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COLLATERAL OR CASUAL NEGLIGENCE.

LIABILITY OF A PRINCIPAL FOR THE NEGLIGENT ACTS OF A CONTRACTOR OR HIS SERVANTS.

The Courts have shewn a tendency in recent decisions to extend the liability of the principal in some cases of negligence by contractors or their servants. The development of the law in this respect will be traced in the following summary of the cases, dealing especially with what is known as "casual" or "collateral" negligence.

I. Definition of "Independent Contractor."

"An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified before-hand": Pollock p. 72.

The following definition by Lord Bramwell is familiar:

"If there is a contract between them (i.e., employer and workman) so that the person doing the work, or doing the act complained of, has a right to say to the employer, 'I will agree to do it, but I shall do it after my own fashion; I shall begin the

wall at this end, and not at the other'; there the relation of master and servant does not exist, and the employer is not liable. But if the employer has a right to say to the person employed, 'you shall do it in this way, that is to say, not only shall you do it by virtue of your agreement with me, but you shall do it as I direct you to do it,' there the law of master and servant applies, and the master is responsible."

"Upon the principle that qui facit per alium facit per se, the master is responsible for the acts of his servant; and that person is undoubtedly liable who stood in the relation of master to the wrongdoer, he who had selected him as his servant, from the knowledge of or belief in his skill or care, and who could remove him for misconduct, and whose orders he was bound to receive and obey": *Quarman* v. *Burnett*, 6 M. & W. 499. But the principle above laid down cannot apply to the case where the person sought to be charged is not the master, "where he does not employ his own servants and workmen to do the work, but intrusts the execution of the work to a person who exercises an independent employment, and has the immediate dominion and control over the workmen engaged in the work."

II. Statement of the General Rule.

Therefore a person who procures work to be done for him by an independent contractor, "by an agent that is over whom he reserves no power of control," is not, as a general rule, liable for the negligence or other torts committed by the contractor or his servants in the course of the work; such negligence is known as casual or collateral negligence.

The rule is formulated by A. L. Smith, L.J., in a recent case as follows:—

"In order to render a person liable for an act of negligence, which he did not himself commit, it must be shewn by the person injured, either that the person sought to be made liable authorized the act of negligence complained of, or that it was committed by his servant in the course of his employment, or that he owed such a duty to the person injured that he could not, by

delegating its performance to a contractor, rid himself of the duty": *Hardaker* v. *Idle District Council* (1896) 1 Q.B. 335, 344.

But where the work is such that if properly done it can occasion no risk of injury to others and no restrictions are imposed by law upon the execution of it, then the contractor and not the employer is responsible for injuries to strangers from the negligent execution of the work. (Addison on Torts, 8th ed. 133). Thus, where a butcher employed a licensed drover in the way of his ordinary calling to drive a bullock from Smithfield to the butcher's slaughter-house, and the drover negligently sent an inexperienced boy with the bullock, who drove the beast into the plaintiff's shewroom, where it broke several marble chimney-pieces, it was held that the butcher was not answerable for the damage: *Milligan* v. *Wedge*, 12 Ad. & E. 737.

Among the earlier cases the most important, probably, is *Quarman* v. *Burnett* (1840) 6 M. & W. 499. The defendants in this case hired horses and a coachman from one M., and provided their own carriage and livery for the coachman, who received regular wages from M., and two shillings a week from the defendants.

An accident happened owing to the negligence of the coachman in leaving the horses without any one to hold them while he went into the house of the defendants to leave his livery there after returning from a drive. The horses bolted and the plaintiff was injured. The defendants were held not liable, as the coachman was not their servant, but the servant of an independent contractor.

III. Exceptions to the General Rule.

Several exceptions have been grafted upon this general rule, and the tendency in modern times is rather in the direction of extending the liability of the principal.

The germs of all these exceptions may be found in the judgments in *Pickard* v. *Smith* (1861) 10 C.B.N.S. 470, and *Dalton* v. *Angus*, [1881] 6 A.C. 740.

In *Pickard* v. *Smith*, the defendant was the owner of a coal-cellar opening by a trap door in a platform where passengers by a railway might lawfully walk up to the highway. He employed a coal merchant to deliver coals into the cellar through this opening. The servants of the coal merchant neglected to fence the opening, and by reason of this a passer by was injured. The owner was held liable, although the parties guilty of negligence were the servants of an independent contractor.

The following rule was laid down in that case:

Williams, J., said: "Unquestionably no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or her employment. consequently if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable.

The rule is, however, inapplicable to cases in which the act which occasions the injury is one which the employer is employed to do; nor, by a parity of reasoning, to cases in which the contractor is entrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned."

"If the performance of the duty be omitted, the fact of his having entrusted it to a person who has neglected it, furnishes no excuse either in good sense or law."

"Liability for collateral negligence depends entirely upon the existence of the relation of master and servant between the employer and the person actually in default, according to the well-known exposition of the law in *Quarman* v. *Burnett*."

"Liability for doing an improper act depends upon the order given to do that thing; and the liability for the omission to do something depends entirely on the extent to which a duty is imposed to cause that thing to be done; and in the two last cases, it is quite immaterial whether the actual actors are servants or not."

In *Dalton* v. *Angus*, Lord Blackburn said (p. 829): "Ever

since *Quarman* v. *Burnett* it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of the contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor.

"He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot hereby relieve himself from liability to those injured by the failure to perform it."

In both of the latter cases, it will be noticed, that a contrast is drawn between negligence of a contractor called "collateral" or "casual," and failure on the part of the contractor to perform the duty incumbent on his employer. For the first the employer is not liable; for the second he is, whether the failure is attributable to negligence or not. The cause of action is founded in the one case upon the negligence, either of the servant acting within the scope of his employment, or of a contractor; in the other the cause of action is founded upon a breach of duty the performance of which a person could not escape by delegation to another.

"The true distinction between cases of master and servant and cases of employer and independent contractor seems to be this, that, when the person actually doing the work does something for which he would himself be liable, the master is, whilst the employer is not, liable for what is conveniently called "collateral negligence' meaning thereby negligence other than the imperfect or improper performance of the work which the contractor is employed to do": Rigby, L.J., *Hardaker* v. *Idle District Council*, post p. 352.

Since *Dalton* v. *Angus* the real question in such cases has been within which of the propositions there stated by Lord Blackburn the case falls. A series of very interesting decisions have

been given upon the question, what is "casual" or "collateral" negligence?

IV. Summary of these Exceptions.

1. The general rule only applies where the act ordered to be done is a lawful act; therefore a person who employs another to do an unlawful act, or one which cannot be done without creating a nuisance will be liable for damage resulting from the doing of such unlawful act. For example, a gas company contracted with one W. for the laying down of gas pipes in the streets of Sheffield, but they had no special powers to lay down such pipes in the streets. W.'s workmen carelessly left upon the footway of one of the streets a heap of stones and earth dug out of one of the trenches which they had made for the gaspipes. The plaintiff stumbled over the heap and broke her arm; it was held that the gas company were liable to her in damages. "It seems to me," said Wightman, J., "as it did at the trial, that the fact of the defendants having employed the contractors to do a thing illegal in itself made a distinction between this and the cases which have been cited." "I am clearly of opinion," said Lord Campbell, C.J., "that if the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself. In the present case the defendants had no right to break up the streets at all." *Ellis* v. *Sheffield Gas Co.*, 2 E. & B. 767.

2. Where the employer personally interferes. The proprietor of some newly-built houses had his attention drawn by a policeman to the fact that a contractor he had employed to make a drain had left a heap of gravel by the roadside. The proprietor said he would get it removed as soon as possible, and paid a navvy to cart it away. The latter did not do his work thoroughly, and the plaintiff driving home was upset and injured.

In an action against the proprietor, *Quarman* v. *Brunett*, 6 M. & W. 499, was cited for the defence and it was urged that it was the contractor who was liable. *Held*, that defendant was liable. "If he had entirely left the matter in P.'s hands I should

have thought he was not liable but here there was evidence enough to satisfy the jury that the matter was under the personal control of the defendant": Coltman, J., *Burgress* v. *Gray* (1845) 1 C.B.N.S. 578.

