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Coronation Day

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GOD SAVE KING GEORGE THE FIFTH!

ON this day, in the Abbey Church of St. Peter, Westminster, were crowned George, son of Edward the Peacemaker and grandson of Queen Victoria of glorious memory, and His Royal Consort Queen Mary.

The King and Queen being placed in their chairs of estate in the Theatre of the Abbey, the Archbishop of Canterbury speaking at the four sides of the Theatre, East, South, West, and North, in order, said:—

> "Sirs, I here present unto you King George, the undoubted King of this Realm. Wherefore, all you who are come this day to do your homage and service, are you willing to do the same?"

And the people signified their willingness and joy by loud and repeated acclamations, all with one voice crying out

"GOD SAVE KING GEORGE!"

Then the trumpets sounded.

The Archbishop standing before the Holy Table, taking the Crown therefrom, reverently put it upon the King's head, at the sight whereof the people with loud and repeated shouts cried

"GOD SAVE THE KING!"

And that shout goes round the world with joyful acclaim from loyal subjects in all parts of the vast Empire over which our King is called to rule and which he serves.

A SINGULAR SITUATION.

We again refer to the important subject brought up for discussion in the cases of *Goodall* v. *Clarke* and *Skinner* v. *Crown Life Insurance Company.*

There is at present no effective appeal to the Supreme Court of Canada in cases from the Province of Ontario when further directions are reserved. This is the practical result of two decisions recently given by that court quashing appeals though it is possible that by a circuitous practice an appeal may ultimately be had, though under difficulty and at great cost.

In both there was a judgment establishing liability and a reference to ascertain the amount.

In the former case the Referee's report, as varied by the Divisional Court and the Court of Appeal, found damages amounting to $1,765.00. An appeal to the Supreme Court from the judgment of the Court of Appeal was taken. It was quashed on the ground that there was no final judgment of the court ordering payment of that amount.

In the latter case the question of liability was appealed to the Court of Appeal which gave judgment affirming the trial judge. An appeal to the Supreme Court was quashed on the ground that the order of the Court of Appeal was interlocutory.

In the one case the liability and the amount of that liability appear to have been settled. All that was wanting was the formal order on further directions to pay it.

In the other case the defendants had in the order allowing an appeal direct from the trial judge to the Court of Appeal admitted that their liability would exceed $1,000, and had undertaken to make that admission upon the reference, if ultimately unsuccessful on the main issue. The combined effect of these two cases will render the usefulness of the Supreme Court much less real.

It ought to be possible, under any system of appeals, to have the question which is really in dispute, disposed of without forcing the parties to occupy a position fraught with difficulties of practice, full of uncertainty as to whether the real point

will be touched, and burdened with liability for unnecessary costs.

The Supreme Court has recently framed an admirable group of rules for determining in advance questions of jurisdiction. It should not be unable to lay down a satisfactory rule for deciding whether, apart from formal findings, liability really exists for an amount over $1,000.00. But necessity exists for some amendment either to its rules or to those sections of the Act respecting the court's constitution and powers which will settle such a question in a rational way. If not, parties must get the habit of appealing from the Court of Appeal to the Judicial Committee of the Privy Council where the amount involved is $4,000.00 and of staying at home in all others.

PROFESSIONAL MEN FOR LEGAL OFFICES.

The Ontario Government has fallen from grace in connection with appointments to legal and quasi-judicial offices. We had pleasure on a recent occasion (ante, page 285) in commending them for commencing a new departure by forsaking the evil practice of their predecessors of appointing laymen to positions of the character above described. It appears now, however, that Mr. Harman was not made Registrar of the Surrogate Court of the County of York, in place of a deceased baker, as expected. There has been appointed to that office a journalist (Mr. Wallis), who has had no more experience than the deceased, though being a journalist, and a very intelligent one, he necessarily knows something about most things. The position is a lucrative one and therefore an appropriate one for political necessities. Mr. Harman, however, has been given the place occupied by the late Mr. Walter Read as counsel to the Statute Revision Commission. The position of Inspector of Insurance Companies, rendered vacant by the death of Mr. Hunter, has been filled by the appointment of Mr. A. R. Boswell. Both these appointments are good ones, and the profession may perhaps think they have done well in securing even two out of the three

positions, all of which, however, should have been filled by professional men. It may be noted as anomalous that the office given to Mr. Wallis is practically a sinecure, as the work can easily be done by a clerk who has some legal training, whilst at the same time the emoluments are very considerable. On the otther hand the positions of Mr. Harman and of Mr. Boswell are ardous ones, requiring careful personal attention as well as professional knowledge, but are not nearly as lucrative as the sinecure.

MEMORIES OF A COURT WEEK IN UPPER CANADA.

Half a Century Ago.

It was the good fortune of the writer of these reminiscences to have had the honour in those days of catering to the Bench and Bar more frequently than falls to the lot of most men, being at the time proprietor of the hostel in Goderich known as the British Exchange Hotel, which gave me favourable opportunities to observe the habits and ways of the professional class.

In 1856 my experience commenced in having the first guests of the legal fraternity under my roof; Sir John Beverley Robinson, Bart., being the pioneer. Possessing a most amiable and courteous manner, with all the instincts of a gentleman of the old school, it was a pleasure to wait on him. With him also arrived his son Mr. Christopher Robinson, Q.C., a most worthy son of a most worthy sire. He was always particularly careful not to put any one to any trouble whatever, and in consequence received the very best of attention from all those whose duty it was to serve him. Henry Eccles, Q.C., of Toronto, was also of the judge's party, as portly and handsome a man as would be seen in a week's travel. Mr. D. G. Miller, of Woodstock, a prominent lawyer in those days, arrived at the same time. As the railway was not yet in existence he always drove himself up to Goderich with a pair of horses. The judge's party would take the boat to Hamilton and thence by rail to Stratford, when Forbes, the livery man, conveyed them to Goderich. Mr. H. C.

R. Becher, Q.C., of London, was also up on legal business. Of a quiet, unassuming manner, but accustomed to all the little amenities of daily life, which, by the way, he always expected to receive, he had the happy knack of soon making himself quite at home.

Mr. Jennings, a popular horseman of London, usually attended in getting the members of the Bar to their destination. After a heavy pull of forty-eight miles over mud roads to Clinton, a halt was made for refreshments, both for man and beast. At the Rattenbury House there, a most famous hostel, known far and wide, a hearty welcome was sure to meet the tired, hungry travellers. Mrs. Rattenbury's roll of spiced beef, served by her charming daughters, being a luxury never to be forgotten.

The constables of Goderich in those days went out as far as Munro's Tavern to meet the judge, all provided with long black staves, after the English custom (though not so elaborate), and escorted him into the town. The court-house being only partially built, the large room of the British Exchange was engaged for the use of the court.

The counties of Huron and Bruce being united for judicial purposes brought a large gathering of jurymen, witnesses and all others interested in court proceedings. These people came principally on horseback, or on foot, as the highways at this time of the year were almost impassable. Generally, all the hotels and taverns in the town were filled to overflowing, making accommodation difficult to obtain. I have known as many as eight in a room, who thought themselves lucky even under such conditions. An arm-chair in the bar-room was considered a luxury.

To give the readers an idea of the number of judges and prominent members of the Bar, who became my patrons for a number of years, I will dot down some of the well-known men of the day: Hon. Mr. Justice Richards, Hon. Vice-Chancellor Spragge, Hon. Vice-Chancellor Blake, Hon. Mr. Justice Thomas Moss, Hon. Mr. Justice Adam Wilson, Hon. Edward Blake, Hon. Vice-Chancellor Strong, Hon. Oliver Mowat, Hon. Mr. Justice

John Wilson, Hon. Matthew Crooks Cameron, Hon. Mr. Justice Street, Hon. Sir William Meredith, Donald Guthrie, Q.C., and others. I ask pardon for a feeling, may I say, of justifiable pride at this record.

The presiding judges in those days entertained the members of the Bar to dinner at the close of the court. These quiet and exclusive affairs never exceeded in number eight or nine guests, whilst a jug of ale and a bottle or two of sherry was the limit in that line. In cases of emergency I was greatly assisted by Williams, the barber, who was a professed waiter, wearing the lightest of soft slippers, and no matter what the conversation was, he heard nothing. Harry Reed, the crier of the court, a well-known figure during the assizes, was possessed of an excellent voice, and gave out the summons to keep order by his "Oyes, Oyes, Oyes," with an amount of authority consistent with the dignity of the occasion. Only once do I remember the court lasting over Sunday, occasioned by a very heavy docket. Money was plentiful in those days, and Bench and Bar as well as jurymen, witnesses, and litigants all seemed to have an abundance of the needful and spent it liberally.

