the purpose of gambling, fighting dogs, fighting cocks, or playing at any game, and all persons actually playing as aforesaid shall on conviction be sentenced," etc.

Under this enactment some golfers were convicted and fined. An appeal was allowed by the court on the ground that there was no "gathering together" to play a game, and moreover that in their opinion no "game" had been played at all. It appears that these crafty South African sports had carefully considered the situation and arranged that each golfer should proceed around the course alone, and so, not having "gathered together" as they claimed with any one else, it was held that they did not come within the ordinance. The reasoning was somewhat subtle not to say "shaky," as was also that of the judgment of the court as to there being no "game" involved, inasmuch as it was thought that that word means something in the nature of a "contest for supremacy, and was not to be taken in its widest meaning of pastime, or amusement;" otherwise every person who rides a bicycle or rows a boat on Sunday would contravene such an ordinance. They seemed to think that

golf was not so much a game as an exercise appropriate and helpful in the line of Sunday meditation, though it is said that explosions of a sulphurous character are not unknown during these exercises—not perhaps "noisy" but at least deep and expressive. We would suggest that it might more properly be described as a sedate and solemn procession composed of a ball, a biped and a "bogey."

We are inclined to think that at least one of our judges in Ontario would if these cases were to come before him on appeal unmercifully "riddle" the reasoning and result arrived at therein.

We are glad to know that the state of affairs referred to in our issue of October 15th, 1907, is now about to be remedied by the Board of Railway Commissioners. In the article referred to we called attention to the want of uniformity existing in the forms of bills of lading used by the various railway companies, some of which were approved by the Board without sufficient examination or consideration, and others not examined at all, but yet, in effect, given statutory authority. A circular has now been issued by the Board pointing out that the views of those interested are so divergent as to create a complication objectionable and unnecessary, and suggesting a conference between representatives of the carriers and shippers. This was the course pursued when a similar matter was under consideration by the Inter-State Commerce Commission in the United States.

In a number of cases before the Board evidence had been taken before the late Chief Commissioner, Mr. Killam, but no adjudication had been made at the time of his death. A re-hearing would have caused great additional expense in time and money. We recently referred to some of these cases (see ante p. 172). In two cases at least we understand that a re-hearing will not be necessary, the parties having agreed that the evidence may be submitted to the present Chief Commissioner, and judgment given by him thereon.

In the State of Wisconsin—we know not whether there is a similar law in any other State—it has been enacted by the State legislature that, "whenever a person pays for the use of a double lower berth in a sleeping car, he shall have the right to direct whether the upper berth shall be open or closed, unless the upper berth is actually occupied by some other person, and the proprietor of the car and the person in charge of it shall comply with such direction." A legal problem recently arose out of this in the case of *State* v. *Redmon*, 114 N.W. Rep. 137, where the court was charged with the duty of deciding as to the constitutionality of the above statute. The result was a learned judgment as to police powers in general and as to the limits of Federal and States jurisdiction, and a finding that the enactment was, under their law, unconstitutional. This, however, need not, at present, concern us. We only refer to the matter now to express the joy we feel that some glimmering of sense is beginning to penetrate into the dull brain of the travelling public, by the knowledge that such a law as that quoted above is in force anywhere, or, at least, that it would like to be in force if the judicial mind would so permit; and in the hope that an attempt may be made by some legislator who is not afraid of railway magnates to get rid of the present tyranny which compels obliging and susceptible porters in sleeping cars to put the regulation lid over the occupants of lower berths, without the slightest benefit even to the company, and very much to the detriment of the health and temper of a long-suffering travelling community. What member of Parliament will make his name famous and secure himself many votes by endeavouring to pass similar legislation in this country?

CUMULATIVE LEGACIES.

"Legacies of equal, less, or greater amount given by different instruments, as by will and codicil, to the same person, are prima facie cumulative." No one will dispute that statement of the law as laid down by Mr. Theobald in the seventh edition of his

standard work on Wills (p. 158). Common sense tells us that a testator would not by codicil substitute a legacy of equal amount for that given by the will; it would be a waste of writing. The law has carried the presumption further, and presumes that any legacy by a second document is intended to be in addition to what has been given by the previous one.

The case of *Wilson* v. *O'Leary*, 26 L.T. Rep. 463, L. Rep. 7 Ch. 448, is a strong instance of the application of this rule. A testator had by his will bequeathed the residue of his property to J. and H. in equal shares. He afterwards executed two codicils which bore a considerable resemblance to each other. Of the legacies to the same persons, some were of different amounts and some of the same amount in the two codicils, while a legacy to a person in the first codicil was not repeated in the second, but one of equal amount was given to another person, and in the second there was the declaration that "these shall be free of legacy duty." It was sought to put in evidence a letter by the solicitor who had prepared the will and first codicil, advising the testator to copy the first codicil, as the signature was in an inconvenient place. The Court of Appeal decided that this was clearly inadmissible, as the question was merely one of construction of the documents.

In *Re Pinney* (1902) 46 Sol. Jo. 552, evidence was proffered to shew that the codicil disposed of all the testatrix's property except 2s. 5d.; but Mr. Justice Joyce refused to allow evidence on this head, and held that the legacies were cumulative. In refusing to admit such evidence he followed the decision of the House of Lords in *Higgins* v. *Dawson*, 85 L.T. Rep. 732, (1902) A.C. 1. Lord Justice James gave the leading judgment in *Wilson* v. *O'Leary*, and, in doing so, said that "where there is a positive rule of law of construction such as exists in these cases—that is to say, that gifts by two testamentary instruments to the same individual are to be construed cumulatively—the plain rule of law and construction is not to be frittered away by a mere balance of probabilities." His Lordship referred to two cases where the contrary had been held, but stated that he could

not help thinking that in both those cases the court of construction had acted upon a sort of feeling that, in truth, the one instrument was intended to be an entire substitution for the other.

The position of the court granting probate is very different in this matter to that of the court of construction. The Probate Division decides whether the two documents are to be admitted to probate or not, and in doing so, in cases of doubt, admits external evidence (see *In the Goods of Bryan*, 96 L.T. Rep. 584, (1907) P. 125), but the court of construction is bound to accept the finding of the Probate Division that there are two testamentary documents, and must construe them in accordance with that finding. An authority for this principle is to be found in the old case of *Foy* v. *Foy*, 1 Cox 163, where Sir Lloyd Kenyon said that although he should have had great doubt (in case it had been competent to him to have decided the question) whether the last paper, which was proved as a codicil, was not, in fact, a new will, and therefore revoked all the others; yet as the Ecclesiastical Court had granted probate of them all, he was bound to consider them all as subsisting in full force. The Probate Division is the successor of the Ecclesiastical Court.

This principle has to be particularly borne in mind where the second document describes itself as the last will. The mere fact that the second document is described as the last will will not ipso facto revoke an earlier will. Thus in *Simpson* v. *Foxon*, 96 L.T. Rep. 473, (1907) P. 54, the later instrument commenced, "This is the last and only will and testament of me," but the president held that it was not the testator's only will, and that "last and only" did not revoke his former testamentary dispositions.

The statement in Theobald on Wills (p. 159) that "If the instrument by which the second gift is made is not a codicil, but is described as a last will and testament, the presumption is strong that it was intended to be in substitution so far as it goes for the prior instrument" is too wide.

In all probability the second document will be described in the probate as a "codicil," and it would be more accurate to say that it will, so far as it goes, alter the earlier will.

All the cases referred to by Mr. Theobald to prove his point had other marks that the legacies were intended to be substitutional. In *Jackson* v. *Jackson,* 2 Cox 35, there was the gift of the same specific chattels in both; so there was in *Tuckey* v. *Henderson* 33 Beav. 174, and in the last-named case there was also a gift of the residue in each document. *Kill* v. *North,* 14 Sim. 463, 2 Ph. 91, resembled *Tuckey* v. *Henderson,* and there was also there a direction to pay debts in both instruments.

Now, it is obvious that specific chattels or the residue cannot be given twice over, while it is equally unlikely that a testator will wish his debts to be paid twice; so that there were in those cases other marks to shew that the scheme of distribution in the first document was so to be modified by the later one that the same legatees should not receive benefits under both. The other case referred to by the above-named learned author in *Re Bryan,* supra, but that was not the decision of a court of construction.