3. Where the thing contracted to be done is perfectly lawful in itself, yet if the damage is caused by the doing of it in an imperfect or improper manner, and is not caused by negligence collateral to the contract, the employer will be liable. A railway company was authorized by Act of Parliament to construct a swing bridge over a navigable river; the Act provided that they should not detain vessels navigating beyond a certain time. They employed a contractor to construct the bridge, but this, through some defect in its construction, could not be opened, and the plaintiff's vessel was detained for a long time. The railway company were held responsible: *Hole* v. *Sittingbourne Ry. Co.* (1861) 6 H. & N. 488.

Pollock, C.B., said: "This does not fall within that class of cases where the principal is exempt from responsibility because he is not the master of the person whose negligence or improper conduct has caused the mischief. This is a case in which the maxim "Qui facit per alium facit per se" applies. Where a person is authorized by Act of Parliament or bound by contract to do particular work, he cannot avoid responsibility by contracting with another person to do that work. Here the contractor was employed to make a bridge, and he did make a bridge which obstructed the navigation. Where the act complained of is purely collateral, and arises incidentally in the course of the performance of the work, the employer is not liable, because he never authorized that act, the remedy is against the person who did it. That, however, generally affords but a poor compensation to the party injured; for the wrongdoer is usually a common workman. Then comes the inquiry, who is the master? The contractor. In such cases the employer is not responsible. But when the contractor is employed to do a particular act, the doing of which produces mischief, another doctrine applies. I rest my judgment simply on this, that there

is a distinction between mischief which is collateral and that which directly results from the act which the contractor agreed and was authorized to do."

Wilde, B., said: "The distinction appears to me to be that, when work is being done under a contract, if an accident happens and an injury is caused by negligence in a matter entirely collateral to the contract, the liability turns on the question whether the relation of master and servant exists. But when the thing contracted to be done causes the mischief, and the injury can only be said to arise from the authority of the employer because the thing contracted to be done is imperfectly performed, there the employer must be taken to have authorized the act and is responsible for it."

4. Where a person causes something to be done, the doing of which casts on him a duty to do the work in a particular way, he cannot escape from the responsibility of seeing the duty performed, by delegating it to a contractor: *Hole* v. *Sittingbourne Ry. Co.* (supra).

5. Where from the nature of the thing ordered to be done, injurious consequences must be expected to arise, unless means are adopted by which such consequences may be prevented, he will not be relieved from responsibility by the employment of a contractor. Plaintiff and defendant were the respective owners of two adjoining houses, plaintiff being entitled to the support for his house of the defendant's soil. Defendant contracted with a builder to pull down his house, excavate the foundations and rebuild it, the builder undertaking to shore up and support the plaintiff's house and make good any damage caused by the works.

The plaintiff's house was injured owing to the insufficient measures taken by the builder to support it, and it was held, on the principle just stated, that the defendant was liable for the injury: *Bower* v. *Peate* (1876) 1 Q.B.D. 321.

So also *Hughes* v. *Percival* (1883) 8 App. Cas. 443. The defendant was the owner of a house standing at the corner of two

streets between a house belonging to the plaintiff and a house occupied by one B.

The defendant employed a competent architect and competent builders to rebuild his house. When the house was nearly finished, the builders' workmen, for the purpose of fixing a staircase, negligently, and without the knowledge of the defendant or his architect, cut into an old portion of the party-wall, which had not been rebuilt, dividing the defendant's house from B.'s, in consequence of which the defendant's house fell, and the fall dragged over the party-will between it and the plaintiff's house, and injured the plaintiff's house.

The cutting into the first-named party-wall was not authorized by the contract between the defendant and the builders. It was held that the law cast a duty upon the defendant requiring him to see that reasonable skill and care were exercised in those operations which involved a use of the party-wall involving risk to the plaintiff. He could not get rid of responsibility by delegating the performance of it to a third person. He was at liberty to employ such a third person to fulfil the duty which the law cast on himself, and, if they so agreed together, to take an indemnity to himself in case mischief came from that person not fulfilling the duty which the law cast upon the defendant; but the defendant still remained subject to that duty, and liable for the consequences if it was not fulfilled.

So also in *Black* v. *Christchurch Finance Co.* (1894) App. Cas. 48, it was held by the Privy Council that a proprietor making a dangerous use of his property—in that case starting a bush fire to clear land—is bound to use all reasonable precautions to prevent damage to his neighbours, and if he authorizes another to act for him, he is bound, not only to stipulate that such precautions shall be taken, but also to see that these are observed, otherwise he will be responsible for the consequences.

"The ratio decidendi of these cases is, that as the duty was imposed upon the defendant by law, he could not escape liability, by delegating the performance of the duty to a contractor, for the obligation was imposed upon the defendant to take the

necessary precautions to ensure that the duty should be performed."

"The absolute character of the duty being once established, the question is not by whose hand an unsuccessful attempt was made, whether that of the party himself, of his servant, or of an 'independent contractor,' whether the duty has been adequately performed or not. If it has, there is nothing more to be considered, and liability, if any, must be sought in some other quarter. If not, the non-performance in itself, not the causes or conditions of non-performance, is the ground of liability": Pollock on Torts, 7th ed. p. 73.

V. Cases illustrating the law applicable to Casual or Collateral Negligence.

It will be remembered that Lord Blackburn in his judgment in *Dalton* v. *Angus* (supra) states that one "employing another is not responsible for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of the contractor or his servants."

What then is the "collateral" or "casual" negligence referred to? The following cases suggest an answer:—

In *Reedie* v. *London & N.W. Ry. Co.* (1849) 4 Ex. 244, defendant company agreed with certain contractors for the construction of a line; the company to have the general right of superintending the work, and the power of dismissing incompetent workmen. The plaintiff's husband was passing under a bridge which was being constructed under the contract, and was killed by a large stone which, owing to the carelessness of one of the contractors' workmen fell on him from above. It was held that the company was not liable, as the workman was not their servant, but the servant of the independent contractor.

This case is sometimes given as an illustration of non-liability for collateral or casual negligence: (see Ringwood on Torts, 4th ed. p. 237.) But it is obvious from a consideration of it that that question did not arise there. The ground of the

judgment may be stated to be that the man causing the stone to fall was not a servant of the defendant company, but of the contractors, who alone under *Quarman* v. *Burnett* (supra) could be held responsible. It is noticeable that the idea of any duty resting upon the employers (the company) does not seem to have suggested itself to the Court; this idea is of comparatively modern growth. Sir F. Pollock deals with the case in the preface to volume 80 of the Revised Reports as follows: "It may well be doubted whether *Reedie* v. *L. & N.W. Ry. Co.*, p. 541, would now be decided on the same grounds. It has been judicially cited, indeed, within the last twenty years, but not with any specific approval of its reasoning. The actual effect of the judgment may be supported on the ground that not only the person by whose negligence the plaintiff suffered was not the servant of the defendant company, but the company, though owner of the part of the line under construction, had not yet assumed occupation and control. In both these respects the case is distinguishable from *Kearney* v. *L.B. & S.C. Ry. Co.* (L.R. 6 Q. B. 759), which being in the Exchequer Chamber, is of higher authority. But the Court seems to have been unwilling to admit that the ultimate employer could ever be liable for the conduct of an "independent contractor" and the opinion which now prevails in the Court of Appeal, that "it is very difficult for a person who is engaged in dangerous works near a highway to avoid liability by saying that he has employed an independent contractor, (*Holliday* v. *National Telephone Co.* (1899) 2 Q.B. at p. 400) would probably have found little favour with the learned Baron who afterwards became Lord Cranworth. The question of what is called "casual and collateral negligence" does not arise, for the statement of the facts, though meagre, shews plainly that the negligence complained of was in the performance of the contractor's work itself."