In closing, may I be permitted to remark, that the habits of the people at the time I refer to were vastly different to what they are to-day. Social dinners of all sorts and conditions were constantly taking place. One of those most prominent was a dinner to the Governor-General, Lord Monck, of over eighty guests; a most interesting demonstration. Sheriff MacDonald brought the distinguished guest to the door with carriage and postillions, while a detachment of Huron Rifles were stationed in front of the house to do sentry duty. As soon as His Excellency had reached his room a violent ring of the bell called me upstairs. Not being accustomed to waiting on Vice-Royalty it made me feel a little nervous, but my fears were soon allayed by the Governor-General paying me some warm compliments for the manner in which I had provided for their comfort. Tendering my thanks for the honour done me, with a hasty bow, I dropped down those stairs feeling much elated at the kind reception I had received.

Another great spread was a dinner given by the town to the volunteers on their return from Sarnia, where they had been doing frontier service during the Fenian Raid days in 1866. One hundred and twenty sat down to the table, which was a most enthusiastic gathering. Mr. Detlor was mayor. This was followed shortly afterwards by a Confederation dinner of over eighty, the principal speakers being Hon. Donald MacDonald and Mr. James Dickson. Later on Sheriff Gibbons and Mr. M. C. Cameron gave me an order to prepare a dinner for the combined County and Town Council and their friends. This party was over one hundred. My instructions were to spare no expense, as they always did these affairs with a most liberal hand. A little later on the officers of the Militia entertained the officers of the two gunboats "Cherub" and "Prince Alfred." Then again I received an order to prepare a cricket match dinner for the Clinton and Goderich clubs.

This was followed shortly afterwards by a dinner given by the Bluejackets of the gunboat "Cherub" to celebrate the marriage of one of their shipmates to an English nurse brought out from England for Mrs. Huntly, the wife of the Captain commanding the ship. This was a very jolly affair, thanks to the lot of good old Naval songs, washed down by an abundance of good beer.

On five separate occasions I was requested to prepare dinners for various law students who had gone to Toronto to pass their final examinations to allow them to practice at the Bar. In this connection I will quote the history of these young men from an article I wrote several years ago entitled "Reminiscences of the Goderich Bar." It is both interesting as well as remarkable that the whole of these young graduates were elevated to the Bench. Here are their names:—Isaac F. Toms, B. L. Doyle, W. R. Squier, L. C. Moore and James T. Garrow. Probably an unparalleled record as well as an extraordinary coincidence. With reference to these law student dinners, which were always very interesting incidents being quite unique in their character, as I never heard of similar affairs in other places, the guests generally numbered about thirty, including

all the members of the Bar in town, and any others from a distance who were up upon legal matters, all the officials of the court-house and the bank managers. As the old timers, such as D. H. Lizars, Sheriff Macdonald, Henry MacDermott, M. C. Cameron, Judge Cooper, Ira Lewis, John Macara, Hugh Johnston, John Davidson, Judge Brough, W. T. Hays and J. B. Gordon, entered the dining-room, each and all were received with rousing cheers and the glad hand of welcome. As a final entertainment I was requested to prepare an induction repast to be given to the Rev. Mr. Camelon, the new Presbyterian minister appointed to St. Andrew's Church. The gravity of this spread was in strong contract with its boisterous predecessors, and proved a most welcome calm after the storm.

Goderich, Ont. J. J. WRIGHT.

THE RIGHT OF ASYLUM.

The admitted and generally recognized principles of international law have not altered the meaning or the effect of the right of asylum, that sovereign right possessed alike by civilized and uncivilized countries. The word asylum still retains its old signification of a place of safety from pursuit, and a protection to all who come within its borders. The territory of a foreign country is an asylum for refugees, political or other, but it is of course subject to the law and treaties of extradition, and to the right of expulsion, the latter, by the almost universal comity of nations, being in many cases an inherent, and in others a reserved, right which all nations claim per se as their own. The right of asylum is a necessary consequence of the inviolability of neutral territory, and we find in Latin and Greek history instances where the right was claimed and acknowledged. It is also used in international law as what, for want of a better word, may be described as the cover extended by neutral territory to belligerent fugitives.

The practice of different countries is as a rule uniform, the only difference arising when land forces as distinguished from

naval forces are concerned. For example, in the former case, a neutral state may at all times receive individuals belonging to the states that are at war with each other, and even the forces thereof, provided its position as a neutral be recognized. Hostilities on that territory cannot be resumed, and the custom is to disarm the refugee forces. In the latter case, a belligerent war vessel may undergo repair and take in such coal and provisions as she needs in a neutral port, and the latter, in not actively preventing the vessel from resuming fighting operations, does not contravene the generally accepted law of nations.

The right of asylum is an apt illustration of the rule of international law that a state is at liberty to do whatever it likes within the confines of its own territory, regardless of the opinions or wishes of other states, so long as its acts do not operate injuriously or prejudicially to their interests and rights.

The cloak of asylum equally covers emigrants and refugees and whether or not the former have broken the laws of their own country in departing from it, and whether the latter are accused of political or non-political crimes, are equally irrelevant to the exercise of the vested right each nation thereby possesses. It is the state to whom the individual applies for leave to enter its territory that alone decides as to whether that privilege shall be granted. The only apparent exception to this rule appears to be that of a person in custody. The converse is equally true that the mere possession and existence of the right invests every state with the power of refusal to receive any or all foreigners. To exercise this right indiscriminately would be to isolate the state so acting; but the exercise of the right on reasonable and probable cause, in circumstances not only warranting such a course of action, but justifying it, is, it may be conceded, more than clear. Although states are by no means in accord or in unison in the matter, it would appear that the ends of justice would be the more easily met and satisfied, if persons who have been accused of crime, and fled from their own to a foreign country, should be delivered up by the latter for trial. Although this is the more prudent course, and therefore the more

commendable, it is very doubtful if there is any legal duty incumbent on, or imposed upon, states of extraditing such criminals. Express agreements have been entered into between certain countries whereby it is therein provided that criminals shall be delivered up for certain named crimes, and under specified conditions, and these agreements are invariably acted upon by the nations who are parties thereto. It would appear that the Fugitive Offenders Act, 1881,[1] infringes the right of asylum of Oriental countries. The Aliens Act[2] is a good illustration of the power which a country has of regulating and laying down the conditions under which foreigners shall enter a country, and the penalties they incur by evading or failing to fulfil these conditions. The admission of foreigners to a particular country carries in its train the right, often exercised, of granting them the status and the privileges of subjects of the state they enter; and here again Parliament has provided for this by the Naturalization Act of 1870. But the limits of the powers of such a state are clearly defined and restricted by the fact that the state cannot impose the duties of nationality, nor divest the foreign subject of his nationality of origin. It appears to be established by authority that the house of a diplomatic agent gives no protection either to ordinary criminals or to persons accused of state crimes. Asylum to political refugees in the houses of diplomatic agents still exists in the Spanish-American republics; and in modern times the right has been recognized and acted upon in 1841, and in 1848, 1865, and 1875, in Madrid; in 1862 in Greece; in the United States in 1873; and in England in 1910. In 1862 a British ship, on the outbreak of a revolution in Greece escorted a Greek man-of-war, with the King and Queen on board, out of Greek waters, and granted them hospitality. The right of asylum is that of the state and not of the foreigner; and the latter cannot insist that protection should be extended to him as a matter of right; he can only ask that it should be conferred upon him as an act of grace, which as a matter of

1. 44 & 45 Vict. c. 69.
2. 1905, 5 Edw VII.

fact and of custom is frequently refused. It is strange to find that the right of asylum with regard to envoys who claimed the power to grant the right within the confines of their residential quarters was not, in the opinion of Grotius, recognised by the law of nations, because he says[3] with regard to it: "Ex concessione pendet eius apud quem agit. Istud enim iuris gentium non est."

Although foreigners who thus enter a country or state in circumstances and conditions such as these are bound by the laws of the country or state they so enter, there is a class of foreigner who is not liable to the jurisdiction or amenable to the laws of such a country, and that class of foreigner is the foreigner to whom the laws of exterritoriality apply. This fiction of the law was attempted to be carried to its furthest limit in 1867, when a Russian subject named Mickilchenkorff, being guilty of an attempt to murder in the Russian embassy at Paris, and having been arrested and his prosecution commenced by the French police, the ambassador disputed their competence and claimed his extradition. The French government, however, refused to admit that the fiction of exterritoriality could be so widely extended, and that notwithstanding that at the time of the attempt the Russians had themselves invoked the aid of the local force.[4] The rule of international law as not permitting asylum in legations to either foreign criminals or political refugees has been well settled by two cases, one in 1726, and the other in 1747, both reported.[5] In the former the Spanish government forced an entrance into the British embassy at Madrid, in order to effect the arrest of the Duke of Ripperda, whose surrender had been refused; and in the latter the Swedish government endeavoured to arrest Springer, charged with treason, who had sought asylum in the British embassy at Stockholm, and the ambassador surrendered him under protest.