In the unreported case of *Re Trimmer* (1907) T. 2028 (Feb. 13, 1908), before Mr. Justice Eve, the second document, described in the probate as a codicil, commenced with the words, "This is the last will." There was, however, no specific gift or direction to pay debts in either instrument, while the gift of residue was in the former only. The learned judge held that in such a case the testator's description of the second document as his last will was not, in the absence of other marks of his intention, sufficient to rebut the rule that legacies by different instruments are cumulative, not substitutional.—*Law Times.*

RIGHTS OF MINORITY STOCKHOLDERS.

The doctrine frequently asserted, that equity protects the minority stockholder, may be stated to comprehend a right to an accounting or an injunction with respect to transactions ultra vires or amounting to a breach of trust. The plaintiff must be

a bona fide stockholder; *Robson* v. *Dobbs* (1869) L.R. 8 Eq. 301; *Belmont* v. *Erie Ry. Co.* (1869) 52 Barb. 637; he must generally shew special injury where the transaction is not ultra vires; *Hill* v. *Nisbet* (1884) 100 Ind. 341; *Hedges* v. *Paquett* (1869) 3 Ore. 77; and, the corporation being a trustee for the stockholders, in most cases he must allege and prove that the corporation is unwilling or unable to bring suit. *Hawes* v. *Oakland* (1881) 104 U. S. 450; *Greaves* v. *Gouge* (1877) 69 N.Y. 154; *Dumphy* v. *T. N. Assn.* (1888) 146 Mass. 495. But when the transaction is ultra vires, *Stebbins* v. *Perry County* (1897) 167 Ill. 567; *Botts* v. *Simpsonville, etc., Turnp. Co.* (1888) 88 Ky. 54, or the corporation is under the control of the guilty parties, *Brewer* v. *Boston Theatre* (1870) 104 Mass. 378; *Wickersham* v. *Crittenden* (1892) 93 Cal. 17; *Rogers* v. *Ry. Co.* (1898) 91 Fed. 299, such proof is unnecessary. Whether or not an allegation that the directors have been requested to sue and have refused is sufficient, seems to be unsettled, some courts holding that the plaintiff need not apply to a stockholders' meeting, *Gregory* v. *Patchett* (1864) 33 Beav. 595; Cook, Corp. sec. 720, and others, that this is necessary, *Foss* v. *Harbottle* (1843) 2 Hare. 461; *Bill* v. *Western Union T. Co.* (1883) 16 Fed. 14, except in the possible case of a fraud which could not be authorized by a majority of the stockholders. *Mason* v. *Harris* (1879) L.R. 11 Ch. Div. 97. Although there be such an authorization, the plaintiff's right is not impaired, for a majority of the stockholders sustain much the same relation towards the minority as the directors sustain towards all the stockholders. *Farmers', etc., Co.* v. *New York Ry. Co.* (1896) 150 N.Y. 410; *Erwin* v. *Oregon, etc., Co.* (1886) 27 Fed. 625. The right of action is not limited to cases of technical fraud, but attaches to every breach of trust, including, it has been held, gross negligence. *Ives* v. *Smith* (1888) 3 N.Y., Supp. 645.

Fraud exists where the interests of the corporation are deliberately neglected in favour of a personal or other interest. An oppressive scheme of management "so far opposed to the true interests of the corporation itself as to lead to the clear in-

ference that no one thus acting could have been influenced by any honest desire to secure such interests" may be enjoined; *Gamble* v. *Queens, etc., Co.* (1890) 123 N.Y. 91; see also *Hannerty* v. *Standard Theatre Co* (1891) 109 Mo. 297; but poor management alone, although resulting in loss to the corporation, furnishes no ground for the interference of equity. *McMullen* v. *Ritchie* (1894) 64 Fed. 253; *Ellerman* v. *Chicago, etc.. Co.* (1891) 49 N.J. Eq. 217; *Leslie* v. *Lorillard* (1888) 110 N.Y. 519. The fraud being a deliberate service of an outside interest, the proof must shew a distinct favouring of that interest. Primarily the question of the adequacy of the consideration is examined, and where it appears that an undue advantage has been taken by the corporate managers, the contracts are avoided or the performance enjoined, *Woodroof* v. *Howes* (1891) 88 Cal. 184; *Sage* v. *Culver* (1895) 147 N.Y. 241, but a substantial discrepancy between the consideration and the market value of the res is not conclusive. *Gamble* v. *Queens, etc., Co.,* supra. Material evidence may be gleaned from a conflict or intermingling of the interests involved in the transaction: as in cases of contracts between the directors, officers, or majority stockholders and the corporation, *Rogers* v. *Lafayette, etc., Works* (1875) 52 Ind. 296; *Munson* v. *Syracuse, etc., Ry. Co.* (1886) 103 N.Y. 58, or between two or more corporations having common directors or officers, *Ryan* v. *Leavenworth, etc., Ry. Co.* (1879) 21 Kan. 365; *Fitzgerald* v. *Fitzgerald, etc., Co.* (1895) 44 Neb. 463; *Pearson* v. *Concord Ry. Corp.* (1883) 62 N.H. 537, or common majority stockholders. *Meeker* v. *Winthrop Iron Co.* (1883) 17 Fed. 48; *Peabody* v. *Flint* (Mass. 1863) 6 Allen. 52; *Farmers', etc., Co.* v. *New York, etc., Ry. Co.,* supra; *Goodin* v. *C. & W. Canal Co.* (1868) 18 Oh. St. 169. Lord Hardwicke said in *Whelpdale* v. *Cookson* (1747) 1 Ves., Sr. 9, "It is not enough for the trustee to say 'You cannot prove any fraud' as it is in his power to conceal it," and upon analogy to cases of strict trust to which this reasoning is applicable and in which the transac-

tion is effected by a single and the only trustee, many decisions have declared these contracts void without proof of fraud in fact, citing almost invariably cases involving the interest of the technical trustee rather than that of the corporate director, *Pearson* v. *Concord Ry. Corp.*, supra; *Munson* v. *Syracuse, etc., Ry. Co.*, supra; *Wardell* v. *R. R. Co.* (1880) 103 U. S. 651, and others have held likewise, provided the officer interested was needed to make a quorum in the board, *Butts* v. *Wood* (1867) 37 N.Y. 317, or his vote was necessary to a majority. *Bennett* v. *St. Louis & etc., Co.* (1895) 19 Mo. App. 349. These decisions, however, are overborne by the weight of authority, requiring proof of actual fraud. *Burden* v. *Burden* (1899) 159 N.Y. 287; *Shaw* v. *Davis* (1894) 78 Md. 308; *Leavenworth County Com'r's.* v. *Chicago, etc., Ry. Co.* (1885) 25 Fed. 219; Aff'd. 134 U.S. 688. The nature of the question is such that each case must be decided very largely upon its facts, and the tendency seems to be to resolve the whole problem into the plain question of "fairness" to the plaintiff. *Continental Ins. Co.* v. *New York, etc., Ry. Co.* (1907) 187 N.Y. 225; *Colgate* v. *U. S. Leather Co.* (N.J. 1907) 67 Atl. 657.

Thus in a recent case in which a minority stockholder sued to enjoin a merger of two trust companies, it appeared that the companies had directors and officers in common and that forty-nine per cent. of the stock of the plaintiff's company was owned by a majority stockholder of the other company. The merger agreement seemed on its face grossly unfair to the plaintiff; but there was no proof of actual fraud and the court balanced the apparent inequality by taking into consideration the greater earning capacity, present and prospective, of the other company. *Colby* v. *Equitable Trust Co.* (1908) 38 N. Y. Law Jour. No. 119. The intermingling of the corporate interests being insufficient without other evidence of fraud, the decision turned upon the question of consideration; and this the court found to be adequate.—*Columbia Law Review.*

RECOVERY FOR DAMAGES FOR MENTAL SUFFERING IN TORT AND IN CONTRACT.

The right to recover for damages for mental suffering, in actions arising ex delicto and ex contractu, is a question in the law concerning which there is a diversity of judicial opinion. There is an apparent reluctance to grant recovery in such cases, due chiefly, perhaps, to the difficulty of definitely ascertaining the true measure of damage from a pecuniary point of view.