Hardaker v. *Idle District Council* (1896) 1 Q.B. 335. A district council being about to construct a sewer under their statutory powers, employed a contractor to construct it for them. In consequence of his negligence in carrying out the work a

gas main was broken, and the gas escaped from it into the house in which the plaintiffs (husband and wife) resided, and an explosion took place, by which the wife was injured, and the husband's furniture was damaged. In an action by plaintiffs against the district council and contractor, it was held that the council owed a duty to the public (including the plaintiffs) so to construct the sewer as not to injure the gas main; that they had been guilty of a breach of this duty; that, notwithstanding that they had delegated the performance of the duty to the contractor, they were responsible to the plaintiffs for the breach; and that the damages were not too remote to be recovered. Lindley, L.J., said: "The council are not bound in point of law to do the work themselves, i.e., by servants of their own.

There is nothing to prevent them from employing a contractor to do the work for them. But the council cannot, by employing a contractor, get rid of their own duty to other people, whatever that duty be. If the contractor performs their duty for them, it is performed by them through him, and they are not responsible for anything more. They are not responsible for his negligence in other respects, as they would be if he were their servant. Such negligence is sometimes called casual or collateral negligence. If on the other hand the contractor fails to do what it is their duty to get done, their duty is not performed, and they are responsible accordingly."

The duty of the council "in sewering the street was not performed by constructing a proper sewer. Their duty was, not only to do that, but also to take care not to break any gas-pipes which they cut under: this involved properly supporting them. This duty was not performed. They employed a contractor to perform their duty for them, but he failed to perform it. It is impossible, I think, to regard this as a case of collateral negligence. The case is not one in which the contractor performed the district council's duty for them, but did so carelessly; the case is one in which the duty of the district council, so far as the gas-pipes were concerned, was not performed at all. The case falls within the second of Lord Blackburn's propositions, and not within the first."

Penny v. *Wimbledon* (1898) 2 Q.B. 212. Action by plaintiff for injuries received while crossing Queen's Road, Wimbledon, after dark. She stumbled on a heap of surface soil and grass, which had been left in the road without any light or protection, and suffered serious injury. This heap had been left there by a contractor employed to make good a highway. Bruce, J., said: "When a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor.

Pickard v. *Smith* is an authority for the proposition that no sound distinction in this respect can be drawn between the case of a public highway and a road which may be, and to the knowledge of the wrongdoer probably will in fact be, used by persons lawfully entitled so to do."

"I subscribe to every work of this passage," said A. L. Smith, L.J., "as being the law": *The Snark* (1900) p. 110.

So far as the principle of law is concerned there is no difference between a public body and any other employer, it is by no means necessary that the duty should be public or statutory; many of the cases have involved no more than the duty owed by one individual to another.

In *Penny* v. *Wimbledon* (1899) 2 Q.B. 72, the Court of Appeal said that the principle of the decision in *Pickard* v. *Smith*, 10 C.B.N.S. 470, is this, that when a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that, if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor. A. L. Smith, L.J., said: "I would add as an exception the case of mere casual or collateral acts

of negligence, such as that given as an illustration during the argument, a workman employed on the work negligently leaving a pickaxe or such like in the road. I cannot think that leaving heaps of soil in the road, which would by the very nature of the contract have to be dug up and dealt with, is an act either casual or collateral with reference to the contract."

Romer, L.J., said: "When a person, through a contractor, does work which from its nature is likely to cause danger to others, there is a duty on his part to take all reasonable precautions against such danger, and he does not escape from liability from the discharge of this duty by employing the contractor if the latter does not take these precautions. I desire to point out that accidents arising from what is called casual or collateral negligence cannot be guarded against beforehand, and do not come within this rule."

Hill v. *Tottenham Urban District Council* (1898) 79 L.T. 495. The plaintiff was being driven along a road which was under the control of the defendants and had recently been made by a contractor employed by them. While passing under a railway bridge, owing to a ridge having been left in the road after it had been repaired, plaintiff was jolted against one of the girders of the bridge and received serious injuries. It was held by Bruce, J., that the making up of a road cast upon the person making it up the duty of taking care that no obstruction, at least, no dangerous obstruction should be offered to the public. Therefore when a public body takes upon itself the making of a road, there is a duty cast upon it of taking care that no dangerous obstructions are allowed to exist to passengers passing along the road. This duty it could not evade or escape by employing a contractor to carry out the work.

In most of the cases above referred to the negligence of the contractor could not be considered as "casual or collateral."

The work authorized to be done was of a kind which necessarily involved danger to the property or persons of others.

The negligence lay in the absence of proper precautions against the danger and the fact which existed in nearly all the

cases referred to that the employer had bound the contractor by strict stipulations to take all necessary steps to avoid injury to others is no defence.

The next case in order of time is *Holliday* v. *National Telephone Co.* (1899) 1 Q.B. 221. In this there is more room for argument as to the character of the negligence which was in question.

The defendants were laying down telephone wires under the soil of a street. The wires were enclosed in metalled tubes which required to be socketed together with soldering material. They employed a person named Highmore to do this part of the work under conditions which made him not the servant of the defendants but an independent contractor.

For the purpose of obtaining light or heat for the work, one of H.'s servants used a benzoline lamp.

To produce the necessary vapour from the lamp he plunged it into the molten soldering material.

The lamp not being supplied with a sufficient safety valve, exploded and threw some of the molten metal upon the plaintiff who was passing by.

Judgment was given in the County Court in favour of the plaintiff. This was reversed by a Divisional Court on the grounds that the accident was caused by casual or collateral negligence, for which the defendants were not liable.

It was thought that the work ordered to be done by them was not in itself dangerous or calculated to interfere with or injure other persons; the negligent act of the workman was not such as could have been contemplated by the defendants, and was placed by the Court in the same category as the fall of the stone in *Reedie* v. *L. & N. W. Ry. Co.* (supra).

The case therefore was thought to differ from *Hardaker* v. *Idle D. C.* in that the accident was not caused by the omission to do something which the work ordered to be done rendered necessary, and which must have been contemplated by the employers; it was a mere casualty.

"The act" (said Wills, J., p. 228), "is about as typical an

instance of negligence merely casual, collateral or incidental, as can well be conceived."

This judgment was in its turn reversed by the Court of Appeal (1899) 2 Q.B. 392, which held that the company was liable for the negligence of the plumber, upon the ground (1) that the work was being done not by the plumber alone as an independent contractor, but jointly by the company and the plumber in such circumstances that the company were responsible for negligence in the joint operation such as that which caused the injury; and, (2) that, even assuming that the plumber was an independent contractor, as the company were carrying out a dangerous work upon a highway, whether they carried it out by themselves or by a contractor, it was their duty to take care that the works were not negligently carried out so as to cause injury to persons using the highway.

"Works were being executed," said Lord Halsbury, L.C., "in proximity to a highway, in which in the ordinary course of things an explosion might take place. It appears to me that the telephone company, by whose authority alone these works were done, were, whether the works were done by the company's servants or by a contractor, under an obligation to the public to take care that the persons passing along the highway were not injured by the negligent performance of the work."

"In my opinion," said A. L. Smith, L.J., "since the decision of the House of Lords in *Hughes* v. *Percival*, and that of the Privy Council in *Black* v. *Christchurch Finance Co.*, it is very difficult for a person who is engaged in the execution of dangerous works near a highway to avoid liability by saying that he has employed an independent contractor, because it is the duty of a person who is causing such works to be executed to see that they are properly carried out so as not to occasion any damage to persons passing by on the highway. I do not agree that this was a case of mere casual and collateral negligence within the meaning of that term, for it was negligence in the very act which H. was engaged to perform."

A barge belonging to the defendants, without negligence

on their part was sunk in the fairway of the Thames. They employed an underwaterman to conduct the salvage operations necessary to raise her and, for that purpose, put him in possession and control; but, owing to the guard vessel placed by him, with lights upon it, to mark the submerged barge, having been negligently allowed to get out of position, the plaintiff's steamship coming up the river, without negligence, ran upon the wreck and sustained damage. Held by the Court of Appeal, that defendants were personally responsible, as (following *Penny* v. *Wimbledon*), they were bound to see that the necessary precautions were taken to prevent danger to the public, and could not escape from this liability by throwing the blame on the contractor employed by them to do the work: *The Snark* (1900) P. 105.