The High Court of Justice has, for example, subject to certain exceptions, no jurisdiction to entertain an action or other

3. Bk. II, c. 18, s. 8.
4. 1 Calvo, s. 571.
5. Martens, 1 Causes Célèbres, 174.

proceeding against any foreign sovereign;[6] any ambassador or other diplomatic agent representing a foreign sovereign and accredited to the Crown;[7] any person belonging to the suite of such ambassador or diplomatic agent.[8] The property of a foreign sovereign cannot be seized or arrested.[9] In the case of the *Duke of Brunswick* v. *King of Hanover*[10] the defendant was not only a foreign sovereign but also a British peer; and the House of Lords (Cottenham L.C., Lords Lyndhurst, Brougham, and Campbell) unanimously affirmed the decision of the Master of the Rolls (Lord Langdale) that the respondent being a foreign sovereign, coming to England, cannot be made responsible in the Courts there for acts done by him, in his sovereign character, in his own country, in virtue of his authority as a sovereign, and not as a British subject. The question remains whether the privilege of a foreign sovereign not to be sued for acts done in his private capacity, qua sovereign, continues after he has ceased, e.g. by abdication, to be a sovereign.[11] The privilege of the ambassador extends to all persons associated in the performance of the bona fide duties of an embassy or legation. Thus, a chargé d'affaires,[12] a secretary,[13] or a chorister employed in the chapel of a embassy,[14] is privileged. The incurring of debts,[15] the breach of a promise to marry,[16] the running down of an English boat by a foreign one in Dover Harbour[17]—in all these cases no

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6. *Mighell* v. *Sultan of Johore*, [1894] 1 Q.B. 149, C.A.; and see *Foster* v. *Globe Venture Syndicate*, [1900] 1 Ch. 811; *The Jassy*, [1906] P. 270.

7. *Parkinson* v. *Potter* (1885), 16 Q.B.D. 152; *Taylor* v. *Best* (1854), 14 C.B. 487; 23 L.J.C.P. 89; *Magdalena Steamship Co.* v. *Martin* (1859), 2 E. & E. 94; *Musurus Bey* v. *Gadban*, [1894] 1 Q.B. 533; [1894] 2 Q.B. 352, C.A.

8. *Fisher* v. *Begres* (1832), 2 L.J. Ex. 13; Nelson, 401; *Novello* v. *Toogood* (1823), 1 B. & C. 554, 562; *Macartney* v. *Garbutt* (1890), 24 Q. B.D. 368; *Musurus Bey* v. *Gadban*, cited supra.

9. *The Parlement Belge* (1880), 5 P. Div. 197.

10. 6 Beav. 1; 2 H.L.C. 1.

11. *The Parlement Belge*, cited supra.

12. *Taylor* v. *Best*, cited supra.

13. *Hopkins* v. *De Robeck* (1789) 3 T.R. 79.

14. *Fisher* v. *Begres* (1832), 2 L.J. Ex. 13.

15. *Wadsworth* v. *Queen of Spain* (1851), 17 Q.B. 171.

16. *Mighell* v. *Sultan of Johore*, cited supra.

17. *Magdalena Steamship Co.* v. *Martin*, cited supra.

action lies. Similarly, an English company tried in vain to recover a call due on shares from an ambassador accredited to the Crown by a foreign state,[18] and so far is the doctrine carried that the household furniture in London even of a British subject, who is accredited to the Crown as Secretary to the Chinese Embassy, cannot be seized for the non-payment of parochial rates.[19] This case has the curious result that a British subject, in the circumstances narrated, is exempt from the local jurisdiction of his own country. The privileges and immunities of an ambassador, in relation to the state to which he is accredited, are (1) a right to inviolability of person; (2) exemption from the local criminal jurisdiction; (3) exemption from the local civil jurisdiction, which includes not being compellable to appear before the local court, even as a witness; (4) exemption from taxation. Liability for debts incurred, however, would not be avoided or evaded by, say, an ambassador from the King of Italy to the French Republic, who visited England and incurred debts here. An action in that case would certainly lie against the ambassador personally. In *Mighell* v. *Sultan of Johore*[20] the principles of law laid down were (1) that the courts of this country had no jurisdiction over an independent foreign sovereign unless he submitted to the jurisdiction, and that such submission cannot take place until the jurisdiction has been invoked; (2) that the fact of a foreign sovereign entering into a contract in this country under an assumed name, and as a private individual, did not amount to a submission to the jurisdiction; and (3) that a certificate from the Foreign Office, or Colonial Office, as the case may be, was conclusive as to the status of a foreign sovereign. It may be mentioned that an order for a stay of proceedings was made by the Divisional Court (Wills and Lawrance, JJ.) and confirmed by the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.).

18. Compare judgment of Wills J. in *Mighell* v. *Sultan of Johore*, cited supra, at pp. 149, 153, and *Musurus Bey* v. *Gadban*, cited supra.

19. *Macartney* v. *Garbutt*, cited supra.

20. Cited supra.

The exceptions to the rule that no action can be entertained by the court against a foreign sovereign, diplomatic agent, or similar person, are two, namely, if any such, having appeared before the court voluntarily, waives his privilege and submits to the jurisdiction of the court.[21] It is, however, doubtful if submission by an ambassador to the jurisdiction of the court would be valid, because an old statute of Anne, called the Diplomatic Privileges Act,[22] "prohibits and makes null and void the issue of any writ or process against an ambassador, and not merely writs or processes in the nature of writs of execution." The other apparent exception to the rule is that the court has jurisdiction to entertain an action against a person belonging to the suite of an ambassador or diplomatic agent, if such person engages in trade.—*Law Quarterly Review.*

MASTERS AND SERVANTS.

Some of the most elementary questions of law which occur almost every day, and on which a lawyer may at any unguarded moment be asked his opinion, are the most difficult to answer. Among these we must place questions between masters and servants. Custom or actual judicial decisions have, however, determined some of them.

For instance, "by a long and well-established custom, it is settled that, in the absence of any agreement to the contrary, the hiring of domestic and menial servants is for a year and subject to determination on a month's—*i.e.*, a calendar month's—notice by either master or servant, or on payment of a month's wages by the employer": (MacDonell's Law of Master and Servant, 2nd edit., p. 138). It has been urged that a further custom should now be recognized—namely, that the contract of service can be determined on either side at the end of the first

21. See the judgment of Esher, M.R. and Lopes, L.J., in *Mighell* v. *Sultan of Johore*, cited supra, at pp. 149, 157, 160; but compare the judgment of Wright, J., in *Musurus Bey* v. *Gadban*, cited supra; *Taylor* v. *Best*, cited supra.

22. (1708) 7 Anne, c. 12.

calendar month by notice given at or before the expiration of the first fortnight. The first month, according to this point of view, is a trial month in which the parties can find out if they suit each other.

In *Moult* v. *Halliday* (77 L.T. Rep. 794; (1898), 1 Q.B. 125) the question as to the existence of this custom came before a Divisional Court, on appeal from a County Court judge who had held that no such custom as alleged existed and that the custom was unreasonable. Mr. Justice Hawkins thought that the alleged custom was reasonable, but as the County Court judge had held that there was no such custom, and he was the sole judge on questions of fact, the court could not interfere with his decision. Mr. Justice Channell agreed, and in doing so said: "A custom is what is so well known and understood that in transacting business it is unnecessary to mention it, because it is so well known that it must be taken to be incorporated in every contract, unless something to the contrary is said. . . . The question as to the existence of a custom is a question of fact, and it is necessary to prove the custom in each case, until eventually it becomes so well understood that the courts take judicial notice of it."

The time has arisen, twelve and a half years later, for the courts to take judicial notice of the custom. In *George* v. *Davies* (noted ante, p. 623) his Honour Judge Bacon took judicial notice of it, stating that he had done so in previous cases. This being a finding as to a fact, the Divisional Court, consisting of Mr. Justice Bray and Lord Coleridge, upheld the decision of the County Court judge, and henceforth this must be reckoned as an implied term of a contract for domestic service, unless the parties agree to omit it.

In *Moult* v. *Halliday* it was also alleged that there was a custom under which if the servant left at the end of the first month he (or she) was entitled to have the character with which he (or she) came handed on to the next master or mistress. Both learned judges held this to be unreasonable, so that it is not likely that judicial notice will be taken of this alleged

custom. It is believed that servants, who have been dismissed without sufficient cause and without a month's notice, often successfully claim board wages. There appears to be only one decision on this point, and that was in a case at the Liverpool Summer Assizes in 1859 (*Gordon* v. *Potter*, 1 F. & F. 644). Mr. Justice Hill, in summing up, told the jury that if the cook had been guilty of moral misconduct she would not be entitled to any wages which had not accrued due before the drunkenness, nor to any wages in advance; "but that if they thought there was not sufficient evidence of the drunkenness, they must give as damages the accruing wages up to the time when she was discharged, and a calendar month's wages in addition—without board wages—as a master had a right to discharge a servant simply by payment of a month's wages, in addition to the accruing wages up to the time of discharge." It may be argued that this is unfair to the servant, as she would have had board and lodging if she had not been wrongfully discharged, but it must be remembered that she is doing no work for her late master and might obtain a new situation in the next day or two.