In actions arising ex delicto the weight of authority is in favour of a recovery for anguish of mind, but the right is limited to three well-defined classes of cases, viz., first, where some physical injury has been inflicted; second, where the plaintiff has been subjected to personal indignity, as in defamation, malicious prosecution, or seduction; and third, where a clear legal right of the plaintiff has been invaded in such a wilful or malicious manner as would naturally cause mental distress, regardless of the preceding elements of physical injury or personal indignity. It does not follow, however, that this is a proper element of damage in all tort actions, and it has been held that there could be no recovery for mental suffering which resulted to a mother from the death of a child by a wrongful act; nor for libeling the dead; nor for mere fright resulting in a nervous disorder; nor for anxiety for safety of one's self or family during a blasting operation; nor from threats or duress by means of which property was unlawfully procured. The better rule would seem to be that recovery for mental pain in this class of cases is restricted to those in which there is an accompanying invasion of a legal right, physical bodily injury, malice, insult or inhumanity.

As a general rule, pain of mind is not a subject of damages in actions arising ex contractu, except where the breach of a contract amounts in substance to an independent, wilful tort. Exceptions to the general rule are actions for breach of promise to marry, and actions against carriers for wilful or malicious injuries to passengers, in violation of their contract to carry safely. The great weight of authority is against a recovery

for mental suffering through failure to deliver telegrams. Some Courts, however, hold contra, in accordance with the so-called "Texas doctrine." Where this doctrine has been followed it has been adhered to consistently, and an extreme case is found in North Carolina, where recovery was allowed for fright and worry incident to a father's failure to meet his young daughter at a railroad station, because of the non-delivery of a telegram advising him of her arrival there at a scheduled hour, and the terror which ensued during a lonely ride at midnight to her home.

Recovery has also been allowed for mental pain resulting from the mutilation of a dead body; from the breach of contract to carry a dead body safely, where such breach constituted a wilful tort; and from the breach of contract of an undertaker to keep safely the body of a dead child. The Supreme Court of Minnesota, however, has recently refused a recovery for mental distress where a railroad company negligently failed to carry a dead body to its destination according to the usual train schedule, the delay interfering with the funeral plans and causing anxiety, humiliation and other anguish of mind. The case holds that the facts establish a breach of contract only, and in the absence of a wilful tort incident to such breach, mental suffering is not an element of damage. It would seem to be in exact accord with the general rule, and commends itself to the legal mind as a sound view of the question involved. The subject is thoroughly reviewed, and the authorities fully stated, in the opinion of the court.—*University of Philadelphia Law Review.*

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

LANDLORD AND TENANT—LEASE—COVENANT NOT TO ASSIGN WITHOUT CONSENT—PAYMENT FOR LEAVE TO ASSIGN—FINE OR SUM OF MONEY IN NATURE OF A FINE—CONVEYANCING ACT, 1892 (55-56 VICT. C. 13) S. 3—WAIVING BENEFIT OF STATUTE.

Andrew v. *Bridgman* (1908) 1 K.B. 596. In this case the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.), have affirmed the judgment of Channell, J. (1907) 2 K.B. 494 (noted ante, vol. 43, p. 731). By the Conveyancing Act, 1892, it is provided that a covenant in a lease not to assign without consent of the lessor shall, unless the contrary be expressed, be deemed subject to a proviso that no fine or sum of money in the nature of a fine shall be payable for giving such consent. The covenant in question in this case contained no provision to the contrary, but the lessor on being applied to for his consent, refused to give it except on the terms of being paid £45. This the lessee paid under protest, and the present action was brought to recover it; but the action failed, because the court held, that the lessee was under no obligation to have paid it, but on the consent being improperly refused, he might, under the statute, have made the assignment without leave; but there was nothing in the statute to prevent his making a bargain with the lessor, and, in fact, waive the benefit of the statute, as he had done.

INSURANCE—WARRANTY OF FREEDOM FROM CAPTURE—CAPTURE OF SHIP—SUBSEQUENT WRECK—CONDEMNATION—TITLE OF CAPTORS.

In *Andersen* v. *Martin* (1908) 1 K.B. 601 the judgment of Channell, J. (1907) 2 K.B. 248 (noted ante, vol. 43, p. 620), has been affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.). The action was brought on a policy of marine insurance which contained inter alia a warranty against capture. The vessel had been captured by a belligerent, but before condemnation by a Prize Court, she became a total wreck. Channell, J., had held that though the capture of the vessel did not, until condemnation by a Prize Court, divest the owner's property, yet, when condemnation did take place, the title of the captors related back to the time of the capture.

and, therefore, the plaintiff could not succeed. The Court of Appeal, however, was of the opinion that, as between the owner and insurer, the question of relation back was really immaterial; the true view being, that the owner had lost his vessel by capture, and the captors had lost their prize by shipwreck, and as the policy excepted loss by capture, the plaintiff could not recover.

PUBLIC BODY—EXPROPRIATION OF LAND—STATUTORY POWER OF EXPROPRIATION—NOTICE TO TREAT—CREATION OF NEW INTEREST AFTER NOTICE TO TREAT—COMPENSATION.

Zick v. *London United Tramways* (1908) 1 K.B. 611. The defendants in this action were empowered for the purpose of their undertaking to expropriate lands, and in pursuance of their statutory powers they gave the landlord of the lands in question in the action notice to treat. At the time the notice to treat was served the land was in the occupation of a tenant under an argeement in writing for the term of three years from March 14, 1905, subsequently by arrangement with the landlord and this tenant the plaintiff became lessee of the premises for a term of three years from 14 February, 1906, on similar terms in other respects to those under which the previous tenant held. Without notice to the plaintiff the defendants had entered and taken possession of the lands without making any compensation to the plaintiff, and the present action was for trespass in so doing. Jelf, J., who tried the action, held that notwithstanding the operation by surrender by operation of law of the former tenancy and the creation by the landlord, after notice to treat, of a new interest in favour of the plaintiff, the plaintiff was, nevertheless, entitled to compensation in respect of that interest so far as it did not exceed that existing at the time of the notice to treat and, therefore, during the period ending March 14, 1908, inasmuch as the creation of the new tenancy during that period did not impose any additional burden on the defendants. He therefore gave judgment for the plaintiff for 40s. damages and costs on the High Court scale, accompanied by the declaration that he was entitled to compensation.

CRIMINAL LAW — LARCENY — PLEADING—INDICTMENT—SUFFICIENCY OF AVERMENT AS TO PROPERTY IN GOODS.

In *The King* v. *Stride* (1908) 1 K.B. 617 the defendants were indicted for stealing 1,000 pheasant's eggs, "of the goods and chattels of and belonging to one Walter Gilbey." It was con-

tended on the part of the defendant that pheasants being feræ naturæ this averment of property was insufficient, inasmuch as it did not sufficiently appear that the eggs in question had been reduced into the possession of Gilbey. But the Court for Crown Cases Reserved (Lord Alverstone, C.J., and Lawrance, Ridley, Darling and Channell, JJ.) held that it was sufficient.

NEGLIGENCE—INFRINGEMENT OF PUBLIC RIGHT—SPECIAL AND PARTICULAR DAMAGE—NEGLIGENT NAVIGATION—DAMAGE TO DOCK—SPECIAL DAMAGE BY BEING DEPRIVED OF USE OF DOCK.

In *Anglo-Algerian SS. Co.* v. *Houlder Line* (1908) 1 K.B. 659 the plaintiffs sued the defendants for damages by reason of the defendants having through unskilful navigation injured a public dock necessitating its being closed for repairs, whereby the plaintiffs were prevented from having access to the dock. The plaintiffs' ship arrived at the dock in order to take a cargo which was ready in the dock to be shipped, but owing to the dock having been injured by the defendants through unskilful navigation, it was closed for repairs, and plaintiffs' vessel could not enter, and delay and loss was thereby occasioned to the plaintiffs; but Walton, J., (the trial judge) held that the defendants' negligent act was too indirectly connected with the plaintiffs' loss to give them any cause of action against the defendants. The action, therefore, failed.

