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ALLOWANCE OF SPECIAL DAMAGES IN ACTIONS FOR WRONGFUL DISMISSAL OF SERVANTS.

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1. **Scope of Article.**—In this article it proposed to state the effect of the cases in which the right of the servant to recover damages for the injurious results of his dismissal other than the loss of the stipulated compensation has been considered. For a general discussion of the criteria which determine proximity and remoteness of causation the practitioner will of course consult a treatise on the subject of damages.

2. **Physical suffering.**—In an Irish case where the contract of the plaintiff, a domestic servant, was subject to termination by either party at a fortnight's notice, and provided that, in the event of her being dismissed without notice, she was to receive the wages then due and also the wages for an additional fortnight, it was held that the jury were not entitled to take into account the fact that she had been expelled from the defendant's

service late at night, without her necessary clothes, and without money, and left exposed during the whole night without shelter, food, or sufficient clothing[1]. The decision was founded on the pleadings submitted to the court. The more general question whether, under appropriate averments, the special damages claimed could have been recovered was not discussed. In the opinion of the present writer the question should be answered in favour of the servant,—a doctrine which is directly sustained by a Texas decision to the effect that, where a person who hired a servant to go to a distant point and work there knew that he was without means, and agreed to furnish food and lodging, and reimburse himself from the wages earned, and the servant on arriving at his destination was refused work, and also subsistence and transportation to his home, and, owing to his lack of means, suffered from hunger and exposure to the weather before reaching home, he was entitled, under proper pleadings, to recover not only the wages lost, but damages for the suffering sustained[2].

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[1] *Breen* v. *Cooper* (1869) Ir. Rep. 3 C.L. 621. Fitzgerald, B., said that, upon the pleading in the action, "the plaintiff was entitled to be put so far as pecuniary compensation could put her, in the same position as she would have been if, at the time of her dismissal, she had been paid the wages due to her together with the additional fornight's wages. She could not recover as special damage in respect of any matters, save such as would not have happened to her had the contract been fulfilled by payment of those moneys at the time of her dismissal. I can find no evidence of any damage in this case which would not equally have happened, though the contract had been fulfilled in the respect complained of by payment of those moneys at the time of dismissal."

[2] *Gulf C. & S. F. R. Co.* v. *Jackson* (1902) 29 Tex. Civ. App. 342, 69 S. W. 89. The court said: "While the measure of damages for a breach of a contract of hire would generally be the difference between what would have been earned under the contract and what could have been earned by the exercise of reasonable diligence at other employments during the time covered by the contract, such is not the exclusive measure of damages. If any special damage is pleaded, which is shown to have been in the reasonable contemplation of the parties at the time the contract was entered into as a probable result of its breach, the special damages so shown can be recovered in addition to the damages which would ordinarily result from the breach of the contract. The appellee on his pleadings claimed damages

3. Mental annoyance.—No allowance in the nature of "pretium affectionis," or in consideration of the "pain that might be felt by the servant on the ground that he was attached to his place," should be made[1].

Where a man employed as a locomotive engineer under a contract by which he was to be paid mileage and to go out when called, held himself in readiness for a call for a long period of time, and was called only on a single occasion, when he was not permitted to go out, it was held that he was not entitled to recover for more than this one trip, and that he could not recover for mental worry suffered while he was waiting for a call to go, nor for the support of his family while waiting[2].

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not only for the wages he would have earned under the contract, but for the inconvenience and suffering he sustained by reason of its breach. The evidence shows that appellant's agent was informed before appellee left his home that he was without money or means of any kind with which to procure food and lodging, and that appellant agreed and promised to furnish same, and to reimburse itself out of the wages to be earned by appellee under his contract of employment. Under these facts, we think appellee was entitled, upon the breach of the contract by the appellant, to recover not only for the wages shown to have been lost by him by reason of such breach, but also damages for the suffering sustained by hunger and exposure to the weather; such damages being clearly within the reasonable contemplation of the parties as a probable result of the breach of the contract."

[1] Erle, J., in his opinion delivered to the House of Lords in *Beckham* v. *Drake* (1849) 2 H.L.C. 576, (607). The learned judge sustained his position by the following arguments: "Indemnity for the loss of his bargain in respect of his labour would be settled on the same principle as for the loss of a bargain in respect of common merchandise. If goods are not delivered or accepted according to contract, time and trouble as well as expense may be required, either in getting other similar goods or finding another purchaser, and the damage ought to indemnify both for such time, trouble, and expense, and for the difference between the market price and the price contracted for. Loss of time and trouble would be occasioned by a breach of contract in respect of goods, as well as by a breach of contract in respect of employment; but they are such time and trouble as have a known merchantable value, and the compensation is measured wholly regardless of the consideration which guide where bodily or mental pain is the direct object of contemplation."