The cases as to the liability of an employer for injuries caused by the negligence of his contractor were again reviewed by the Court of Appeal in the instructive case of *Maxwell* v. *British Thomson Co.* (1902) 18 T.L.R. 278.

The defendants were employed by a municipal corporation to convert their system of horse tramways into a system of electric railways worked by overhead wires. They employed a firm of sub-contractors to erect the iron standards along the streets with arms to support the wires. The sub-contractors' workmen used a high platform on wheels to enable them to attach the wires to the arms, and they left this platform so situated that certain iron rails connected with it hung over the tramways. The plaintiff, who was riding on a tram car, was thereby injured. For the defendants it was contended that they were not liable for the negligence of the sub-contractors. The test was whether the defendants had any reason to suppose that the particular act which caused the accident would be done. The act complained of was not inherent in the character of the work. It was merely collateral or casual. This platform was not a dangerous structure, and the negligent act of the sub-contractors' workmen in leaving it too near the tram lines was similar to the case of a pickaxe left in a road or a hammer dropped by a workman on

the head of a passer by, which had been held to be a collateral or casual act of negligence.

But the Court held that the failure to protect passengers was a default in the performance of the duty cast upon the defendants and was not merely an act of collateral negligence; the defendants could not lessen their responsibility to do their duty under the contract by delegating it to a sub-contractor.

"The work here was to be done upon a highway. That placed the case in a special category. The work could only be done under proper precautions to safeguard the public. That duty to do the work in a proper manner extended to the use of the instruments which were necessary for the execution of the work, and a duty lay on the defendants not only in regard to the main purpose of hanging the wires, but also in regard to the instruments which were proper for carrying out the work, to take proper precautions that those instruments did not become a source of danger to the public using the highway. They could not escape liability by delegating the work to a sub-contractor."

"The case" (says a writer) "was certainly on the border line, and it is probable that if the work had not been performed upon a highway (thus rendering special precautions necessary), the negligence might probably have been held to be casual or collateral; but under the circumstances the failure to protect passengers was considered to be a default in the performance of the duty cast upon the defendants, and the Court of Appeal, affirming Kennedy, J., held the defendants liable: Solicitors' Journal, February 8, 1902, 241-242.

In a public and busy street in the City of Toronto, a horse which was being driven, became frightened by a steam roller engaged in repairing an intersecting street, and swerving suddenly upon the plaintiff, who was passing on a bicycle, injured him. The roller was the property of the city corporation, and was being used by paving contractors under a provision in the contract with the corporation. The work was being done for the corporation and it necessitated the use of the roller. It was shewn that the roller was a machine likely to frighten horses of

ordinary courage and steadiness: that of this city corporation's servants were aware; and that proper precautions were not taken on the occasion in question to warn persons of the approach of the roller to the street on which the horse was passing. It was held that the corporation and contractors were both liable. It was contended on behalf of the city that the terms under which the paving company were accorded the use of the roller amounted to a hiring by the paving company, so as to place its working and control entirely in their hands, and that the city were relieved from responsibility for any negligence while the roller was engaged in the paving company's work. But, without determining the question as to the hiring and user, the Court held that the place where the work was to be done and the means by and the manner in which it was to be performed made it incumbent on the city, if it had been doing the work otherwise than through a contractor, to see that proper precautions were taken to guard against danger to the public from the use of the roller. That being so, it was clear that the city could not denude itself of this obligation by entrusting the work to a contractor. The city placed the performance of the work in the hands of contractors and furnished them with this dangerous machine as part of the means with which it was to be performed. The operation of the machine was likely to be attended with danger to the public. The obligation still rested on the city to see that proper precautions were taken: *Kirk* v. *City of Toronto* (1904) 8 O.L.R. 496.

In a case decided by the Court of Appeals of Kentucky, it appeared that the appellants, having a contract with the owner for the erection of a building, sublet the brick work to an independent contractor. The latter, in doing the brick work, failed to erect barricades to prevent injury to persons passing along the adjoining sidewalk. A child in passing on the sidewalk was injured by a brick falling from the scaffold erected by the independent contractor. An action for damages was brought against the original contractor, and it was held that the failure to erect such barricades for the protection of the public, considering the location of the building with respect to the

sidewalk, was a nuisance which rendered the original contractor liable for the injury to the child received while passing on the sidewalk. The Court said that while the contention of the appellant, that the independent contractor alone is liable, is the general doctrine, it does not apply to cases where the thing done or omitted to be done is of itself a nuisance, or will necessarily result in a nuisance if proper precautionary measures are not used.

Professor Bigelow puts the distinction as follows: "In *Gorham* v. *Gross*, 125 Mass. 232, Gray, C.J., said: 'Where the very thing contracted to be done is imperfectly done, the employer is responsible for it.' The distinction is between 'negligence in a matter collateral to the contract' and cases 'in which the thing contracted to be done causes mischief. The employer will be liable for the negligence of the independent contractor, or of his men, where the employer employed the independent contractor to do improper work, or to do proper work which is improperly done in the sense of being a bad job. The two kinds of negligence may together be called vice in the work."

The distinction between cases of collateral negligence and vice in the work rests on the general theory of duty, observable danger which one may avoid. Collateral negligence is not to be expected by the employed; hence danger is not observable.

It is plainly otherwise of vice in the work in either of its forms; danger is observable and harm may be avoided: Bigelow on Torts (1903) p. 337.

VI. General Conclusions.

1. In ordinary cases the rule would still appear to be that the employers of an independent contractor are not the employers of his servants, and therefore are not liable for their incidental, or casual, or collateral negligence.

2. But when the work is being done on or near a highway or public place, the work is in a special category. In such a case the work cannot legally be done without special precaution for

the protection of passersby. Then negligence of the contractors or their servants which would otherwise perhaps be regarded as casual or collateral would now usually be considered default in performance, or failure in performance of the duty to protect passengers, or "vice in the work," and the original employer would, in general, be held responsible to persons injured in consequence of this default.

3. In cases of this sort the question as to the character of the negligent act, whether casual, or collateral, or otherwise, would seem to be immaterial; it is "negligence in the very act," and therefore negligence for which the original employer is responsible.

4. Nor is the question material where the contractors are employed to do what the employers are under a duty to do, and damage is caused to third parties owing to work being not done or badly done. The ground of liability in such a case is because the employer has not performed the duty cast upon him by law. There seems to be no modern case in which the absolute duty being once established, the person owing such duty has escaped liability by shewing that the act of the contractor's servant causing the damage was casual or collateral.

N. W. HOYLES.

THE BENCH AND THE PRESS.

We feel compelled to refer to a matter which is specially within our province as a legal Journal, as it affects the honour and dignity of the Bench.

The City of Toronto has a street railway, owned by a company not by the municipality. Disputes having arisen as to the construction of a contract between the parties, they came before the Courts of Ontario. The decisions given were, in the main, in favour of the contention of the city. These were in a large measure confirmed by the Supreme Court of Canada. Counsel for the Railway Company had always stoutly contended that the Courts here had misinterpreted the contract. Cross

appeals were taken to the Judicial Committee of the Privy Council and were heard by that Court of final resort. A cablegram having stated that all questions were decided in favour of the company, some of the journals of Toronto thereupon poured out the vials of their wrath upon the law lords of the Privy Council. A writer in *The News* charged that these judges had "robbed the city of its principal rights under the street railway contract." Other papers also made similar reckless charges. No one in this country at that time knew the reasons on which their lordships arrived at their conclusions. In no event would the views of these writers be of any value as to the construction of the contract, which was the subject for adjudication, yet they had the hardihood to accuse some of the most gifted men and most highly trained legal experts in the British Empire of "robbery;" in other words, of wilfully depriving the city of its just rights. This charge was subsequently repeated by the same paper in various forms of words.