DISTRESS—EXCESSIVE CHARGES BY BAILIFF—PENALTY FOR EXTORTION BY BAILIFF—DISTRESS (COSTS) ACT, 1817 (57 GEO. III. c. 93)—(R.S.O. c. 75, s. 6).

Robson v. *Biggar* (1908) 1 K.B. 672. It was held by the Court of appeal (Williams, L.J., and Barnes, P.P.D., and Bigham, J.), that a proceeding before justices to recover a penalty against a bailiff for extortion under the Distress Act, 57 Geo. III. c. 92 (see R.S.O. c. 75, s. 6), is a "criminal cause or matter," and, therefore, under the Judicature Act no appeal lay to the Court of Appeal from a decision of a Divisional Court on a case stated.

BANKRUPTCY—FOREIGN AND DOMESTIC ASSETS—POOLING OF ASSETS—CREDITORS.

In re MacFadyen (1908) 1 K.B. 675. Bigham, J., here authorized an English trustee in bankruptcy of an insolvent com-

pany which had assets in a foreign country in the hands of an official assignee to enter into an agreement with such official assignee for the pooling of all the assets and distributing them ratably among the English and foreign creditors, although there is no express provision in the English Bankruptcy Act authorizing such an arrangement.

BREACH OF PROMISE OF MARRIAGE—PROMISE BY MARRIED PERSON TO MARRY ANOTHER—PUBLIC POLICY—INABILITY TO CONTRACT.

Spiers v. *Hunt* (1908) 1 K.B. 720 was an action for breach of promise of marriage; the promise was given by the defendant to marry the plaintiff on the death of the defendant's wife. Phillimore, J., held that such a promise is contrary to public policy and null and void.

Wilson v. *Carnley* (1908) 1 K.B. 729 is another case of the same kind, the promise being given when, to the knowledge of the plaintiff, the defendant was a married man, and in this case the Court of Appeal (Williams, Farwell and Kennedy, L.JJ.) came to the like conclusion.

PRACTICE—ACTION TO RECOVER GAMBLING DEBT—FRIVOLOUS AND VEXATIOUS ACTION—CAUSE OF ACTION—NEW CONSIDERATION—FORBEARANCE TO SUE.

In *Goodson* v. *Grierson* (1908) 1 K.B. 761, the defendant applied to dismiss the action as being frivolous and vexatious, on the ground that the plaintiff had admitted on his examination that the debt sought to be recovered was a gambling debt. But the plaintiff by his answer set up as the consideration for the defendant's indebtedness, his forbearance to sue and giving time to the defendant at the latter's request. The Master dismissed the action and Jelf, J., affirmed his order, but the Court of Appeal (Moulton and Buckley, L.JJ.) reversed the order, holding that the giving of time at the defendant's request might possibly constitute a good consideration for the debt claimed, and that at all events the action ought to proceed to trial in order that all the facts might be laid before the Court. "In order to support an application of this kind the defendant has to shew that under no possibility could here be a good cause of action consistently with the pleadings and the facts in the case," per Moulton, L.J.

SHIP—BILL OF LADING—CONDITION LIMITING LIABILITY—LOSS DUE TO NEGLIGENCE.

Baxter's Leather Co. v. *Royal Mail SS. Co.* (1908) 1 K.B. 796 was an action to recover damages against a shipowner for loss of the plaintiffs' goods by reason of the defendants' negligence. The bill of lading expressly stipulated that the shipowners should "under no circumstances" be liable for any goods of whatever description "beyond the amount of £2 per cubic foot for any one package." The defendants contended that this was the limit of their liability for the goods in question, notwithstanding that they had been lost through negligence on their part, and Bigham, J., held that they were right.

PRACTICE—STAYING OF ACTION—ABUSE OF PROCESS—CAUSE OF ACTION ARISING OUT OF JURISDICTION—SUBJECT MATTER OF ACTION OUT OF JURISDICTION—DEFENDANTS ORDINARILY RESIDENT OUT OF JURISDICTION—SERVING DEFENDANT OUT OF JURISDICTION AS BEING NECESSARY PARTY.

In re Norton, Norton v. *Norton* (1908) 1 Ch. 471 was an action for an account against the trustees of a marriage settlement for an account. The settlement was made in India, and the property of the trust was situate there and all the defendants though having an English domicil were ordinarily resident in India. The plaintiff had been separated from her husband (one of the trustees) and had since 1902 been living in France. Two of the defendants came on a visit to England, and while there the plaintiff came over from France and commenced the action against them: and she then applied for an order for leave to serve Brodie, the third trustee in Calcutta, on the ground that he was a necessary party to the action against the other defendants. The husband applied to stay all proceedings on the ground that they were vexatious and oppressive, which Eady, J., refused. Eady, J., however, refused to allow service on the trustee in India, on the ground that the claim was for an account only, and it was admitted by plaintiff's counsel that the trustee sought to be served had not received any property as trustee of the settlement. The orders were appealed from. The Court of Appeal (Williams, Farwell and Kennedy, L.JJ.) held that the property of the trust being in India, and the defendants being ordinarily resident there, it was oppressive and vexatious to bring the action in England, and it was accordingly stayed, and the order refusing leave to serve the defendant in India was, of course, affirmed.

CHARITY—"CHARITABLE OR IMMIGRATION USES"—UNCERTAINTY.

In re Sidney, Hingeston v. *Sidney* (1908) 1 Ch. 488 the decision of Eady, J. (1908) 1 Ch. 126 (see ante, p. 148), to the effect that a gift by will of personal estate "for charitable uses or for such immigration uses, or partly for such charitable and partly for such immigration uses" as the trustees in their discretion might think fit is void for uncertainty, immigration uses, unless expressly for the benefit of poor persons, not coming within the term "charity," was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.).

TRUST FUND—UNAUTHORIZED INVESTMENT—RESTORATION OF CAPITAL WITH INTEREST AT 5 PER CENT.—CAPITAL AND INCOME—INCREASED INTEREST OBTAINED BY UNAUTHORIZED INVESTMENT.

In *Slade* v. *Chaine* (1908) 1 Ch. 522 a summary application was made to Kekewich, J., to determine the rights of tenant for life and remainderman in a trust fund which had been misappropriated by the trustee and subsequently restored with interest at 5 per cent. The misappropriation consisted in the trustee applying the money in paying his private debt. The tenant for life was his wife, who made no claim. On behalf of the remainderman it was contended that the extra interest which she had received, or should be taken to have received, over and above what would have been realized by an authorized investment of the fund, ought to be treated as an accretion to the capital, but Kekewich, J., refused to give effect to that claim, and the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) held that he was right.

MASTER AND SERVANT—CONTRACT OF SERVICE—REPUDIATION—WRONGFUL DISMISSAL—UNDERTAKING NOT TO TRADE WITHIN CERTAIN LIMITS.

General Billposting Co. v. *Atkinson* (1908) 1 Ch. 537 was an action to restrain the defendant, who had formerly been a servant of the plaintiffs, from committing a breach of an undertaking not to trade, on quitting plaintiffs' employment, within certain limits. The defendant set up and established that the plaintiffs had wrongfully dismissed him from his employment, and that had the effect of a repudiation of the contract on their part, and a consequent release of the defendant from the undertaking restricting his right to trade on the termination of his en-

gagement. Neville, J., thought that, notwithstanding the wrongful dismissal, the plaintiffs were entitled to enforce the undertaking, but the Court of Appeal (Cozens-Hardy. M.R., and Moulton and Buckley, L.JJ.) were of a different opinion and reversed his decision and dismissed the action.

RECEIVER—PARTITION ACTION—SALE BY MORTGAGEE—PURCHASE BY RECEIVER WITHOUT LEAVE OF COURT.

In *Nugent* v. *Nugent* (1908) 1 Ch. 546 the sole point in question was whether a receiver could, without the leave of the court, purchase for his own benefit property of which he was appointed receiver at a sale thereof by a mortgagee under a power of sale. Eady, J., held that he could not (1907) 2 Ch. 292 (noted ante, vol. 43, p. 724), and the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ) have now affirmed his decision.

WILL—CONSTRUCTION—NO NEXT OF KIN—UNDISPOSED OF RESIDUE—EXECUTORS BENEFICIALLY ENTITLED—EQUAL PECUNIARY LEGACIES TO EXECUTORS—UNEQUAL SPECIFIC LEGACIES TO EXECUTORS—PRESUMPTION OF INTENTION.