According to Mr. C. M. Smith's treatise on the Law of Master and Servant (6th edit. p. 57), it is perfectly clear that if a servant wrongfully quits his master's service he forfeits all claim to any wages for the part of the current year for which he has served, and cannot claim the balance after deducting a month's proportionate part. The learned editor defends this seeming harshness, on the ground that the servant has only to give notice and pay or agree to allow the master to deduct a month's wages, and then he can leave at once if he desires to do so.—*Law Times.*

COMPENSATION OF UNFAITHFUL AGENTS.

Among the frauds of modern commercial life, which impose on the honest members of the community a serious addition to their already heavy expenses, one of the most insidious and dangerous is that of the secret discount, or rake-off, obtained by an agent in transacting the business of his principal.

Although the principle of publicly tipping servants and the higher grades of agents has not yet reached in this country the unpleasant proportions it has attained in Europe, it is to be feared that we are already in the midst of a wide-spread development of a most serious outgrowth of the tipping policy. It is well known to the Bar, as well as to business, that eager dealers are constantly resorting to the practice of giving some secret personal benefit to the representatives of others with whom they trade. The full extend of it from its very nature cannot be discovered, but in any agency case counsel will do well to probe this feature of the agency, and will be almost certain to produce surprising results. Some States have enacted statutes punishing as a misdemeanour the acceptance of a secret discount, or rebate, by an agent.[1]

These statutes, however, are seldom enforced, and are generally overlooked by the Bar. A still more effective punishment in many cases is the well-established rule founded in the soundest common sense that an unfaithful agent is not entitled to compensation for his services.

An agent is held to uberrima fides in his dealings with his principal, and if he acts adversely to his employer in any part of the transaction or omits to disclose any interest which would naturally influence his conduct in dealing with the subject of employment, it amounts to such fraud upon the principal as to forfeit any right to compensation for services.[2] "The defendant was entitled throughout the negotiations to command the personal fidelity and sound judgment of his agent to whom he had entrusted the business, uninfluenced by such an arrangement. But, after the plaintiff had placed himself in a position where according to a common experience he must be unduly affected by a regard for his individual advantage and that of

(1) See Acts of 1904, Ch. 343 of Massachusetts.

(2) *Murray* v. *Beard*, 102 N.Y. 505, 508 *Acc. Schliefbaum* v. *Rundbaken*, 81 Conn. 623, 625; *Wadsworth* v. *Adams*, 138 U.S. 380, 388; *Schaeffer* v. *Blair*, 149 U.S. 257, 257; *Williams* v. *McKinley*, 65 Fed. 4, 7, 11 (C.C. Minn., 1894; *Trice* v. *Comstock*, 121 Fed. 620, 622 (C.C.A. Mo., 1903); *Hobart* v. *Sherburne*, 66 Minn. 171, 172; *Williams* v. *McKinley*, 74 Fed. 94, 95 (C.C.A. Minn., 1896).

his associates, he assumed adverse relations to his principal. It was, therefore, correctly ruled that, if found, such conduct constituted a breach of his contract, which prevented the earning of a commission.'"[3]

The general rule is well settled that a broker must act with entire good faith towards his principal, and he is bound to disclose to his principal all facts within his knowledge which are, or may be material to the matter in which he is employed, or which might influence the principal in his action and if he has failed to come up to this standard of duty he cannot recover.[4]

In *Williams* v. *McKinley*,[5] the court said: "The law guards the fiduciary relations with jealous care. It seeks to prevent the possibility of a conflict between the duty and the personal interest of a trustee. It demands that the agent shall work with an eye single to the interest of his principal. It prohibits him from receiving any compensation but his commission and forbids him from acting adversely to his principal whether for himself or for others. It visits such a breach of duty not only with the loss of the profits he gains but with the loss of the compensation which the faithful discharge of duty would have earned. To permit the agent of a vendor to become interested as the purchaser or as the agent of a purchaser in the subject matter of the agency, inaugurates so dangerous a conflict between duty and self-interest, that the law wisely and peremptorily forbids it. An agent of a vendor who speculates in the subject matter of his agency or intentionally becomes interested in it as a purchaser, or as the agent of a purchaser violates his contract of agency, betrays his trust, forfeits his commission as agent and becomes indebted to his principal for the profit he gains by his breach of duty.[6] This is not the first time this court has been called upon to announce these principles, but the reckless disregard of them which characterizes the acts of some of the agents

(3) *Quinn* v. *Burton*, 195 Mass. 277, 281.
(4) *Veasey* v. *Carson*, 177 Mass. 117, 120; *Acc. Sullivan* v. *Tufts*, 203 Mass. 155, 157; *Woods* v. *Lowe*, 207 Mass. 1.
(5) 74 Fed. 94.
(6) Citing cases.

whose transactions are portrayed to us, admonishes us that we cannot reiterate them too often nor enforce them too rigidly. The court below placed the decree from which their appeal was taken upon these indisputable principles."

The general rule has been equally well established in England.[7] An exception has, however, been made in recent English litigation, which will in many case destroy the efficacy of the general rule as a preventive measure.

The English decisions appear to have drawn this distinction, that where the transactions are separable and it can be determined as to which of the transactions the agent has obtained a secret profit or commission, such transactions are to be separated from those in which he has dealt fairly with his principal, and that the agent will not be deprived of his commission on all such transactions.[8]

In the *Hippisley* case, Kennedy, J., said: "I feel it is difficult to lay down any definite rule upon the subject with confidence, but I would venture to suggest the following: That where the agent's remuneration is to be paid for the performance of several inseparable duties, if the agent is unfaithful in the performance of any one of those duties by reason of his receiving a secret profit in connection with it—and I here use that word 'unfaithful' as including a breach of obligation without moral turpitude—it may be that he will forfeit his remuneration, just as in certain cases a captain of a ship might be held in the Admiralty Court to forfeit his wages as a result of misconduct in any branch of his duty as a captain; but where the several duties to be performed are separable, as to my mind they are in the present case, the receipt of a secret profit in connection with one of those duties would not, in the absence of fraud, involve the loss of the remuneration which has been fairly earned in the proper discharge of the other duties."

(7) See *Andrews* v. *Ranney* (1903), 2 K.B. 635.

(8) *Hippisley* v. *Knee Brothers*, 1 K.B. 1. The Mass. Supreme Court, on March 3, 1911, in the case of *Little* v. *Phipps*, criticised the *Hippisley* case and affirmed the general rule. 94 N.E. Rep. 260.

This was an action brought by the complainants against a firm of auctioneers who had been employed to sell certain goods for the plaintiffs, and who were to be paid a certain commission therefor together with their cash disbursements. In making their charges the auctioneers put in the full amount of the charge for certain newspaper advertisements where, as a matter of fact, the newspapers had allowed them a certain percentage as commission on such advertisements. The custom to allow such commission was established by proper evidence. The court disallowed the commissions but refused to allow the plaintiff's contention that they could recover from the defendants the total commission agreed upon for their services as auctioneers.

The more recent case of *Stubbs* v. *Slater*,[9] the lower court refused to allow a stockbroker his commission because it was shewn that he was getting another commission from another broker with whom he dealt in the course of carrying the principal's stock. The *Hippisley* case was expressly limited to cases where the agent's compensation was separable, and he could be deprived of the portion of the compensation due for the part of his conduct which was unfaithful, and yet allow him that which he had earned for the part of his conduct that was faithful. On an appeal the decision in the case was reversed on the ground that the plaintiff ought to have known from the form in which the account was rendered that the broker was getting a commission for carrying it. There is also some loose talk in this decision to the effect that the broker would be entitled to a reasonable compensation, even if he could not get the stipulated compensation.

It is hoped that the stringent rule applying to all fiduciaries will not be weakened in this way in this country, and in the only case[10] which has been found bearing upon it, though the English was not considered, the general rule was rigidly enforced. The plaintiff as broker for defendant was to sell land and have as his compensation all over $2,000. He then made a contract to

(9) (1910) 1 Ch. 195, 203, 632.

(10) *Little* v. *Phipps*, supra, was decided since the above was written.

sell it to X. for $2,100. He then represented to the defendant that all X. would pay was $2,000, and that the plaintiff ought to get some pay so the original contract was amended so as to give the plaintiff $20 in addition to all over $2,000. The defendant discovered the fraud and refused to sell through the plaintiff, but sold to X. directly, and the plaintiff sues for his commission. The court instructed the jury that the plaintiff's fraud, if established, would deprive him only of the $20 commission. This was held error. The amendment was equivalent to a new contract for a single consideration. It was indivisible. "An agent owes his principal the utmost good faith, and if he fraudulently and falsely misrepresents the situation for the purpose of increasing his compensation and securing a more advantageous contract for himself, he cannot recover anything thereon. Indeed it is quite generally held that a separation of the good consideration from that which is illegal will be attempted only in those cases where the party seeking to enforce the contract is not a wrongdoer, or where denial of the relief asked would benefit the guilty party at the expense of the innocent."[11] —*Central Law Journal.*

(11) *Braden* v. *Randles*, 128 Ia. 653, 656.