These judges, let it be noted, are men of the highest character, and absolutely indifferent to anything except the legal proposition laid before them by counsel. Were it not for the mischief done to the administration of justice and the breaking down of proper respect for the powers that be, hysterical attacks such as we have seen in these articles would only provoke merriment. This judgment not meeting with the approval of these writers, and of the Board of Control and the aldermen of Toronto, the right of appeal to England must of course be abolished, and the whole judicial system changed. It may here be remarked that "yellow journals" and aldermen (and it is the latter who urged on this litigation), frequently hunt in couples, perhaps because too many of them appeal to and live by the favour of the class who from ignorance and want of thought are most easily influenced by claptrap. Fair criticism is one thing, a charge of deliberate injustice is another. No judge would object to the former. His position prevents his replying to the latter, which is therefore very much like striking a man whose hands are tied.

The ignorance displayed in these criticisms is amazing. We had supposed that every intelligent man of affairs would have known that a cardinal principle of the law of contracts is that the whole of a contract must be taken into consideration and that the intent of the parties is to be gathered from the words used. The lords of the Privy Council apparently considered that the Canadian judges had improperly applied this principle, and reversed their findings. These newspaper writers seem to think that a document should be construed, not by what it actually contains, but by what *they* think it ought to have contained. The absurdity of such a contention is apparent as soon as stated.

The same newspaper has an editorial which is apparently intended to be complimentary to the judges of our Canadian Courts: but it is almost as insulting to our Bench as the above utterances are to the judges of the Judicial Committee. Speaking of the latter body of jurists the writer says:—"Under no circumstances could the Privy Council be familiar with the conditions under which the street railway agreement was granted; nor could they be familiar with the plain intention of its clauses as offered by the city, and accepted by the company; nor could they be familiar with the practice and the tempor of the parties to the agreement. On a technical legal interpretation of the contract the Privy Council has decided the whole case against the city, and we are likely to suffer for it for fourteen years." The writer of the above remarkable utterance alleges that the Canadian judges came to the conclusions they did because they were familiar with conditions unknown to the judges of the Privy Council, and because they were familiar with the practice and temper of the parties to the agreement; in other words, they gave their decision not according to law, but on their view of certain alleged local conditions and of the way and temper in which the parties were in the habit of treating each other; basing their judgment on supposed popular sentiment. It is surely no compliment to our judges to say that they were influenced by

town talk or by inflammatory newspaper articles or the clamour of aldermen. The mere hint of such a possibility shews the necessity of having an appeal to judges who admittedly could not be swayed by local influences.

In a subsequent article the same newspaper accuses the judges of the Privy Council of deliberately wresting from the City of Toronto its rights under the contract. It charges the Court with having done "its best to strip the city of any standing or right in connection with the Toronto Railway Company." A cartoon published in the same paper added point to the libel. Anything more discreditable to Canadian journalism than the baseless charges in the newspaper referred to has never appeared in this country. The only end served by such writing is anarchy. Nothing is more potent for evil in that direction than slanderous imputations of injustice to those who are called upon to dispense justice. When once the public has lost confidence in the judiciary of a country, that country has lost its greatest safeguard for law and order.

Happily the daily press of Toronto, referring especially to those journals which most abuse their powers, has ceased to wield the influence it once did, and people are more and more beginning to think for themselves, and to criticise rather than to accept, as either weighty or conclusive, the foolish or extravagant or misleading utterances of individuals, who, whilst claiming the dignity of the editorial "we," too often exhibit either their ignorance, or their desire for the applause of the least worthy element of society. But

> "Slander meets no regard from noble minds.
> Only the base believe what the base only utter."

REVIEW OF CURRENT ENGLISH CASES.

MORTGAGE—CONSOLIDATION OF MORTGAGES—PUISNE MORTGAGEE—EXPRESS CONTRACT—CONTRARY INTENTION—CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (44 & 45 VICT. C. 41), S. 17.

In *Hughes* v. *Britannia Permanent Building Society* (1906) 2 Ch. 607, Kekewick, J., decided that even where there is an express agreement (which is now necessary under the Imperial statute 44 & 45 Vict. c. 41, s. 17) entitling a mortgagee to consolidate his mortgage, such an agreement will not prevail as against a subsequent mortgagee of any one of the mortgaged premises, of whose mortgage the first mortgagee has notice, so as to compel the subsequent mortgagee to redeem other mortgages created by the mortgagor in favour of the first mortgagee after such subsequent mortgagee acquired his rights, but, of course, the right of consolidation extends to all mortgages existing at the time of the taking of the subsequent mortgage.

POWER—SPECIAL POWER—EXERCISE OF POWER BY WILL—"APPOINT"—INDICATION OF CONTRARY INTENTION.

In re Weston, Neeves v. *Weston* (1906) 2 Ch. 630. Under a settlement made in 1863 a testator had a power to appoint in favour of his children certain leasehold property; by his will after making bequests of a watch, picture and organ, he devised bequeathed and "appointed" all the residue of his estate, real and personal, to trustees upon trust to convert into money, such part of the trust estate as should not consist of money, and out of the proceeds pay funeral expenses and debts and divide the residue of "such trust moneys and premises" equally between two of his sons (declaring that he made no provision for his other children as they were already sufficiently provided for). The testator then empowered his trustees to postpone the conversion of his "real and personal estate" for so long as they should think proper, and, during the postponement, to manage, lease or let his "real and leasehold estates" and out of the capital or income to provide for improvements, repairs, insurance for the benefit of his "real or personal estate," but declared that no part of his property not actually producing income

which should form part of his estate, should be treated as producing income. The testator also declared that the trustees might invest the trust representing the shares of his said two sons during their respective minorities in certain specified securities, and that the whole income of their shares should be paid to their guardian during their minorities for maintenance. Buckley, J., held that, notwithstanding the use of the word "appointed" in the will, the whole tenor of the will shewed that the testator was only dealing with his own property, and that the dispositions he had made were inconsistent with any intention to exercise the power of appointment and therefore that the will was not an exercise of the special power of appointment.

LANDLORD AND TENANT—COVENANT BY LANDLORD TO PAY RATES—COVENANT WITH LESSEE "HIS EXECUTORS, ADMINISTRATORS AND ASSIGNS"—UNDERLEASE—UNDERLESSEE NOT AN "ASSIGN"—32 HEN. VIII. c. 34, s. 2—(R.S.O. c. 330, s. 13).

In *South of England Dairies* v. *Baker* (1906) 2 Ch. 631 the plaintiffs were underlessees of certain premises for an unexpired term, and brought the action against the assignee of the reversion of the superior landlord, who had covenanted with the plaintiffs' lessor his "executors, administrators and assigns" to pay the rates assessed on the demised premises; for breach of the covenant, and Joyce, J., held that the action would not lie on the ground of want of privity, an underlessee not being an "assign" of the original lessee within 32 Hen. VIII. c. 34, s. 2 (R.S.O. c. 330, s. 13), and that there was no principle of equity by which the action could be maintained.

VENDOR AND PURCHASER—TITLE DEEDS—CUSTODY OF DEEDS—DOCUMENTS SHEWING EXISTENCE AND EXTINGUISHMENT OF EASEMENT APPURTENANT TO LAND SOLD—RETENTION BY VENDOR OF FORMER SERVIENT TENEMENT.

In re Lehmann v. *Walker* (1906) 2 Ch. 640 was an application under the Vendors and Purchasers' Act to determine the right to the custody of certain title deeds. The deeds in question shewed the existence of an easement appurtenant to the land sold, and also its extinguishment, the vendor retained the former servient tenement and claimed to be entitled to retain the deeds in question, and Eady, J., held that his claim was well founded.

DISENTAILING DEED—PROTECTOR OF SETTLEMENT—LEGAL ESTATE IN TRUSTEE—VOID TRUST FOR ACCUMULATION—BENEFICIAL OWNER—HEIR—FINES AND RECOVERIES ACT, 1833 (3 & 4 WM. IV. c. 74) ss. 22, 27—(R.S.O. c. —, ss. 23, 15)—THELLUSSON ACT (39 & 40 GEO. III. c. 98) s. 1—(R.S.O. c. 332, s. 2).