In re Glukman, Attorney-General v. *Jefferys* (1908) 1 Ch. 552. This was an appeal from the decision of Eady, J. (1907) 1 Ch. 171 (noted ante, vol. 43, p. 354) That learned judge held that where a pecuniary legacy of any kind is left to executors, that raises a presumption that the testator did not intend that they should take beneficially the undisposed of residue of the personalty in the event of there being no next of kin, even though such legacies were unequal; but the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) have come to the conclusion that the presumption of an intention that executors should not take beneficially undisposed of residue, where there are no next of kin, only arises from the fact of gifts being made to the executors by the testator, where such gifts are equal, and if there is any inequality in such gifts the presumption does not arise. In the present case the testator had given each of his executors £1,000, but to two of them he had also given other specific gifts. This inequality was held to prevent any presumption of an intention that they should not take beneficially the undisposed of residue.

APPOINTMENT—POWER TO APPOINT BY WILL—SPECIAL FORMALITIES—NON-COMPLIANCE WITH SPECIAL FORMALITIES IN EXECUTION OF POWER—WILL VALID IN PLACE OF DOMICIL—PROBATE IN ENGLAND.

In re Walker, MacColl v. *Bruce* (1908) 1 Ch. 560, a domiciled Scotswoman had a power of appointment over a trust fund exercisable by "her last will and testament in writing or any codicil or codicils thereto to be signed in the presence of and attested by two or more witnesses." She executed a will with the necessary formalities exercising the power and appointing the whole fund to her three daughters. Subsequently by holographic dispositions written from time to time and under the last of which her unattested signature appeared, she referred to the fund and gave thereout £500 to each of her sons therein named. One son afterwards died, and by a later writing she cancelled the gift to him and gave it to her three daughters. The holograph writings were effective testamentary papers according to Scots law and were with the will admitted to confirmation in Scotland, and were also admitted to probate in England along with the will and codicil thereto. Joyce, J., held that the will and codicil and holographs constituted a sufficient execution of the power, notwithstanding the latter had not been attested as required by the power, and as they were a sufficient testamentary disposition by the law of Scotland, the testatrix's place of domicil, the court would aid the defective execution. The power was therefore held to have been well executed.

COPYRIGHT—UNPUBLISHED PICTURE—COMMON LAW RIGHT OF OWNER OF PICTURE—INFRINGEMENT—PIRATED COPY—INNOCENT PUBLICATION—DAMAGES.

Mansell v. *Valley Printing Co.* (1908) 1 Ch. 567 is a useful case, as illustrating the fact that altogether apart from copyright statutes the owner of a picture has rights in his property which cannot safely be interfered with. The plaintiff in this case had procured to be painted for him two pictures for the purposes of his trade, for which he paid £43. These pictures were surreptitiously copied by a servant of the plaintiff, who subsequently sold the copies as original productions to the defendant company, who purchased them bonâ fide, and thereafter, without any notice of the plaintiff's rights, proceeded to make and publish copies thereof. The pictures of the plaintiff had never been published

by him, nor had he registered them under the Fine Arts Copyright Act (25-26 Vict. c. 68). In these circumstances Eady, J., held that the plaintiff's common law rights had been invaded, and the fact that the defendant had acted innocently was no excuse, and he gave judgment in the plaintiff's favour for £43, and ordered all copies in the hands of the defendants to be delivered up to the plaintiff.

LANDLORD AND TENANT—PROVISO FOR RE-ENTRY—BREACH OF COVENANT—FORFEITURE—NOTICE DETERMINING LEASE—NO RE-ENTRY—ISSUE OF WRIT MAKING INCONSISTENT CLAIMS—UNEQUIVOCAL DEMAND FOR POSSESSION.

Moore v. *Ullcoats Mining Co.* (1908) 1 Ch. 575 is a case which seems to shew that it may for some purposes still be necessary to be familiar with the old procedure regarding ejectment, and the mysterious personages John Doe and Richard Roe, and the part they used to play in the ancient legal drama. The action was brought by the plaintiffs as executors of a deceased lessor to recover inter alia possession of the demised premises, the plaintiffs claiming that they had put an end to the term for breach of covenant, in pursuance of a proviso for re-entry contained in the lease in that behalf. The defendants had committed a breach of a covenant. On April 29 the plaintiffs gave the lessees notice in writing that they determined the lease, and on May 3 gave notice demanding possession of the premises which it was stated their agent would attend to receive on the following day. It was stated at the trial that the agent attended and possession was refused, but of this no evidence was given. On the 6th May the present action was commenced, and the plaintiffs claimed (1) to recover possession, (2) mesne profits, (3) an injunction to restrain defendants from working the mines on the premises so as to hazard, endanger or occasion loss or damage to the mines, and (4) an order requiring defendants to allow the plaintiffs at all proper times to view state of the mines, (5) a receiver, (6) damages, and (7) costs. The only question discussed in the judgment of Warrington, J., who tried the action, was whether or not the lease had been effectually determined. This point, in the opinion of the learned judge, turned on the question whether the notice of May 3, followed by the writ claiming possession coupled with other relief inconsistent with a determination of the lease, was effectual to terminate the lease. He came to the conclusion that if the writ had been a claim for possession and relief merely

incidental thereto, it would have been equivalent to re-entry, and sufficient to determine the lease, having regard to the old law of ejectment which was based on a supposed entry by the plaintiff, which the defendant was bound to admit as a condition of being allowed to defend; but he thought claims 3 and 4 were consistent with the lease being treated as still subsisting, and, therefore, the claim for possession could not be regarded as an absolute and unequivocal demand of possession, and, therefore, that the plaintiffs were not entitled to possession. We see, however, that an appeal was brought from this decision and after the appeal had been argued several days, the judgment was discharged on consent and the case settled out of court.

WILL—CONSTRUCTION—LEGACY—FORFEITURE CLAUSE — SUBSTITUTED LEGACY—INCIDENTS OF ORIGINAL LEGACY APPLICABLE TO SUBSTITUTED LEGACY.

In re Joseph, Pain v. *Joseph* (1908) 1 Ch. 599. In this case a testatrix had by a will given to her grandchild a legacy of £1,000 subject to a condition that if she should marry a person not professing the Jewish faith she should, for the purposes of the will, be deemed to have died in the lifetime of the testatrix under twenty-one and unmarried. By a codicil in substitution of the £1,000 a legacy of £1,500 was given to be held in trust for the grandchild for life, with remainder to her issue. The grandchild survived the testatrix and subsequently married a Christian. Was the legacy of £1,500 thereby forfeited, the forfeiture clause not having been expressly made applicable thereto? Eve, J., held that it was, because the legacy of £1,500 being in substitution of the £1,000 legacy, the condition attached to the original applied also, without any express direction, to the substituted gift. Consequently neither the grandchild nor her husband or children were entitled to any interest in the £1,500.

Correspondence.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—

I have frequently heard it laid down as absolutely incontrovertible that it is mathematically true that 2 and 2 make 4, and cannot be equal to 5, and I had supposed that it would be equally impossible to prove that 15 is not more than 14—until I read

the decision of the Supreme Court of Nova Scotia in the case of *The King ex rel. Johnston* v. *Judge of County Court, etc.*, noted at p. 118 of the current volume. The conviction there referred to appears to have been made on October 21st, and the judges had to determine the apparently simple question in arithmetic as to whether the 21st of October was more than 14 days before the 5th of November following. Now, any ordinary school boy would at once, if he were fairly ready in mental arithmetic, remembering that October has 31 days, go through this process in his mind: From 21st to 31st is 10 days, and then to 5th November, 5 days more, or 15 days altogether. If, however, said boy could only reason by units he might adopt this process: The 4th of November is 1 day before the 5th, the 3rd, 2 days, the 2nd, 3 days, the 1st, 4 days, the 31st Oct., 5 days, and so on backwards till he would arrive at the same conclusion, viz., that the 21st of Oct. is 15 days before the 5th of Nov. Many decisions of our courts are calculated to make people believe that, as administered and interpreted in them, law is often directly opposed to common sense, but it has remained for the Supreme Court of New Brunswick to shew that, as interpreted by it, law is sometimes also opposed to common arithmetic and the plain meaning of ordinary English words.