REVIEW OF CURRENT ENGLISH CASES.

SHIP—COLLISION—LIMITATION OF LIABILITY—MERCHANTS SHIPPING ACT, 1894 (57-58 VICT. C. 60), SS. 503, 742—BARGE.

The Mudlark (1911) P. 116. In this case it was determined by Deane, J., that a hopper barge used for dredging purposes, with a rudder, but without any means of propulsion, and which had to be towed to and from her destination, is a "ship" within the meaning of s. 741 of the Merchants Shipping Act, 1894, and her owners are entitled to the limitation of liability as mentioned in s. 503 of the Act.

COMPANY—PROSPECTUS—FACTS OMITTED TO BE STATED—REMEDY FOR OMISSION—COMPANIES ACT, 1908 (8 EDW. VII. C. 69) SS. 81, 285—(7 EDW. VII. C. 34, S. 99 (ONT.)—(R.S.C. C. 79, S. 43).

In re South of England Natural Gas Co. (1911) 1 Ch. 573. By the English Companies Act, 1908, in case there has been an offer of shares to the public such offer must be stated in any subsequent prospectus issued by the company. A prospectus had been issued omitting to mention a prior offer of shares to the public, and on the faith of this prospectus one Byrne applied for and was allotted 200 shares. He died without having paid for the shares, and his executors applied to rectify the register by striking out his name as an allottee of shares, on the ground of the abovementioned omission in the prospectus, but Eady, J., held that although the prospectus was defective, it did not entitle the applicants to a rescission of the contract to take the shares, but that their remedy was in damages against those responsible for the prospectus, following *In re Wimbledon Olympia* (1910), 1 Ch. 630 (noted ante, vol. 46, p. 448).

EXPROPRIATION OF LAND—NOTICE TO TREAT SERVED ON MORTGAGEE —POSSESSION TAKEN BY EXPROPRIATORS—INJUNCTION.

Cooke v. *London County Council* (1911) 1 Ch. 604. In this case the defendants under statutory powers required land for their purposes belonging to one Ellis on whom notice to treat was served, and who informed the defendants that the property had been mortgaged by her, but declined to disclose the names of the mortgagees. The defendants proceeded under the notice to

treat and a jury assessed the compensation, which the defendants paid into Court. Cooke, one of the mortgagees, refused to be bound by the jury's finding, and the defendants thereupon served her with notice to treat, she then brought the present action alleging that the defendants had taken possession of the land and claiming an account of what was due on her mortgage, damages for injuries to the property, and an injunction. The defendants then gave the plaintiff notice to proceed to assess the compensation payable to her under their notice to treat, and she applied for an interlocutory injunction to restrain the council from proceeding to summon a jury, or otherwise proceeding under their notice to treat; but Parker, J., before whom the motion was made, decided that even if the defendants had taken possession that fact did not preclude them from exercising their statutory right to give notice to treat, or to proceed thereon, and he therefore refused the injunction.

PRINCIPAL AND AGENT—LIMITED COMPANY EMPLOYED AS AGENT—COMPANY EMPLOYING ITS OFFICIALS—PROFITS OF OFFICIALS—SALARY AND COMMISSION.

In *Bath* v. *Standard Land Co.* (1911) 2 Ch. 618, the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.), while affirming the decision of Neville, J. (1910) 1 Ch. 408 (noted ante, p. 14), in so far as he held that the defendant company was not entitled to make any charge for keeping the accounts of the estate of which it was manager, have reversed it, in so far as he held that it could not recover from the trust estate the profit costs of its own directors employed as solicitor and auctioneer. Moulton, L.J., however, dissented. The majority of the Court of Appeal held that the directors stood in a fiduciary relation to the company, but not to the plaintiff, and that the profit costs paid to them by the company for services rendered in respect of the estate of which the company was manager might be allowed to it in its accounts. The view of Moulton, L.J., on the other hand was that where a company undertakes the administration of a trust the directors can not use their position as de facto administrators of the trust, to profit themselves or one another; and there seems to be a great deal to be said in favour of that view, as it is easy to see that great abuses might arise if not only a trust company is allowed to make a profit, but its directors also are allowed to make individual profits out of estates committed to the company for administration.

TRUSTEE—BREACH OF TRUST—LIABILITY OF LEGACY TO TRUSTEE TO MAKE GOOD HIS DEFAULT AS TO RESIDUE—ASSIGNEES OF TRUSTEE.

In re Towndrow, Gratton v. *Machen* (1911) 1 Ch. 662. By the will of a testator a specific legacy, subject only to prior interests therein, was given to the trustee of the will, but he took no interest in the residue whereof he was trustee. He settled part of the legacy while still reversionary and mortgaged the other part. Several years afterwards he misappropriated part of the residue. The legacy having fallen into possession had been paid into Court in an action for the execution of the trusts of the will. The residuary legatees now sought to attach the legacy to make good the breach of trust of the trustee in respect of the residue, and their claim was opposed by the beneficiaries under the settlement, and the mortgagee of the legacy; and Parker, J., held that the rule that a defaulting trustee cannot claim any share in the trust estate until he has made good his default did not apply to the present case because the trustee was not entitled to any share or interest in the residue, and that as the specific legacy and residue were held upon entirely distinct trusts, one fund was not liable to indemnify the other, and therefore the assignees of the legacy were entitled to it free from any lien or equity in respect of the assignor's default.

EQUITY OF REDEMPTION—ASSIGNMENT OF EQUITY OF REDEMPTION —IMPLIED OBLIGATION OF ASSIGNEE OF EQUITY OF REDEMPTION TO INDEMNIFY ASSIGNOR—EXPRESS COVENANT OF INDEMNITY —EXCLUSION OF IMPLIED INDEMNITY—CONTINGENT REVERSIONARY INTEREST.

Mills v. *United Counties Bank* (1911) 1 Ch. 669. The plaintiff in this case, was, under the will of his father entitled to a one eleventh share of the testator's real estate expectant on the death or second marriage of the testator's widow, contingently on his being alive at the date of the death or second marriage of the widow, and his share was susceptible of augmentation in the event of any other of the testator's children dying prior to the death or marriage of the widow. This interest the plaintiff mortgaged to the defendants and secondly to his father-in-law, one Molyberley. The defendants having commenced an action against the plaintiff an arrangement was come to which included the purchase by the defendants of the plaintiff's equity of redemption in the contingent reversionary interest under his

father's will, but not in anything which might accrue thereto by reason of the death of any of his brothers or sisters. The deed of assignment provided that the equity of redemption was not to merge in the defendants' mortgage, and expressly provided that the share when received was to be applied first in payment of the defendants' claim under this mortgage, and then so far as the same would extend in payment of Mobberley's mortgage and the surplus, if any, was to be the defendant's absolute property. The share of the plaintiff in his father's estate not having yet fallen into possession, and the present holders of the Mobberley mortgage having called on the plaintiff for payment thereof, the present action was instituted calling on the defendants to pay off that mortgage on the ground of an alleged implied obligation on the part of the defendants to indemnify the plaintiff against the claim under the Mobberley mortgage. Eve, J., held, however, that the action failed, first because the implied obligation on the part of an assignee of an equity of redemption to indemnify his assignor does not take effect until the latter has obtained possession, and in this case the mortgaged property was still reversionary and contingent; and secondly because he held that there being in this case an express covenant or arrangement as to the terms on which the assignment was made it precluded any implied covenant or equitable obligation.

MORTGAGE—DEFAULT BY MORTGAGOR—MORTGAGEE IN POSSESSION —TRUST TO APPLY RENTS IN PAYMENT OF MORTGAGE DEBT— SURPLUS RENTS—ACKNOWLEDGMENT OF MORTGAGOR'S TITLE —STATUTE OF LIMITATIONS, 1874 (37-38 VICT. C. 57) S. 7 —(10 EDW. VII. C. 34, S. 20 (ONT.)).

In re Metropolis and Counties P.I. Building Society (1911) 1 Ch. 698. In this case a mortgage had been made to a building society which provided that in case of default the mortgagees might enter into possession of the rents and profits and apply same in payment of the mortgage debt and pay the balance, if any, to the mortgagor, and the rules of the society provided that when a mortgage was satisfied a receipt should be indorsed on the mortgage at the expense of the mortgagor. The mortgagee having made default, the mortgagees in 1887 went into possession and received sufficient rents by the end of 1902 to satisfy the mortgage. Subsequent receipts were carried by the society to a suspense account, and it also appeared that in the annual statement of account of the society of 1909, signed by the chairman and countersigned by the secretary and sent to the Registrar

of Friendly Societies, the mortgaged property in question was included in the "properties of which the society are in possession as mortgagors." The society having been ordered to be wound up, the mortgagor claimed to be entitled to the surplus rents in the hands of the society. This claim was based on the ground that the society were trustees of the fund and therefore the Statute of Limitations 37-38 Vict. c. 57, s. 7 (see 10 Edw. VII. c. 34, s. 20 (Ont.)) did not apply. But Neville, J., held that, notwithstanding the form of the mortgage, as creating a trust, it was in fact only a mortgage and the Statute of Limitations as in the case of other mortgages began to run as against the mortgagor from the time the mortgagees went into possession in 1887, and as the plaintiffs could not recover the land, neither could they recover the surplus rents. He also said that the annual statutory accounts above referred to were not acknowledgments of the mortgagor's title. The learned Judge calls attention to the following statement in Fisher on Mortgages, 5th ed., s. 1404: "Time will not run in the case of a common mortgage until the day of redemption has arrived; for the mortgagor cannot redeem before that day: *Brown* v. *Cole*, 14 Sim. 627"; and points out that the time, according to the statute s. 7, begins to run from the time a mortgagor enters into possession, which may in some cases be before the day fixed for redemption.