[2] *Texas C. R. Co.* v. *Newby* (18[illegible]) (Tex. Civ. App.) 41 S.W. 102.

4. Impairment of personal or business reputation.—It seems to be fully settled that compensation for the impairment, if any, of a servant's personal or business reputation which may result f m his dismissal, cannot be recovered in an action for wrongful dismissal, under a declaration which merely claims damages generally, and contains no specific averments setting forth the particular facts relied upon as a ground for awarding such compensation [1]. Whether that compensation can be recovered in

[1] In *Walton* v. *Tucker* (Exch. Div. 1880) 45 J.P. 23, it was held that, as the amount paid into court was sufficient to cover the actual pecuniary loss sustained by the servant, and no special damage was proved, he was not entitled to have any question left to the jury, and could not recover anything beyond the amount of that loss. Pollock, B., said: "There may have been a slight imputation on the character of the plaintiff, and it was sought to put in evidence that the dismissal was intended to be prejudicial; but no special damage was proved. It may be that the mode of dismissal was wrong because vindictive; but that could have been proved by the use of words at the dismissal; there was, however, no such evidence. As in Sedgwick (Dam. p. 57), you could inquire quo animo the defendant had acted, but to do so was useless, for there was no allegation of anything of the kind in the statement of claim. What the plaintiff sought to recover was the ordinary damages for the dismissal and for the time he was out of employment, and therefore I am of opinion that the ruling at the trial was correct." Stephen, J., said: "It seems to me that, if we gave way to the argument of the plaintiff, it would introduce an extensive and undesirable change in the law. There are few actions more frequently brought than actions for wrongful dismissal, and it must have happened upon many occasions that the dismissal must have been considered as grievous to a servant, not so much from the monetary loss as from the slur cast upon his character. No case, however, binding upon this court has been produced where such injuries as are now sought to be compensated have been so compensated. I think, therefore, that no such damage can be given, and it seems to me right that it should be so, because if any further damage is due, that further damage must be caused by something which is in itself an actionable wrong. For instance if the plaintiff has been expelled by violence a count for assault might have been added; or if he had been abused, or the cause of dismissal had been stated needlessly so as not to have been within the privilege, an action for slander or malignment would lie. As in this case the plaintiff was neither assaulted nor slandered he ought not to recover more than the actual result of the breach of contract."

That a wrongfully discharged commercial traveller cannot recover damages from his employer for the injury done to the good will of his trade connection by his refusal to send him on journeys was held in *Lagerwall* v. *Wilkinson* (1899) 80 L.T.N.S. 55.

such an action under an appropriate count is a question the answer to which depends upon the rules of pleading which prevail in the given jurisdiction. The language used in several of the cases cited in the last note is fairly susceptible of the construction that damages under this head were regarded by the courts as being recoverable, if specially averred[2]. There is indeed no apparent reason why such a joinder of claims should

In *Lee* v. *Hill* (1888) 84 Va. 919, 6 S.E. 178, it was categorically laid down that neither special damage for loss of character, nor anything beyond compensation for loss of his contract, be recovered under a mere general claim for damages.

In *De Puilly* v. *St. Louis* (1852) 7 La. Ann. 443, the right of an architect to recover damages on this footing was denied without any qualification.

In *Berlin* v. *Cusachs* (1905) 114 La. 744, 38 So. 539, it was laid down that the employer is not liable for remote collateral damages arising from unjust unauthorized inferences or conclusions adverse to the employé which the public may draw from the mere fact of the discharge. It was conceded that the employer might be liable in damages if the discharge was accompanied by special features giving use to an independent cause of action.

In *Dugue* v. *Levy* (1904) 114 La. Ann. 21, 37 So. 995, it was held that an employer who had discharged an architect did not owe him anything for remote and consequential losses, such as the loss of reputation and loss of profits on other business. It was observed that, if the defendant had been guilty of any tortious behaviour towards the plaintiff, in word or in act, and the plaintiff had suffered damages therefrom in respect to his reputation or financial credit, another question would be presented. Such a loss would lie outside the contract, and possibly give rise to an action ex delicto; but it was not within the purview of the Louisiana Civil Code, Art. 2765, which empowers a proprietor to cancel a bargain at pleasure upon paying the "undertaker" the expense and labour already incurred, and such damages as the nature of the case may require.

In *Westwater* v. *Rector, etc., of Grace Church* (1903) 73 Pac. 1055, 140 Cal. 339, decided with reference to the California Civil Code, §§ 3300, 3301, providing that for breach of an obligation arising from contract the measure of damages is the amount which will compensate the party aggrieved for all detriment proximately caused thereby, and that no damages can be recovered which are not clearly ascertainable in both their nature and origin, it was held that a singer discharged from her employment without notice, in violation of her contract, could not recover damages for injury to her health, or to her feelings or reputation, by reason of such discharge.