In re Hughes and London and North Western Ry. Act (1906) 2 Ch. 642. This was a petition for the purpose of obtaining a declaration of the Court that a disentailing deed affecting moneys in Court was effectual to bar the entail absolutely. The question turned on whether or not there was a protector of the settlement. The entail had been created by will whereby the testator who died 3 April, 1854, devised the land in question to three trustees during the lives of 3 persons and the survivor of them to pay certain annuities and accumulate the surplus rents and profits and hold them for the trusts therein mentioned. In 1879, and after the termination of the trust estate the testator devised the land to his grandson in entail, the Court by order declared that the trust for accumulation after 3 April, 1875, was void under the Thellusson Act, s. 1 (R.S.O. c. 332, s. 2), and that thereafter the heir at law was entitled beneficially to the surplus rents and profits. The land in question having been expropriated by a railway the purchase money was paid into Court, and in July 1875, the tenant in tail executed a disentailing deed of the land and the purchase money, and in this deed the surviving trustee of the will joined as protector of the settlement. In these circumstances Eady, J., held that the entail had been effectually barred, and that there was in fact no protector of the settlement, because the trustees under the settlement from and after the 3 April, 1875, became bare trustees of the inheritance, and as such could not be protector under the Fines and Recoveries Act, s. 27, (R.S.O. c. 122, s. 15), and that the heir at law who was beneficially entitled was also, by the same section, precluded from being protector.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] [March 13.

MONTREAL STREET RY. CO. *v.* MONTREAL CONSTRUCTION CO.

Vendor and purchaser—Sale of securities—Interpretation of contract—Railways—Debtor and creditor—Right of way claims—Legal expenses incurred in settlement.

The plaintiffs sold the defendants stocks and bonds of the P. & L. Ry. Co. with an agreement in writing which contained a clause stipulating as a condition that the vendees might declare the option of paying a further sum of $30,000, in addition to the price of sale, in consideration of which the vendors agreed to pay all the debts of the P. & I. Ry. Co., except certain specially mentioned claims, some of which were in respect of settlement for the right of way. The final clause of the agreement was as follows:—"After two years from the date thereof the Montreal Street Railway Company will assume the obligation of settling any right of way claims which the vendors may not previously have been called upon to settle and will contribute $5,000 towards the settlement of any such claims which the vendors may be called upon to settle within the said two years. Any part of the said sum not so expended in said two years or required by the purchasers so to be, shall be paid over to the vendors at the end of the said period, it being understood that the purchasers will not stir up or suggest claims being made." The vendees exercised the option and paid the $30,000 to the vendors who reserved their right to any portion of the $5,000 to be contributed towards settlement of the right of way claims which might not be expended during the two years. An unsettled claim for right of way, in dispute at the time of the agreement, was subsequently settled by the vendors within the two years. The question arose as to whether or not this existing claim and legal expenses connected therewith was a debt which the vendors were obliged to discharge in consideration of the extra $30,000 so paid to them, and whether or not the $5,000

was to be contributed only in respect of right of way claims arising after the date of the agreement.

Held, affirming the judgment appealed from, that the agreement must be construed as being controlled by the provisions of the last clause thereof; that said last clause was not inconsistent with the previous clauses of the agreement and that the vendees were bound to contribute to the payment of such claims and legal expenses in respect of the right of way to the extent of the $5,000 mentioned in the last clause.

Hague, for appellants. *Dandurand,* K.C., for respondents.

Que.] MAYRAND *v.* DUSSAULT. [April 2.

Will—Testamentary capacity—Undue influence—Fraud and artifice—Improper suggestion—Captation—Importunity—Deception by beneficiary—Concurrent findings of fact—Reversal on appeal—Practice—Revocation of former will—Onus of proof.

The promoter of a will by which he takes a benefit is obliged to produce evidence clearly shewing that, in making the will, the testator acted without improper suggestion or undue influence in the revocation of a former will. Shortly after his marriage, the testator and his wife made their wills, respectively, by which they each constituted the other general residuary legatee. A short time before the death of the testator from a wasting disease, the defendant took advantage of the testator's weakness and by artifices and improper suggestions so influenced him as to secretly procure the execution of another will by which the former will was revoked and the defendant was given the bulk of the testator's estate.

Held, reversing the judgment appealed from, that, under the circumstances, the insidious methods persistently made use of by the defendant amounted to captation and undue influence and that, in the absence of clear proof that the testator was not deceived and misled thereby, the will should be annulled.

As there were concurrent findings by the courts below against the contention that the testator was of unsound mind at the time of the execution of the second will, the Supreme Court of Canada refused to interfere on that ground.

Bisaillon, K.C., for appellant. *Mignault,* K.C., and *Bonin,* K.C., for respondent.

N.B.] [March 13.

CARLETON WOOLEN MILLS *v.* TOWN OF WOODSTOCK.

Municipal corporation—Exemption from taxes—Resolution of council—Discrimination—Establishment of industry.

By s. 1 of 36 Vict. c. 81, the New Brunswick Legislature authorized the Town Council of Woodstock from time to time to "give encouragement to manufacturing enterprises within the said town by exempting the property thereof from taxation for a period of not more than ten years by a resolution declaring such exemption." In 1892 the council passed the following resolution: "That any company establishing a woolen mill in the Town of Woodstock be exempted from taxation for a period of ten years."

Held, per DAVIES, IDINGTON and MACLENNAN, JJ., that this resolution provided for discrimination in favour of companies and against individuals who might establish a woolen mill or mills in the town, and was therefore void. *City of Hamilton* v. *Hamilton Brewing Association*, 38 S.C.R. 239, followed.

Held, per DAVIES, J. The resolution exempting any company and not any property of a company was too indefinite and uncertain to found an exemption upon.

In 1893 a woolen mill was established in Woodstock by the Woodstock Woolen Mills Co., and operated for some years without taxation. In 1899 the mill was sold under execution and two months later The Carleton Woolen Mills Co. (appellants) were incorporated and acquired the said mill from the purchaser at the sheriff's sale and have operated it since.

Held, per FITZPATRICK, C.J., and DUFF, J., that the appellants could not by so acquiring the mill which had been exempted be said to have "established a woolen mill," without shewing that when it was acquired it had ceased to exist as such, which they had not done. Appeal dismissed with costs.

Carvell, for appellants. *Vince* and *Hartley*, for respondents.

Ont.] [March 19.

JAMES BAY RY. CO. *v.* ARMSTRONG.

Appeal—Railway Act—Expropriation—Appeal from award—Choice of forum.

By s. 168 of 3 Edw. VII. c. 58, amending the Railway Act, 1903 (s. 209 present Act) if an award by arbitrators on expro-

priation of land by a railway company exceeds $600, any dissatisfied party may appeal therefrom to a Superior Court, which in Ontario means the High Court or the Court of Appeal (Interpretation Act, R.S., 1906, c. 1, s. 34, sub-s. 26).

Held, that if an appeal from an award is taken to the High Court there can be no further appeal to the Supreme Court of Canada which cannot even give special leave.

Armour, K.C., and *R. B. Henderson,* for appellants. *DuVernet* and *Kyles,* for respondent.

Ont.] ROBINSON *v.* MCGILLIVRAY. [April 2.

Appeal—Amount in controversy—Creditor's action—Transfer of cheque.

R. on behalf of himself and all other creditors of McG. brought an action for a declaration that the transfer of a cheque for $1,025.00 by McG. to S. was preferential and void, and or recover the proceeds of said cheque for distribution among the creditors. The judgment of the High Court, affirmed by the Court of Appeal, dismissed the action.

Held, that the only matter in controversy was the property in the sum represented by the cheque, and such sum being more than $1,000.00, an appeal would lie. Motion to quash dismissed.

Shepley, K.C., for motion. *Chrysler,* K.C., contra.

Ex. Ct.] SHIP "WANDRIAN" *v.* HATFIELD. [April 2.

Maritime law—Collision—Negligence—Tug and tow — Negligence of tug.