Licensing Act—"Second offence."

The King v. *Justices of South Shields* (1911) 2 K.B. 1. This case is deserving of a brief notice for the fact that a judicial interpretation is given therein to the meaning of the words "second offence" in a Licensing Act. The Court of Criminal Appeal, Lord Alverstone, C.J., and Ridley, and Channell, JJ., came to the conclusion that the expression means a second or subsequent offence committed after a previous conviction and does not mean a second offence in point of time merely.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Moss, C.J.O., Garrow, Maclaren and Magee, JJ.A.] [May 8.

RE HENDERSON AND WEST NISSOURI.

School law—Right of board to intervene in support of by-law.

This was an application on behalf of the West Nissouri Continuation School Board to be allowed to intervene and be heard by counsel in support of the by-law in question in this appeal. The by-law was passed by the council of the township of West Nissouri to authorise the issue of debentures to purchase a site and erect a school-house for the above school which was established, by a by-law of the county council of the county of Middlesex. The validity of this by-law was not admitted, but was not the subject of direct attack. The application was dismissed by MIDDLETON, J., and his decision was upheld by a Divisional Court, RIDDELL, J., dissenting, and this was an appeal from that decision. Since it was lodged, there had been a change in the personnel of the township council, and there was now reason to believe that they would not support the by-law before this court.

Under the above circumstances, the court ordered that the School Board should be at liberty at its own expense to appear and be represented by counsel upon the argument of the appeal, and support the present judgment. The School Board undertook to abide by any orders as to costs to be made on the appeal.

Reference was made to the following cases: *Langtry* v. *Dumoulin*, 11 A.R. 549, 13 S.C.R. 258; *Re Ritz and New Hamburg*, 4 O.L.R. 639; *Re Billings and Township of Gloucester*, 10 U.C.R.; *Re McKinnon and Village of Caledonia*, 33 U.C.R. 507; Safford and Wheeler, Privy Council Practice, 818.

Sir George Gibbons, K.C., for the township. *J. N. McEvoy*, for the appellant, Henderson.

Mulock, C.J.Ex.D., Teetzel and Middleton, JJ.] [May 18.

NORTHERN CROWN BANK *v.* INTERNATIONAL ELECTRIC CO. LIMITED.

Promissory note payable on demand—Endorsed to plaintiffs on date when it becomes overdue—Bills of Exchange Act, sec. 182.

This was an action upon a promissory note bearing date the 28th of June, 1906, made by the defendant company payable to the order of the Electric Advertising Co., for the sum of $3,500 with interest at 5 per cent. per annum, "before and after due and until paid," and endorsed to the plaintiffs on the day of its date. The defence was that the note was without consideration, that being payable on demand it was always overdue, and therefore came into the plaintiffs' hands as overdue, and as such subject to the equities existing between the original parties.

MULOCK, C.J.:—The neat point to be determined is whether the note was overdue when the plaintiffs became holders for value. The case was tried before Meredith, C.J.C.P., who held that the note was not overdue when on the day of its date it passed into the plaintiffs' hands. I agree with the views expressed by the learned Chief Justice in his judgment. It seems to me that the language of s. 182 of the Bills of Exchange Act negatives the appellants' contention that a promissory note payable on demand becomes overdue at the instant of its coming into existence. In substance the section declares that mere delay in presentment for payment shall not cause a note payable on demand to be deemed overdue, thus implying that delay may give a demand note the character of an overdue note which it had not previously possessed. If it were always overdue such delay could not have the operation contemplated by the section. I think it is fair to interpret the section as declaring to the effect that a note payable on demand shall not, because of that circumstance, be deemed to be overdue, but that delay in its presentment may give it the character of an overdue note.

Hellmuth, K.C., and *J. R. Meredith*, for defendants. *Arnoldi*, K.C., for plaintiffs.

HIGH COURT OF JUSTICE.

Divisional Court, May.] [May 11.

RE MCALLISTER.

Will—Construction—"Heirs"—Rule in Shelley's case.

This was an appeal from an order of RIDDELL, J.

This case is referred to at length, ante, p. 363. The appeal was dismissed.

Armour, K.C., for appellant. *Lazier*, for executors. *J. R. Meredith*, for infants.

Mulock, C.J.Ex.D., Teetzel, J., Middleton, J.] [May 17.

HAMILTON *v.* PERRY.

Married woman—Judgment against—Form of—Division Court jurisdiction.

Appeal from order of CLUTE, J., in chambers.

The main point in this case is referred to at length, ante, p. 361. Appeal allowed.

W. J. Clark, for defendant. *King*, K.C., for plaintiff.

Riddell, J.] WILSON *v.* DEACON. [May 27.

Contract—Agency—Commission—Sale for principal.

This was an action to recover commission on the sale of some patent rights. The plaintiff was an agent for the sale of them. The defendant had invented a carpet sweeper, and employed the plaintiff to sell the patent rights, even before the patent actually issued. The plaintiff took a great deal of trouble in the matter, and at length had the arrangement put into writing as follows:—

"With regard to our conversation concerning the selling of your patent right for Great Britain, Canada, and the United States of America, I am willing to accept twenty-five per cent. of the proceeds received for the sale or sales of said patent rights for carpet sweeper. It being understood that no other agent will have any power to act in this matter without my instructions while I am acting in your behalf." Subsequently the defendant

himself effected a sale for the amount $5,500.00 and the trial judge held that the defendant acted as he had with the intention and design of preventing the plaintiff from making a commission.

Held, 1. The plaintiff was entitled to a commission in the amount of the sale.

2. Whilst the principal himself is not as a rule disentitled to sell if the sale be made in good faith and not a mere trick to defraud the agent, under the circumstances of this case an action would lie not for the commission, but for damages for breach of contract.

G. S. Gibbons, for plaintiff. *T. G. Meredith*, K.C., for defendant.

Boyd, C., Teetzel, and Latchford, JJ.] [May 27.

RE STURMER AND BEAVERTON.

Municipal corporations—Local option by-law—Motion to quash—Residence—Constructive residence—Animus revertendi—Irregularities—Laches and acquiescence—Curative provisions of sec. 204 *of Municipal Act.*

Appeal by the applicant Henry Sturmer from the judgment of MIDDLETON, J., on a motion to quash a local option by-law.

BOYD, C.:—"Residence" is a word of flexible import, and as said in *Naef* v. *Mutter*, 12 C.B.N.S. 816, at p. 821, has a great variety of meanings according to the subject-matter and the objects and purposes of the legislature. In a poor-law case Blackburn, J., said: "I do not like the phrase 'constructive residence': when a person is physically absent for a time, if he has an animus revertendi, his residence continues; and the question in such a case is whether he continues to be resident, or has ceased to be resident by taking up his permanent residence elsewhere": *Regina* v. *Abingdon*, L.R. 5 Q.B. 406, at p. 409.

In a franchise case, *Ford* v. *Hart*, L.R. 9 C.P. 275, it is held that there may be a constructive residence where there is no actual residence, the person claiming in this way must have the liberty of returning, and also the intention of returning whenever he pleases. In a case of like character in the same volume, Brett, J., says: "It is true that when a person keeps the dominion over his house, and goes away for an indefinite time, with the intention of returning at an indefinite time, he may be con-

sidered as inhabitant of the house while he is not bodily within the house." That case also decides that "residence" and "inhabitancy" are practically synonymous terms: *Durant* v. *Carter*, L.R. 9 C.P. 261, at p. 268. In *Beal* v. *Town Clerk of Exeter*, 20 Q.B.D. 300, at p. 301, Coleridge, L.J., says: "Constructive residence may often be easily inferred, as in the case of a barrister on circuit, or a sailor at sea, when there is no doubt of both the power and the intention to return as soon as the circuit or the voyage is over." These observations, which are quite in accord with the view of residence in our election law as defined and held by Osler, J., in the case cited by my brother Middleton, *Re Voters' List of Seymour*, 2 Ont. El. Cas. 69, are ample authority for deciding that the voter Arthur Jones whose status is attacked (assuming that it is open to attack at this stage) could well claim to be, and swear that he was at the time of the voting, resident in the municipality for one month next before the election. The vote was taken on the 2nd January, 1911; he was then the tenant of his home at Beaverton held since the 7th April, 1909, of which he had been in actual occupation by himself and his family up to the 9th December, 1910. He was in that month called off to Whitby to take the place for a short time of an injured workman, employed as he was by the railway company. This was a temporary call and he did not expect that the removal would be at the outside for more than 2 or 3 months, and so he was told by the company. The tenure or terms of his employment are not in evidence, and there is no foothold for the argument that he had not the power to return at any time without the breach of a legal obligation—if that term is to be imported from the later English cases on the exercise of the parliamentary franchise. He had removed only enough furniture to fit up two rooms at Whitby for temporary occupation with his wife and child, and had left all the rest of his belongings (and some poultry) at his home, which he had locked up, and of which he kept on paying the rent. This is a controlling feature of the case, which, to my mind, shews that his real bona fide and continuing place of residence was where he cast his ballot. He was rightly on the list and rightly voted on that list.