Yours truly,

BARRISTER.

WINNIPEG, 28th April, 1908.

The Editor, THE CANADA LAW JOURNAL:

DEAR SIR,—

Your contributor of the article "Default in Contracts" at page 298 of your last number, has fallen into some errors as to the case of *Labelle* v. *O'Connor*. He stated that the court decided that where a purchaser makes default in a contract for the sale of land in which time has been of the essence of the contract, then he forfeits his deposit, but does not forfeit other payments which have been made on account of the purchase money. This question did not arise. Only the deposit had been paid and the court held that the deposit must be returned.

Yours truly,

H. D. GAMBLE.

TORONTO

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Boyd, C., Falconbridge, C.J.K.B., Teetzel, J.] [April 23.

MATTEI *v.* GILLIES.

Motor-car—Negligence of chauffeur—Owner's liability—Scope of employment.

Action by plaintiff for damages on account of an accident arising from the alleged negligence on the part of the servant of the defendant who was at the time in charge of the motor-car. The case was tried before MABEE, J., and a verdict given for $450 damages. Appeal to Divisional Court. The finding discredited the evidence of the chauffeur, and if this was correct there was no question as to the propriety of the verdict.

BOYD, C.:—It has been more than once noticed that the idea prevails among some motor-drivers that when once they have sounded the horn they are justified in going at any rate of speed, and that people are bound to get out of their way: see per Lord Alverstone in *Troughlin* v. *Manning*, 69 J.P. 207; whereas the more salutary rule would be as recommended by the "Considerate Drivers' League," "Assume that it is your business and not the other man's to avoid danger": Pettit on Motor-cars, p. 81.

The facts in this case were such as to require the intervention of a jury to decide whether the injury occurred while the driver was acting within the scope of his authority. The chauffeur, who was employed by Gillies and paid solely for the purpose of attending to the automobile, had general charge and care of it, and, having express permission to take it out on the afternoon of the day in question, he was on his master's business, though he made a detour to give a ride to his friends, according to the doctrine of *Ford* v. *Morrison*, 6 C. & P. 501, which stands approved in many cases: *Whatman* v. *Pearson*, L.R. 3 C.P. 422, and *Burns* v. *Paulson*, L.R. 8 C.P. 567. As said

in *Venables* v. *Smith*, 2 Q.B.D. 281, "he was on his way home, though he was going in a somewhat roundabout fashion," in order to satisfy his friends; and the motor was intrusted to his general care: *Sleeth* v. *Wilson*, 9 C. & P. 607.

The learned Chancellor also expressed the opinion that a liberal reading was, under the force of 7 Edw. VII. c. 2, s. 7, sub-s. 41 (O.), to be given to the "responsibility" clause of 6 Edw.VII. c. 46, s. 7. Verdict sustained.

J. M. Godfrey, for plaintiff, *R. H. Grier*, for defendant.

Riddell, J.—Trial.] SMITH *v.* BRENNER. [April 28.

Motor-car—Negligence—Frightening horse on highway—Liability of owner for act of servant—Unauthorized detour.

Action for damages on account of injuries received by the alleged negligent use of an automobile owned by the defendant, operated by a chauffeur. The plaintiff and her son were driving in a buggy on a highway when the horse was frightened by an automobile coming at great speed. The horse swerved from the road and dashed the buggy against a tree, causing considerable damage.

RIDDELL, J.:—I am of opinion that there was a clear violation of 6 Edw. VII. c. 46, s. 10, . . . As to the alleged detour, supposing that there was a turning out of the direct route by the chauffeur to get a cigar, I do not think that would render him no longer about his master's business. . . . It is a matter of great regret that such a useful invention as the application of mechanical means to the propulsion of carriages upon the highway should be brought into disrepute too manifest by the disregard (always silly and often malicious by many of those in charge of such motor carriages) of the comfort and rights of others. Of course the child with a new toy must shew how great a child he is, and how great his toy; but it is to be hoped that if and when the motor like the bicycle, ceases to be a plaything and becomes a business carriage, and the possession of a fine motor ceases to be a mark of distinction, all or at least most of those in charge of such vehicles (for the fool we have always with us) will act as many, to their credit be it said, act now, with a due consideration for others differently and perhaps less fortunately situated.

Province of New Brunswick.

SUPREME COURT.

Full Court.] [April 30.

REX *v.* WARDEN OF DORCHESTER PENITENTIARY.

Criminal law—Jurisdiction—Halifax charter.

Motion referred to the Full Court by HANINGTON, J., for the discharge of the prisoner Seely under a writ of habeas corpus. The prisoner was arrested in the city of Halifax, and convicted in November, A.D. 1903, under Criminal Code, 1892, s. 785, on a summary trial, with his own consent on a plea of "guilty," before the stipendiary magistrate of the city of Halifax, in the county of Halifax, in the province of Nova Scotia, for the offence of burglary committed in the city of Sydney, in the the county of Cape Breton, in the province of Nova Scotia. The motion was made on the ground that the territorial jurisdiction of the stipendiary magistrate of the city of Halifax, being limited to the said city, he had no jurisdiction to convict for an offence committed outside of the said city.

Held, in view of s. 144 of the Halifax City Charter, and s. 6, c. 33, Rev. Stat. Nova Scotia, 1900, which conferred on stipendiary magistrates all the power, jurisdiction and authority mentioned in the Criminal Code, and as the prisoner could be legally charged or committed for trial by the stipendiary magistrate of the city of Halifax, under ss. 554 and 557 of the Criminal Code of 1892, for the said offence, the conditions required by section 785 were complied with and the conviction and imprisonment thereunder was legal and valid.

Lionel Hanington and *O'Hearn* (of Nova Scotia Bar), for the prisoner. *J. Power,* K.C. (of Nova Scotia Bar), for the Attorney-General of Nova Scotia.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] CARBERRY GAS CO. *v.* HALLETT. [April 13.

Gas Inspection Act—Liability of consumer to pay for gas when no certificate posted up as required by s. 44 and no test made as provided in s. 34—Obligation of company supplying gas in a place for which there is no local inspector.

Plaintiffs sued for supply of acetylene gas from their works in the town of Carberry. The Department of Inland Revenue

has not prescribed a testing place there pursuant to s. 34 of the Gas Inspection Act, R.S.C. 1906, c. 87. No inspector had been appointed under the Act specially for Carberry, but the inspector at Winnipeg acted for the three provinces of Manitoba, Saskatchewan and Alberta.

Held, 1. Sec. 34 of the Act only makes the sale of gas illegal after notice to the undertaker of the location of the testing place prescribed by the department, and until the connections specified in that section are made.

2. Sec. 44, requiring the posting up of the certificates of tests made by the inspector, does not become operative till s. 34 has been acted on and a testing place prescribed and notified to the undertaker.

3. The penalties provided for by ss. 59 and 60 for failure to procure and post up the certificates of tests required by s. 44, and for selling gas before connections have been made with the testing place, etc., are not incurred when s. 44 has not become operative by notification to the undertaker of the prescribing of a testing place.

PHIPPEN, J.A.:—Ss. 34 and 44 are both subsidiary to s. 31 which limits the obligations therein imposed to undertakers "in any city, town or place for which there is an inspector of gas," and the provisions of ss. 31 to 47 inclusive are not applicable to places for which there is no local inspector.

J. D. Hunt, for plaintiffs. *Elliott* and *Stackpoole*, for defendant.

KING'S BENCH.

Mathers, J.] [March 28.

EMPEROR OF RUSSIA v. PROSKOURIAKOFF.

Jurisdiction—Service of statement of claim out of jurisdiction—Writ of attachment—Non-resident foreigner—Detention of goods pending result of suit respecting them.

Application to set aside an order of attachment under which certain goods said to belong to the male defendant had been seized by the sheriff. The statement of claim alleged that the male defendant had, while in the position of treasurer of one of the departments of the Government of Russia, stolen a large amount of the moneys of the plaintiff which had come to his hands and had brought the money into Manitoba where he had bought

certain lands with it, and also the goods seized under the attachment. Amongst other things, the plaintiff asked for payment of the moneys stolen, an order for the delivery or sale of the goods and a declaration that the defendants had no claim to the said lands as against the plaintiff. It appeared that the defendants had left the province before the commencement of the action and their whereabouts were unknown to the plaintiff.