A tug with the ship "Wandrian" in tow left a wharf at Parsboro', N.S., to proceed down the river to sea. The schooner "Helen M." was at anchor in the channel and the tug directed its course so as to pass her on the port side, when another vessel was seen coming out from a slip on that side. The tug then, when near the "Helen M." changed her course without giving any signal and tried to cross her bow to pass down on the starboard side, and in doing so the "Wandrian" struck her inflict-

ing serious injury. In an action against the "Wandrian" by the owners of the "Helen M." the captain of the former insisted that the schooner was in the middle of the channel, which was about 400 feet wide, but the local judge found as a fact that she was on the eastern side.

Held, affirming the judgment of the local judge (11 Ex. C.R. 1) that the navigation of the tug was faulty and shewed negligence; that if the "Helen M." was on the eastern side of the channel as found by the judge there was plenty of room to pass on her port side, and if, as contended, she was in the middle of the channel she could easily have been passed to starboard; and that in attempting to cross over and pass to starboard when she was so near the "Helen M." as to render a collision almost inevitable, was negligence on the tug's part, and that the "Helen M." exercised proper vigilance and was not negligent in failing to lengthen her anchor chains as the "Wandrian" was too close and had not signalled.

Held, also, that the tow was liable for such negligence in the navigation of the tug. Appeal dismissed with costs.

Coster, K.C., for appellants. *McLean*, K.C., for respondent.

Ex. Ct.] [April 2.

COPELAND-CHATTERSON CO. *v.* PAQUETTE.

Patent of invention—Infringement—Novelty—New and beneficial results—Subject matter of invention—Purchase of patented device—Estoppel.

The plaintiffs were patentees of an alleged device intended to cheapen and simplify former methods of keeping and rendering statements of accounts by merchants and others, as was claimed, by providing for making entries and invoices by one and the same act, on manifolding sheets so folded as to occupy the entire platen of standard typewriters, and, at the same time, without waste, to provide a binding margin for the leaf with the bookkeeping entry to utilize it as a page in a permanently bound book. The sheets manufactured and sold by the plaintiffs accomplished these ends through being folded so as to form two or three leaves, as required, with two-leaf sheets, the upper leaf forming an original or invoice and the lower sheet the duplicate and bookkeeping entry; with three-leaf sheets, the third leaf serving either as a duplicate or to be used as an original dupli-

cated on the reverse side of the centre leaf. In each case the leaves are connected together so as to form one integral sheet with vertical and transverse score lines enabling the invoices, etc., to be easily detached leaving the permanently retained page and folded margin with perforations to fit binders. The specifications of the patented device succinctly described and illustrated various forms of folding the sheets to secure its advantages. An action for infringement by the defendants manufacturing and selling sheets similar to the above described device was dismissed in the Exchequer Court. On appeal to the Supreme Court of Canada, it was

Held, affirming the judgment appealed from (10 Ex. C.R. 410) that there was neither subject matter nor novelty in the device claimed as an invention and consequently that it was not patentable.

Raney, for appelants. *Mignault*, K.C., and *Perron*, K.C., for respondent.

EXCHEQUER COURT.

Burbidge, J.] MASSICOTTE v. THE KING. [March 18.

Public Work—Negligence—Injury to person.

Upon a claim for damages by the widow of an employee of the Government, who was killed by the explosion of one of the boilers of a dredge, such accident being alleged to have been caused by the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment, the registrar, acting as referee, found that the deceased met his death in an explosion which happened by reason of his own neglect of duty as watchman of the boilers on the dredge; and not by reason of the negligence of some fellow-servant, being an officer or servant of the Crown, as alleged. On appeal from the Registrar's finding on this question of fact, it was contended that as the type of boilers used on this dredge required constant and exacting care and watchfulness to see that sufficient water was maintained therein, and that any neglect of duty in that behalf was likely to lead to an explosion, the deceased's superior officers

were negligent in permitting him to be, and remain in charge of such boilers.

Held, affirming the Registrar's report, that the facts did not disclose a case of negligence for which the Crown should be liable under R.S.C. 1906, c. 140, s. 20 (c); and that the accident happened through deceased's own fault, and not through the neglect of his fellow-servants. The deceased knew as well as his fellow-servants the care that was required in his employment, and the danger to which he was exposed in case he neglected his duty.

Martineau, K.C., for supplicant, *Bérard*, for respondent.

Burbidge, J.] [March 25.

UPSON WALTON COMPANY v. SHIP "BRIAN BORU."

Shipping—Goods supplied to ship—Liability of owners—Credit advanced to ship.

Appellants, who were ship-chandlers, had for a long period been in the habit of supplying the D. C. Company, with goods for use on their dredges, tug-boats and other contracting plant. The goods were generally supplied in small quantities, and paid for on delivery. It was not shown that there was ever an open account between the appellants and the company. In September, 1904, and later in that year the said company were working upon a breakwater, part of the plant with which that work was carried on consisted of a dredge, a tug-boat and two dump-scows. These vessels had been leased by the said company to the D. & S. D. Corporation. During the months of September, October and November 1904, the appellants supplied to the D. C. Company goods which were used on the said vessels or in connection with the work that was being carried on by means thereof. The goods were ordered by the D. C. Company's foreman, and were charged to that company in the appellants' books, and the accounts therefor were in the first instance made out to the D. C. Company. In that respect there was at the time no change in the manner of dealing between the appellants and the D. C. Company; but after such company had made an assignment, the appellants sought to enforce the claim against the defendant vessels.

Held, affirming the judgment of the local judge, that the

goods were supplied on the credit of the D. C. Company, and not on the credit of the vessels themselves, and that the action should be dismissed.

J. H. Rodd, for appellant. *F. A. Hough*, for respondents.

Province of Ontario.

HIGH COURT OF JUSTICE.

Divisional Court.] [Feb. 28.

INTERNATIONAL TEXT BOOK CO. *v.* BROWN.

Constitutional law—Powers of provincial legislature—B.N.A. Act s. 92, sub-s. 2.—Act respecting licensing of extra provincial corporations—Intra vires—Company carrying on business in Ontario.

The plaintiffs, a company incorporated in the State of Pennsylvania, to carry on a printing, publishing and bookbinding business, with the head office in that State, carried on, as one of its department, under a special charter therefor, procured in the same State and with the same head office, what was called "The International Correspondence School," the object being to give by correspondence through the mails, instruction to applicants, for enrolment as students, the company having representatives throughout the province for procuring such applications, all of which were submitted to the head office for approval, and, if accepted, the certificates of enrolment were sent direct to the students with the lesson and instruction papers, followed at stated intervals by further instruction and lesson papers, pamphlets, etc. and, when the contract so provided, lesson books in bound form, drawing materials, phonographic and other outfits, were loaned to the students. The company had an office in Toronto, over which their name was affixed, with a superintendent, cashier and a number of stenographers, to which all moneys collected in this province were forwarded to, and from there remitted to the head office; while the bound lesson books, &c., for convenience of passage through the customs were sent from the head office to Toronto, and after pay-

ment of duties, were forwarded by the postmaster to the students. Salaries, etc., were paid by the cashier at Toronto, out of the moneys in his hands.

Held, that 63 Vict. c. 24 (*o*) for licensing of extra provincial corporations, was intra vires the provincial legislature, as coming within s. 92, sub-s. 2 of B.N.A. Act, being a mode of direct taxation within the province, or as relating to the issuing of licenses in order to the raising of a revenue; and that the plaintiffs were carrying on business in Ontario within the meaning of the Act, so as to necessitate their taking out a license, and their omission to do so precluded them from maintaining an action for the recovery of moneys claimed to be due from one of the enrolled students.

Eyre, for plaintiffs. *Blackburn*, for defendant. *Cartwright*, K.C., and *Mulvey*, K.C., for the Attorney-General.

Divisional Court.] REX v. HUDGINS. [March 1.

Justice of the peace—Jurisdiction—Delay in issuing summons—Liquor License Act, Criminal Code s. 539—Prohibition—Certiorari.

By s. 95 of R.S.O. 1897, c. 245, an information for an offence must be laid within thirty days of its commission thereof, and s. 559 of the Criminal Code, the justice upon receiving any complaint or information "shall hear and consider the allegations of the complainant, and, if of opinion that a case for so doing is made out, shall issue a summons," the form of summons given in the schedule referring to the offender as having "this day" been charged, etc.