Held, also, that it is too late, after the matter has gone to vote on a local option question, to hark back to preliminaries of procedure with a view of picking flaws, when there is no evidence that anyone has been misled, or that anyone has not had ample opportunity and knowledge of where his vote was

to be cast. The greatest publicity is given as to the time and place of voting before the election, and everyone interested had the opportunity of doing his utmost to further or to oppose the success of this appeal to the electorate. This failure to observe the directions of the statute was no doubt an irregularity as to the taking of the poll, but it is not made to appear that it has in any sense affected the result of the election, and the curative section (204) applies to validate at this stage. Apart from the statute the doctrines of laches and acquiescence apply to protect the outcome of de facto elections, when the parties complaining have been aware of the irregularities and have concurred therein by taking part in the election: *Regina* v. *Ward*, L.R. 8 Q.B. 210, and see *Regina ex rel. Regis* v. *Cusac*, 6 P.R. 303.

J. B. Mackenzie, for appellant. *Raney*, K.C., for respondent corporation.

Middleton, J.] REX *v.* WELLS. [May 29.

(And four other Cases.)

Lord's Day Act—Sale of cigars, candies, newspapers, etc., by hotel keepers, restaurant keepers, and druggists—"Merchant or tradesman"—Exercise of ordinary calling—Works of necessity or charity.

The defendants in these cases were charged before the police magistrate of Toronto with violations of the Provincial Lord's Day Act, C.S.U.C., c. 104, and acquitted. These decisions were questioned by the Crown, and at the instance of the Attorney-General for Ontario, a stated case in each instance was submitted by the magistrate under s. 761 of the Criminal Code. These five cases all arose under the same statute, and were argued together having much in common. Counsel for the Crown based his case on the Provincial Lord's Day Act and not on the Dominion Statute of R.S.C. c. 153, s. 16.

C.S.U.C., c. 104, s. 1, reads as follows: "It is not lawful for any merchant, tradesman, artificer, mechanic, workman, labourer or other person whatsoever on the Lord's Day to sell or publicly shew forth or expose or offer for sale or to purchase any goods, chattels or other personal property or any real estate whatsoever, or to do or exercise any worldly labour, business or work of his ordinary calling (conveying travellers or Her Majesty's mail by land or water,

selling drugs and medicines and other works of necessity, and works of charity, only excepted)."

Held, 1. Hotel keepers and restaurant keepers exercising their legitimate calling are not merchants and tradesmen within the above enactment. See also *Palmer* v. *Snow* (1900), 1 Q.B. 725, where it was held that a barber was not within the Act. Whilst a hotel keeper and a restaurant keeper may and do purchase and sell goods, the services they render to their guests are in the nature of work and labour rather than in the sale of goods; and so long as they confine their business to its legitimate limits, they are not within the Act. If they go beyond these limits they may become merchants or traders and so bring themselves within the Act.

2. Whilst carrying on such business they may sell cigars as an incident to a meal presumably for consumption on the premises. They would become merchants or traders if they sell cigars, candy, etc., as merchandise.

3. The proprietor of a news stand in a hotel who sells cigars as part of his ordinary calling is a merchant or tradesman, and is within the statute.

4. A druggist who sells cigars to all comers is within the Act. A cigar is not a drug in the sense of its being a medicine nor is it a necessity.

5. Works of necessity and charity as used in the statute contemplate the necessity of the person who works and not him who compels the work. A merchant may, as an act of mercy towards someone in need, do that which would bring him within the statute, but the necessity of purchaser might justify the conduct of the merchant as an act of mercy.

E. Bayly, K.C., and *R. U. McPherson*, for the Crown. *Haverson*, K.C., *Robinette*, K.C., and *H. C. Macdonald*, for the various defendants.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] FORNSICA *v.* JONES. [June 13.

Deed of settlement—Improvidence—Trust—Revocation—Independent advice—Rule against perpetuities.

Appeal from judgment of MATHERS, C.J., noted vol. 46, p. 386, dismissed with costs, but right reserved to widow to bring new action.

KING'S BENCH.

Macdonald, J.] [May 25.

THE KING *v.* SUCK SIN.

Magistrate—Bias—Disqualification—Pecuniary interest—Trial of charge by magistrate who is also a member of the board of police commissioners of a city—Resolution of commissioners instructing prosecution of that class of offences—Prohibition—Practice—Civil or criminal proceeding.

Held, 1. The police magistrate of the city of Winnipeg, who is also by statute a member of the board of police commissioners, is not disqualified to hear and determine a charge of selling liquor without a license by reason of having, at a meeting of the board previously held, moved a resolution instructing a particular member of the police force to take active steps for the prosecution of offences against the Liquor License Act in unlicensed places, without naming any individual or class of persons, although the charge in question had been laid by that officer. *Queen* v. *Handsley*, 3 Q.B.D. 383, and *Reg.* v. *Pattitmangin*, 9 L.T.N.S. 683, followed. *Queen* v. *Lee*, 9 Q.B.D. 394; *Queen* v. *Allan*, 4 B. & S. 915, and *Queen* v. *Henley* (1892), 1 Q.B. 504, distinguished.

2. The police magistrate of the city is not disqualified to hear and dispose of such a charge by reason of his being a ratepayer of the city and so benefiting to a small extent by any fine which might be imposed, part of which would be received by the city, or by reason of his being paid a salary by the city. *Ex parte McCoy*, 1 C.C.C. 410, followed.

3. An application for an order to prohibit a migistrate from hearing a criminal charge on the ground of disqualification through bias is itself a civil and not a criminal proceeding, and the practice to be followed is that laid down in the King's Bench Act, R.S.M. 1902, c. 40, and the rules thereunder, instead of by rule nisi as in criminal proceedings.

Phillips and *Whitla*, for defendants. *Patterson*, K.C., D.A.G., for the Crown.

COUNTY COURT OF BRANDON.

Cumberland, Co.J.] [March 21.

WALLACE *v.* FLEMING.

Election petition—Municipal election—Municipal Act, R.S.M. 1902, c. 116, ss. 90, 116, 118, 191, 287—Irregularities of officials conducting elections—Directory or imperative requirements of statute—Illiterate voters—Secrecy of the ballot.

Sections 90, 116, 118, 191 and 287 of the Municipal Act, R.S.M. 1902, c. 116, relating to the duties of the municipal officers in connection with the holding of the annual election of the mayor of a city, are directory and not imperative, and breaches of any or all of those sections by the officers, not amounting to wilful misconduct, and not materially affecting the result of the polling, will not be sufficient to warrant the declaring of the election void. *Woodward* v. *Sarsons*, L.R. 10 C.P. 747, followed.

The following irregularities and omissions, therefore, were held not to be fatal to the election:

1. That the clerk did not post up notices giving the names of the candidates in all the places pointed out by section 90, but only in two of them. *Re Wycott and Ernestown*, 38 U.C.R. 533, followed. Cases arising under the Canada Temperance Act, or under local option clauses of Liquor License Acts, such as *Hatch* v. *Oakland*, 19 M.R. 692; *Re Mace and Frontenac*, 42 U.C.R. 70; *Re Henderson and Mono*, 9 O.W.R. 599, and *Hall* v. *South Norfolk*, 8 M.R. 437, distinguished.

2. That the clerk did not, as required by section 287, furnish each of the deputy returning officers with two copies of sections 276 to 287 inclusive (the sections dealing with corrupt practices) and did not post up a copy in his office and one in the post-office. *West Gwillimbury* v. *Simcoe*, 20 Gr. 211, followed.

3. That most of the deputy returning officers, poll clerks and agents failed to take the oath of secrecy as to the marking of the ballots required by section 191, there being nothing to indicate that the officials did not, in fact, substantially maintain the secrecy of the ballot or that they permitted any invasion of that principle. *Wynn* v. *Weston*, 15 O.L.R. 1, followed.

4. That the clerk, as returning officer, relieved the deputy and acted in his stead for a short time in each of three polling places on the polling day, although the ballots initialled by him were disallowed. *Watterworth* v. *Buchanan*, 28 O.R. 352, 357, and *Re Ellis and Renfrew*, 21 O.L.R. 74, 85, followed.