Held, 1. The facts did not bring the case within Rule 201 of the King's Bench Act, R.S.M. 1902, c. 40, or any of its sub-rules, so that it was not a case in which the statement of claim could be served out of the jurisdiction.

2. It could not be said that the defendant had committed a tort in Manitoba within the meaning of paragraph(*e*) of Rule 201. *Anderson* v. *Nobles,* 12 O.L.R. 644, followed.

3. A court has no power to enforce a personal money claim against a person who is neither domiciled nor resident within its jurisdiction unless he has appeared to the process or has expressly agreed to submit to the jurisdiction of such court. *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (1894) A.C. 670, and *Emanuel* v. *Symon* (1908) 1 K.B. 302; and, therefore, apart from Rule 202 of the King's Bench Act, the possession by the defendants of property in Manitoba gave the Court no jurisdiction over the defendants in an action in personam.

4. If evidence had been given that the defendants were possessed of property in Manitoba to the value of $200, it would have been necessary to consider whether, under Rule 202, the statement of claim could be served out of the jurisdiction without previously obtaining leave to serve it. *Gullivan* v. *Cantillon,* 16 M.R. 644, and also whether the plaintiff's cause of action against the defendant was upon a contract within the meaning of that rule.

Writ of attachment set aside with costs as having been issued without jurisdiction; but, as there was a possibility that the plaintiff might succeed in establishing a claim to the specific chattels seized, an order was made for the detention of them by the sheriff until further order on condition that the plaintiff should always keep the cost of detaining, storing and insuring the goods paid in advance, so as to protect defendants against loss in case the plaintiff should fail to establish his claim, with leave to either party to apply at any time to vary or rescind the order.

O'Connor and *Blackwood* for plaintiff. *Hudson* and *Levinson* for defendants.

Macdonald, J.] TRADERS BANK *v.* WRIGHT. [April 6.

Fraudulent conveyance—Injunction against further transfer by grantee—Suit to set aside fraudulent conveyance commenced before judgment for debt obtained.

Held, that, if a creditor brings his action to recover a debt, and at the same time to set aside a fraudulent conveyance or transfer made by the debtor before recovery of judgment for the debt, he must sue on behalf of himself and other creditors; but that, if he does so, and makes out a sufficient case, he may have an injunction to prevent a further transfer of the property being made by the grantee or transferee, and also forbidding any further transfers of his property by the debtor, pending the trial of the action. The learned judge considered the circumstances in this case warranted the issue of such an injunction.

Minty, for plaintiff. *Mulock*, K.C., and *Armstrong*, for defendants.

Mathers, J.] IN RE GREAT PRAIRIE INVESTMENT CO. [April 10.

Winding-up Act—Application by liquidator to court for directions to proceed against directors for fraudulent acts.

The liquidator of the company, which was in process of voluntary winding up under the Manitoba Winding-up Act, R.S.M. 1902, c. 175, applied, under section 23 of the Act, for a direction as to whether or not proceedings should be taken against a number of former directors of the company to cancel certain shares of the capital stock which they had issued to themselves as bonus or promotion stock fully paid up, without payment of any kind, and to recover the dividends, to the amount of over $62,000, which they had afterwards paid to themselves on said shares.

Held, that, whilst it was manifestly the duty of the liquidator to take appropriate proceedings to recover the money for the company, the question was not one "arising in the matter of the winding up" within the meaning of section 23, and that no order should be made or formal directions given.

T. R. Ferguson, for the liquidator. *Hoskin*, for shareholders.

Mathers, J.] PULKABECK *v.* RUSSELL. [April 15.

Registry Act—Purchase and dedication of land for a public highway by the municipality—Priority as against subsequent purchaser who registered his deed first.

In 1897 the defendant municipality purchased from the owner, one Boulton, a strip of land 22 yards wide through the

south-east quarter 13-20-29 West for a public road and took a conveyance thereof, and in 1899 the municipality passed a by-law establishing such strip as a public road and highway and dedicating it for public use as such. The council also spent public money in grading and improving the road and it was used as a public highway thereafter. The by-law was not registered, as required by s. 699 of R.S.M. 1902, c. 116, nor was the conveyance to the municipality registered until 1906. In 1903 the plaintiff bought the quarter section from Boulton without any notice of the defendant's deed and without actual notice of the existence of the road. The conveyance to him did not except the road and he registered it in 1904. This action was brought to have the defendant's deed removed from the registry as a cloud upon the plaintiff's title.

Held, that the deed from Boulton vested the title in defendants, and as soon as they dedicated the road to the public it became vested in the Crown by virtue of s. 622 of the Municipal Act, and that, as the provisions of R.S.M. 1902, c. 150, s. 68, do not apply to the Crown, the plaintiff obtained no title to the road as against the defendants.

Fullerton, for plaintiff. *Hudson*, for defendant.

Mathers, J.] [April 15.

EMPEROR OF RUSSIA *v.* PROSKOURIAKOFF.

Jurisdiction—Service of statement of claim out of jurisdiction —Substitutional service.

See note of former decision in this action at page 359 for the circumstances and facts.

Application to set aside an order of the referee allowing substitutional service of the statement of claim within the jurisdiction and the service made thereunder. The order objected to had been made partly on the strength of an affidavit of one of the solicitors for the plaintiff relating a conversation which he had with the defendants' solicitor in which it was alleged that the latter admitted the defendants were in Manitoba but refused to give their address. It did not appear that the defendants' solicitor knew at the time that anything he might say would be put in an affidavit and used against his clients.

Held, that it did not appear that the alleged admission had been obtained in a way that would justify its use in an affidavit and that, as there was no other evidence to shew that the de-

fendants were within the jurisdiction, the order allc ing service should be set aside.

Held, also, that, as it was not a case in which personal service out of the jurisdiction could be made, no order could be made for substitutional service. *Fry* v. *Moore,* 23 Q.B.D. 395; *Welding* v. *Bean* (1891) 1 Q.B. 100.

Blackwood, for plaintiff. *Levinson,* for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] [April 8.

EAST KOOTENAY LUMBER CO. *v.* CANADIAN PACIFIC RY. CO.

Agreement—Non-liability for damage to property a consideration—"Property," meaning of.

In consideration of building a siding at the plaintiff company's mill, they entered into an agreement with the railway company freeing them from liability for damage caused by the railway to plaintiffs' property, or the property of any other person on the premises comprised in the siding. Two horses employed in hauling a car from one part of the siding to another were killed by a car being shunted on to the siding by an engine of the railway company.

Held, on appeal, reversing the finding of WILSON, Co.J., at the trial, that the word "property" in the agreement was not confined to fixtures and rolling stock, and horses on the premises were properly included.

Davis, K.C., for defendants, appellants. *Sir C. H. Tupper,* K.C., for plaintiffs, respondents.

Full Court.] FOLLIS *v.* SCHAAKE MACHINE WORKS. [April 8.

Master and servant—Workmen's Compensation Act, 1902—*"Dependants"—Costs occasioned by abortive common law action—Set-off—Power of arbitrator to direct taking of evidence on commission.*

Plaintiffs at times received money from deceased in his lifetime, but there was no evidence of the money having been sent at regular times or in regular amounts.

Held, on appeal, affirming the judgment of MARTIN, J., that plaintiffs were dependants within the meaning of the term in the Workmen's Compensation Act, 1902.

An action at common law for damages for negligence, resulting in the death of a workman, having failed, and defendants admitting liability under the Workmen's Compensation Act, the trial judge proceeded under s. 2, sub-s. 4, to assess compensation. On the question of the apportionment of costs of the abortive action and of the assessment under the Act, plaintiffs set up their inability under the Act to procure the taking of evidence on commission.

Held, per MARTIN, J., at the trial, that s. 2 of the second schedule, and rules 2, 34 and 81 of the Workmen's Compensation Rules, 1904, give the arbitrator power to direct the taking of evidence on commission.

Joseph Martin, K.C., for defendants, appellants. *G. E. Martin*, for plaintiffs, respondents.