The offence was committed on the 12th, and the information laid on the 24th of October, but the summons, though dated the 24th of October, was not issued until the 14th of January following. After notice of motion for prohibition had been served on the magistrate, he made his conviction, and on the return of the motion it was agreed that the motion should be deemed, as asking in the alternative for a writ of certiorari.

Held, affirming the judgment of ANGLIN, J., that the prohibition would not be granted, but a writ of certiorari was directed to issue.

Middleton, for appellant. *Cartwright*, K.C., for the Crown and convicting magistrate.

Falconbridge, C.J.K.B., Britton J., Riddell, J.] [March 11.

YEATES *v.* GRAND TRUNK RY. CO.

Railways—Accident—Injury to cattle—Crossing—Negligence—Special agreement—Liability—Tenant—Railway Act 1903.

Held, that on the proper construction of section 237, subsection 4, of the Canada Railway Act 1903, 3 Edw. VII. c. 58 D. which enacts that: "When any cattle or other animals at large upon the highway or otherwise, get upon the property of the company, and are killed or injured by a train, the owner of such animals, so killed or injured shall be entitled to recover the amount of such loss or injury against the company...unless the company...establishes that such animals got at large through the negligence...of the owner or his agent...the reference is not to the case of animals getting upon the railway from and adjoining field or enclosure, but only to animals at large upon the highway, or otherwise at large. It can have no reference to animals escaped from an adjoining field where, apart from any defect in railway fencing, they were properly enclosed. The action was brought for the loss of cattle of the plaintiff, which escaped from the plaintiff's enclosure and got upon the defendant's railway and were killed. The plaintiff was a lessee of the said enclosure from the owner for one year, and his animals were therefore lawfully pasturing there, and got on the railroad owing to a defective gate at the farm crossing. It appeared that prior to the plaintiff's lease the owner had agreed with a servant of the defendants', that he the owner might put in the crossing, provided he did it himself and would keep his gates up, and that the defendants should not be responsible for anything he might lose on that crossing.

Held per BRITTON and RIDDELL, JJ., that this agreement exonerated the defendants, the plaintiff being bound by it whether he knew of it or not when he took his lease.

Semble, also per BRITTON, J., that were it not for the said agreement the defendants would have been liable. The plaintiff would not be disentitled to recover by reason of his continuing use of the faulty gate and its fastenings, for as between him and the defendants, it was the duty of the defendants to provide a proper gate and fastenings as provided by statute. Such knowledge as the plaintiff had, and such use as the plaintiff made, of the gate and fastenings as they were would not warrant the conclusion that the plaintiff had adopted them as sufficient.

Held, also per RIDDELL, J., that the plaintiff's contributory negligence disentitled him to recover. It was proved by evidence properly admitted that the plaintiff had agreed with the owner to keep up the gates, and while this could not be relied upon by the defendants as an estoppel, or, in itself, a perfect defence, it was cogent evidence of contributory negligence, for the plaintiff knew it was his duty to keep the gate in repair and he knew that the gate was not a safe gate, yet he deliberately put his animals into the field. He had no right to have the defective gate in the defendants' fence except under the express agreement between the owner and the defendants, and that was under the express condition of keeping the gate in proper repair. This condition he undertook to fulfill and failed, and by reason of this failure he had been damnified. Therefore the only cause of the accident was his own neglect.

Weir, for plaintiff. *Foster*, for defendants. *McGowan*, K. C., for third party.

Court of Appeal.] REX *v.* BRINLEY. [March 14.

Criminal law—Bigamy—Foreign divorce—Domicil—Constitutional law—Criminal Code, s. 275.

Case reserved by the junior judge, of the County of Huron, sitting in the County Court judge's Criminal Court.

The defendant was charged with bigamy under s. 275, subs. 4. of the Criminal Code. He was, and had always been, a British subject, and was married in the County of Huron in 1897. In 1903, his wife left him and went to reside in Michigan. She then intended to separate from her husband and had no intention of ever returning, and thenceforth made her home in Michigan. In 1906, she obtained a divorce from the defendant in Michigan, on the ground of extreme cruelty. The defendant was not served with any notice of the divorce proceedings and took no part therein. In 1906, the defendant went to Detroit, Michigan, and went through a form of marriage with another woman before an officer duly qualified, under the laws of that State. He left Canada with intent to go through the form of marriage with her, and immediately afterwards returned with her to his residence in the Township of Goderich in Ontario. Before obtaining his marriage license in Goderich, he had obtained legal advice that the divorce decree obtained by his wife in 1906, was legal and binding, and that he was at liberty to marry again if he saw fit.

Held, 1, in answer to case submitted, that the decree of divorce obtained in 1906, was not a valid and binding divorce or of any effect in Ontario, inasmuch as the defendant's marriage had been solemnized in Canada, and the defendant had been at the time and always afterwards a British subject, resident and domiciled in Canada, and had never appeared or taken any part in the proceedings in the Michigan Court.

2. The fact that the defendant knew that the decree of divorce had been granted before he went through the form of a second marriage, and that he could legally marry again was no defence to the indictment, on the ground that the element of intent or mens rea was thereby removed.

3. Paragraph (*a*) of sub-s. 1, of the Criminal Code 1892, is *intra vires* of the Parliament of Canada when read with the limitation imposed by sub-s. 4, that no person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such person being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage.

Cartwright, K.C., for the Crown. *Proudfoot*, K.C., for the defendant.

Riddell, J.] STURGIS *v.* VAN EVERY. [April 8.

Accountant's office—Issue of cheque—Refusal to accept—Delay in second application—Special application—Costs of—Interest on amount.

The accountant's office exists and the High Court receives money primarily for the protection of infants and others not competent to deal with their own property, and those who cannot be found: the machinery of the Court not being intended as a convenience for those who are *sui juris* and know their rights, it is the duty of those entitled to receive money out of the Court to apply for it at the earliest moment reasonably possible.

Held, that a party so entitled, who had refused to accept a cheque, on the ground that the solicitor who applied for and obtained it had no authority so to do, and delayed seventeen years in applying for it, must pay the costs of an application to the Court on the ground of the outstanding cheque, (which was not accounted for), and should only get interest at the rate of 3%, while the money was in Court.

Middleton, for applicant. *Harcourt*, official guardian, for the accountant.

Book Reviews.

The Canadian Law of Banks and Banking: the Clearing House, Currency, Dominion Notes, Bill, Notes, Cheques and other Negotiable Instruments. By JOHN DELATRE FALCONBRIDGE, M.A., L.L.B., Osgoode Hall, Barrister-at-law. Toronto: Canada Law Book Company, Limited. 1907. 721 pp. $6.50.

This comes with commendable promptitude after the re-enactment of the Bank Act of the Bills of Exchange Act, now appearing as chapters 29 and 119 of the Revised Statutes of Canada, 1906.

As the author tells us, the former Act established a system of banking differing in many respects from that prevailing either in England or the United States. The whole Act is a codifying Act, making plain many matters which before were obscure, and giving statutory sanction to many propositions which formerly required to be supported by authorities. Many changes in form in the revision of 1906 make such a work as this before us necessary. These and other changes make English works on the subject now inconvenient guides to the Canadian Act.

The author has succeeded in giving us a luminous view of both the above Acts, enabling the reader with much ease to at once turn to the point upon which information is required. Both Acts are extensively annotated with Canadian and English cases. The history of Dominion legislation, resulting in the present Banking Act, is referred to in the introductory chapter. To every one interested in banking law this is very interesting information.

The author does not claim that the second part of the work, which is devoted to negotiable instruments, and the Bills of Exchange Act, is at all exhaustive as to these subjects; but he has been successful in pointing the reader to where a more detailed information is obtainable.

We congratulate the author upon his first attempt at book making. The work is all the more valuable from the fact referred to in the following sentence in the preface: "I am much indebted to my father (the learned Chief Justice of the King's Bench Division), for the affectionate care with which he read the whole book in proof form."