5. That, in taking the votes of a large number of persons unable to read, the deputy returning officers went into the voting compartments with the voters and marked their ballots or caused them to be marked out of the sight of the agents of the candidates contrary to section 116, and this without any declarations of inability to read having been made by the voters, as most of them were foreigners unable to understand English and the deputies apparently acted in good faith.

6. That a number of the deputies failed to make the declaration prescribed by section 118 as to the proper keeping of the poll book.

Held, also, that it would not be proper to deduct from the total vote cast for the successful candidate votes to the number of the assisted voters who had not made the declaration of inability to read, as the petitioner had brought out in evidence that many of the latter had marked their ballots for him. *Re Prongley, Re Ellis, and Re Schumacher*, all in 21 O.L.R., at pp. 54, 74, and 522, respectively, followed.

In re Shoal Lake, 20 M.R. 36, dissented from.

Preudhomme, for petitioner. *Curran*, K.C., for respondent Fleming. *Henderson*, K.C., for other respondents.

Book Reviews.

The Canadian Ten Year Digest, 1901-1910, *inclusive*. By W. J. TREMEEAR, of Osgoode Hall, Barrister-at-law. In two large volumes. Canada Law Book Company, Limited, Toronto. 1911.

This digest, just completed, of both federal and provincial decisions, authorized by the Law Society of Upper Canada, and based upon the head notes of the official reports, will no doubt be the standard digest of Canada for the next ten years. The classification of titles and the method of sub-division are both admirable, and it is to be hoped that the semi-annual or annual digests for future years will follow the same practical classification which this digest contains. For example we take the title "Master and Servant." Under this heading are the two general divisions, first of "Wages, Hiring and Dismissal" and secondly of "Employers' Liability for Negligence." Each of these is again sub-divided into four territorial sub-divisions under which appear the decisions given in "Ontario," "Que-

bec," "Eastern Provinces," and "Western Provinces," the latter division including cases reported in the North-West Territories Reports during the decade, the decisions in British Columbia and Manitoba and the cases in the Alberta and Saskatchewan Reports. References are also given to additional cases in the "Eastern Law Reporter" and "Western Law Reporter" not officially reported. Canadian appeals to the Privy Council are, of course, included for the ten year period. The typographical management of the work is excellent. A large appendix gives the references to Ontario cases appearing in the Ontario Weekly Reporter which either have not been officially reported or which, although reported in appeal, shew the decisions at nisi prius or on interlocutory motions. The tables of cases affirmed, reversed or considered, is very complete. The whole work reflects great credit upon Mr. Tremeear and his assistants.

A Treatise upon the law of Light. Including an exposition of the law relating to the nature, acquisition, preservation, and extinguishment of the easement or right to light, and the remedies afforded for the protection of window lights. By R. G. NICHILSON COMBE, of Inner Temple, Barrister-at-law. London: Butterworth & Co., 11 & 12 Bell Yard, Temple Bar, Law Publishers. 1911.

This important branch of the law of easements is not of as much interest in this country as it is in the British Isles; nor, under our legislation, is it likely to be so. We note for example that the Ontario Ten Years Digest, recently published refers to less than half a dozen cases on the subject of light in that province. Many cases, however, will doubtless arise from time to time where the information to be found in this excellent treatise will be of the greatest use. A cursory examination of Mr. Combe's book indicates very clearly that he has great gifts as a legal text-writer. The author adopts in his work two new phrases, coined by himself for the purpose, under which he accurately and conveniently groups his material; he styles the accessorial right of light as "Light Easement," and uses the term "Light Nuisance" to describe the wrong worked by obstruction, which amounts to an actionable interference with the light.

As the author correctly says, prescription is an important branch of the Law of Light; and so he devotes three chapters to that subject. Even if there were nothing in the book but the

lucid statements of the law as to the abstruse doctrine of prescription, the book should find a place in every lawyer's library.

Its contents are divided as follows: Chap. I., Introduction; II., Nature and extent of the easement of light; III., Creation of the right to light by express grant; IV., Easements of light arising by implication of law; V., The doctrine of prescription; VI., Prescriptive claims to light apart from the Prescription Act; VII., Statutory prescription to light; VIII., Extinguishment and variation of light easements; IX., Remedies for disturbance of light easements.

A Treatise on the Law of Bills of Exchange, Promissory Notes, Bank-notes and Cheques. By Right Hon. Sir JOHN BARNARD BYLES, late one of the Judges of the Court of Common Pleas. 17th edition. By W. J. BARNARD BYLES and ERIC R. WATSON, Barristers-at-law. London: Sweet & Maxwell, 3 Chancery Lane. 1911.

The first edition of this book was published in 1829 and has been, as our readers are aware, the leading authority on the subject from that day to this. An important change has been made in the present edition by inserting the actual words of the Act of 1882 in the text, in compliance, as the present editors state, with a suggestion to that effect contained in various criticisms of recent editions. This necessarily involved many changes and alterations in the text, but the editors have wisely made as few of them as possible. There has also been a careful revision of the notes, eliminating old and effete authorities, and retaining only those cases which are of practical importance at the present time, and inserting all decisions since the last edition, which was published in 1899. The typographical appearance of the book has been greatly improved by larger pages and larger type.

Challis's Law of Real Property Chiefly in Relation to Conveyancing. 3rd edition. By CHARLES SWEET, Barrister-at-law. London: Butterworth & Co., 11 and 12 Bell Yard. 1911.

In this volume Mr. Challis's text and notes are reprinted verbatim from his second edition, and the additions and comments of the present editor are enclosed in square brackets indicating his views which occasionally dissent from those of the author. Both author and editor express their views with much

freedom and definiteness; for example, the author comments upon the language of the statute, 12 Car. 2, c. 24 which has been ascribed, like the Statute of Frauds, to Lord Hale, as being "marked by an iteration always inept and sometimes perversely maladroit, which is a surprising feature of such authorship." An example of the editor's dissenting comments appears on p. 467, and like his other comments is well worthy of consideration. A very thoughtful and valuable work.

The Law Quarterly Review. Edited by SIR FREDERICK POLLOCK, Bart., D.C.L. London: Stevens & Sons, Limited, 119 and 120 Chancery Lane.

The April number of this, the leading law magazine of England and of world-wide reputation is quite up to its usual high average. It contains the usual interesting notes and the following papers: Some recent decisions on the rule against perpetuities; The report of the Land Transfer Commissioners. Mr. Underhill in this article discusses the long expected and recently issued report of this Commission. The task it undertook was a most difficult one. A radical change was impossible and it is said that perhaps too much has been attempted. It is impossible for us in this country to understand the great difficulties attendant upon any change of system as to land registration in Great Britain, but a beginning has been made, and those concerned may expect beneficial results eventually. The subject of jurisprudence is learnedly dealt with by Mr. A. H. F. Lefroy, K.C., of the Ontario Bar. A paper discussing a Digest of English Case Law foreshadows the possibility and advisability of something which would be in the nature of a code though not so called. We copy elsewhere an interesting article on the Right of Asylum. Other papers are The Policy of the Mortmain Acts; The Resurrection of our Criminal Code, etc. The usual book reviews conclude the number.

The German Law of Bills of Exchange and of Cheques. By SIDNEY LEADER, Solicitor. London: Sweet & Maxwell, 3 Chancery Lane. 1911.

This is a translation of the latest text of the "Wechselordnung," etc., which came into force in 1908. It cannot be said that this book is of much value to the profession in this country, except to the few who have clients having direct trade relations

with Germany. But it is very interesting to know the nature of that country's negotiable instruments, as to which there is a marked difference between their use and ours.

Analysis of Williams on the Law of Personal Property. For the use of students, with an appendix of questions. By A. M. WILSHERE, Barrister-at-law. London: Sweet & Maxwell, Ltd., Law Publishers, 3 Chancery Lane. 1911.

This is one of the series published by these well-known law publishers for the use of students. It claims to be "a note-book and nothing more"; but students would do well to have it before the examination day. Mr. Wilshere's experience as a lecturer and examiner is a sufficient guarantee of the excellence of the contents.

The Law of Ejectment or Recovery of the Possession of Land. By J. H. WILLIAMS and W. B. YATES, Barristers-at-law. 2nd edition. London: Sweet & Maxwell, Limited, 3 Chancery Lane. 1911.

During the 16 years which have elapsed since the first appearance of this work there have been many decisions and several statutes requiring the attention of the authors and necessitating a new edition and increasing the size of the volume to 440 pages. A very handy book of reference with some useful forms.

Flotsam and Jetsam.

There is a rather good story of inept advocacy in Mr. Birrell's Life of Frank Lockwood, which we were reading the other evening. Once in the Court of Chancery a witness was asked in cross-examination by an eminent Chancery leader whether it was true that he had been convicted of perjury. The witness owned the soft impeachment, and the cross-examining counsel very properly sat down. Then it became the duty of an equally eminent Chancery Q.C. to re-examine. "Yes," said he, "it is true you have been convicted of perjury. But tell me: Have you not on many other occasions been accused of perjury and been acquitted?"—*Law Notes.*