Full Court.] REX *v.* SMITH. [April 10.

Criminal law—Evidence—Proof of blood relationship on a charge of incest.

On a trial for incest, the evidence against the accused was that of the child, a girl of eleven years, and of a woman who had known the accused and the girl living together as father and daughter for some seven or eight months. This evidence was not rebutted.

Held, on appeal, affirming the holding of WILSON, Co.J., that there was not sufficient proof of relationship to justify a conviction.

Maclean, K.C., for the appeal. *Macdonell*, for the accused.

Clement, J.] IN RE BEHARI LAL. [April 29.

Immigration Act, 1907 (*Dom.*)—*Delegation of power under Act.*

Sec. 30 of the Immigration Act, 1907, empowering the Governor-General, by proclamation, to prohibit the landing of immigrants of a specified class, does not permit the delegation of such power to the Minister of the Interior.

Brydone-Jack and *Woods*, for prisoners. *Macdonell*, for Dominion Government.

Book Reviews.

Roscoe's Digest of the law of Evidenc and the practice in Criminal Cases. Thirteenth edition. By HERMAN COHEN. Barrister-at-law. London: Stevens & Sons, Limited, 119-120 Chancery Lane; Sweet & Maxwell, Limited, 3 Chancery Lane. 1908. 937 pp.

A new edition of a standard work and not merely new in bringing the authorities and statutes down to date, but in many respects an improved edition. A small matter, but of practical use is the introduction of the modern practice of inserting the dates of cases cited. Some new subject sections have been added as also two introductory notes. Dead branches have been lopped off where new legislation has rendered some case law absolute; space has also been gained by omitting the abbreviation "*R.* v." in the title of criminal cases—odd that no one ever thought of doing this before. The editor takes great pride in the index. The reader will not take long to find out that it is all that he claims it to be.

A Compendium of the law of Torts. By HUGH FRASER, M.A., LL.D. Barrister-at-law. Seventh edition. London: Sweet & Maxwell, Limited, 3 Chancery Lane. 1908. 252 pp.

An elementary work for the use of students. Originally compiled as an analysis of the author's lectures to students. Not intended to be used as a help to cramming, but giving a scientific bird's-eye view of a subject so vast that numberless volumes have been written to elucidate its manifold ramifications. This book cannot be too highly commended for the purpose for which it has been prepared.

United States Decisions.

MOUNTING SLOWLY MOVING CAR—SUDDEN JERK, CAUSING INJURIES.—In deciding that to attempt to board a slowly moving car is not necessarily negligent, the Supreme Court of Georgia says, in *Rome Ry. & Lt. Co.* v. *Keel*, 60 S.E. Rep. 464: "To attempt to mount a slowly moving street car is not neces-

sarily negligent. If while the passenger is getting upon the car the motorman, by producing an unusual and unnecessary jerk, throws him off, a liability against the company may be predicated thereon. Also a sudden acceleration of the speed while the passenger is in the act of getting aboard may be negligent. *White* v. *Atlanta Consolidated Street Ry. Co.*, 92 Ga. 494, 17 S.E. Rep. 672; *Gainesville Ry. Co.* v. *Jackson*, 1 Ga. App. 632, 57 S.E. Rep. 1007. In *Ricks* v. *Georgia Southern & Fla. Ry. Co.*, 118 Ga. 259, 45 S.E. Rep. 268, a recovery was denied because the sudden acceleration of the train had begun and was already dangerous when the plaintiff tried to catch a car rail, which he missed. In the transaction now before us, if safe entrance into the car was reasonably practicable at the time the plaintiff attempted to mount, and the motorman negligently did something to render it dangerous, a liability might be predicated; but, if the attempt was fraught with danger ab initio, and the motorman did nothing to increase the danger, the plaintiff should not recover, though he succeeded in accomplishing a part of what was attempted without actually encountering injury."—*Central Law Journal.*

NUISANCE.—A railway company is held, in *Southern R. Co.* v. *Com.* (Ky.) 12 L.R.A. (N.S.) 526, to be liable for a nuisance, where it harbours upon its right of way a band of labourers who are boisterous, riotous, and shoot firearms, to the alarm of the neighbourhood and persons passing on the public highway.

STREET RAILWAYS.—A street railway company is held, in *Brockschmidt* v. *St. Louis & M. R. R. Co.* (Mo.) 12 L.R.A. (N.S.) 345, not to be liable for the death of one who, knowing of the frequent passage of cars along its tracks, takes a position in the path of the cars with his back to those which will approach him, for the purpose of removing dirt from the track, and remains there, without any heed to approaching cars, until he is struck and killed, although the motorman does not sound the gong, and a municipal ordinance requires him to keep a vigilant watch for persons on the track.

TRUSTS — UNREASONABLE DETENTION OF INCOME. - *Held*, in *Angell* v. *Angell*, Supreme Court of Rhode Island (Jan. 22, 1908), under a deed of trust, providing for payment of the income by the trustee to certain persons "the times,

amounts and methods of such payments being left absolutely in the discretion of the trustee," the trustee's discretion must be exercised reasonably, considering all the circumstances; and is subject to the control of the proper court, on proper proceedings, in case of unreasonable detention of income.

A court of equity will decree the termination of a trust where there is no good reason for its further continuance.

NEGLIGENCE—STREET CAR.—That a street car company cannot escape liability for the injury of a passenger through derailment of a car because the derailment was caused by a brick placed on the track by a stranger, is declared in *O'Gara* v. *St. Louis Transit Co.* (Mo.) 12 L.R.A. (N.S.) 840, if, by the exercise of the high degree of care and diligence which such corporations must exercise toward their passengers, the motorman could have seen the brick in time to avoid running upon it.

That it is not negligence, as matter of law, to ride upon the platform of a street car, notwithstanding a notice that it is dangerous to do so, and the fact that at the time there is room within the car, is declared in *Capital Traction Co.* v. *Brown* (App. D. C.) 12 L.R.A. (N.S.) 831, where the company customarily so overloads its cars that passengers must of necessity ride upon the platforms.

Bench and Bar.

JUDICIAL APPOINTMENTS.

Francis Robert Latchford of the City of Ottawa, barrister-at-law, to be a judge of the Supreme Court of Judicature for Ontario, a Justice of the High Court of Justice for Ontario, and a member of the Chancery Division of that court, in the room of Mr. Justice Mabee, appointed Chief Commissioner of the Board of Railway Commissioners for Canada. (May 5.)

Flotsam and Jetsam.

There is a breezy sort of good sense about Lord O'Brien's conduct of judicial proceedings that is very useful sometimes from the point of view of absolute justice. A few days ago,

whilst his Lordship was presiding at Green Street, two persons were indicted for the alleged larceny of a sum of money belonging to a person called John Francis. It was stated by the constable who arrested the prisoners that one of them had in his possession £1 8s. 6d. in silver and 11 d. in coppers, and the prisoner stated that he did not know how it had got into his pocket. The jury acquitted the accused, and his Lordship, blandly addressing the prisoner in whose pocket the money had been found, said: "I suppose you don't object to giving back the money to Francis?" "No, my Lord," said the prisoner, cheerfully. "Quite right," said Lord O'Brien. Thus the little mistake was rectified in so far as it could be, and with the utmost good feeling on all sides.—*Law Times.*

A big husky Irishman strolled into the Civil Service room where they hold physical examinations for candidates for the police force.

"Strip," ordered the police surgeon.

"Which, sor?"

"Get your clothes off, and be quick about it," said the doctor

The Irishman undressed. The doctor measured his chest and pounded his back.

"Hop over this rod," was the next command.

The man did his best, landing on his back.

"Double up your knees and touch the floor with your hands."

He lost his balance and sprawled upon the floor. He was indignant but silent.

"Now jump under this cold shower."

"Sure an' thot's funny," muttered the applicant.

"Now run around the room ten times. I want to test your heart and wind."

This last was too much. "I'll not," the candidate declared defiantly. "I'll stay single."

"Single," inquired the doctor, puzzled.

"Single," repeated the Irishman with determination. "Sure an' what's all this funny business got to do wid a marriage license anyhow?"

He had strayed into the wrong bureau.—*Everybody's.*