[2] See especially *Walton* v. *Tucker*, and *Lee* v. *Hill*, ubi supra.

not be permitted in any jurisdiction in which the distinction between forms of action has been abolished. But presumably it is not allowable in any jurisdiction in which that distinction is still preserved[3].

In one case it was laid down that an apprentice who had been dismissed on the ground of misconduct of which he was not proved to have been guilty was entitled to recover for "all the damages flowing naturally from the breach," and that among the elements of damage, the jury might take into account the difficulty which an apprentice discharged for misconduct would have in obtaining employment[4]. This decision, as has been pointed out by an Australian judge, is not a specific authority for the doctrine that damages for loss of reputation are recoverable[5]. But the virtual effect of the doctrine thus propounded seems to be in some instances to enable a wrongfully dismissed servant to recover indirectly, under a general claim for damages, that compensation for impairment of reputation which he is not allowed to recover directly except under a special count. That enhancement of the difficulty of procuring other employment which is recognized as being a proximite consequence of

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[3] In *Comerford* v. *West End Street R. Co.* (1894) 164 Mass. 13, 41 N.E. 59, one count of the declaration alleged that the defendant falsely accused the plaintiff of larceny by words substantially as follows: "He is discharged from the employ of this company for misuse of passenger checks." Another count alleged that, under the circumstances set forth in the first one, the defendant wantonly dismissed the plaintiff, and falsely and publicly charged him with being dishonest therein. The court was of opinion that, if the latter count was to be construed as one for discharging the plaintiff under such circumstances as to impute to him a charge of dishonesty, it must fail, for the reason that an action of tort did not lie against an employer for wrongfully discharging an employé. The reason thus assigned would, it is clear, not have been decisive in the view of the judges who decided *Walton* v. *Tucker*, note 1, supra. The count condemned would by them have treated as one for special damages resulting from the plaintiff's dismissal.

[4] *Maw* v. *Jones* (1890) 25 Q.B.D. 107.

[5] Pring, J., in *Kelmar* v. *Souden* (1902) 2 New So. Wales St. Rep. 348, 19 N.W. 235. The other two judges declined to express a definite opinion on the point.

the dismissal is itself the result of the unwillingness of employers to hire a servant who, in the judgment of one person at least, has been guilty of improper conduct. It seems impossible to deny that an unwillingness traceable to such a cause is to all intents and purposes an unwillingness created by an impairment of the servant's reputation. The conclusion to which these considerations point is that a court which views the increased difficulty of obtaining employment which the servant will encounter on account of his dismissal as an element to be considered in estimating his damages is adopting a doctrine which, so far as the measure of compensation is concerned, is equivalent to one which would permit him to recover damages on the specific ground of a loss of reputation arising from the dismissal. But this conception of the situation is pertinent only in jurisdictions in which the assessment of damages with reference to the period subsequent to the trial is permitted. In computing the damages for the period preceding the trial the difficulty of obtaining employment is material only in so far as it bears upon the question whether the servant has exercised due diligence in seeking another position.

5. Loss of property or of personal freedom.—Where a seaman had exercised his right to abandon his ship at a foreign port on account of its being there converted to a purpose which would not only have subjected him to a material increase of risks, but also made him a participant in an illegal voyage, and had afterwards been imprisoned as a deserter by the local authorities at the port, it was held that damages for the imprisonment and the loss of his clothes which had been carried away on the ship while he was in prison were too remote to be recoverable[1]. The authority of this decision is weakened by the fact that it was not concurred in by the whole court; and the question involved may perhaps be regarded as being still an open one.

In a case where a seaman was left by the master in a foreign port it was held that the owner was liable for the loss of his

[1] *Burton* v. *Pinkerton* (1867) L.R. 2 Ex. Ch. 340 (Kelly, C.B., dissented).

clothes, though they had not been converted by the master, but had simply been left exposed, until they were destroyed[2].

In assessing the damages of a servant who, upon being dismissed, is required to leave a house which he had been permitted by his master to occupy rent free, the jury cannot take into account the value of personal property stolen owing to his own remissness in not securing it after his master had exercised his right of removing it from the house[3].

6. Loss of valuable privileges or opportunities incident to the servant's tenure of the employment.—Where a servant whose remuneration consists partly in the enjoyment of a license to occupy premises belonging to his master, with or without other privileges, is required to leave those premises after his dismissal, damages may be recovered for the deprivation of the license and incidental privileges thus granted, provided that specific evidence of their value is given[1]. If the action is tried before

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[2] *Hunt* v. *Colburn* (1853) 1 Sprague 215, citing *Hutchinson* v. *Coombs* (1840) Ware 65.

A servant engaged for a year, to be compensated by a specified salary and a suit of clothes, may, if wrongfully turned away within the year, maintain an action for damages for being prevented from becoming entitled to the clothes; but he cannot maintain trover for the clothes. *Crocker* v. *Molyneux* (1828) 3 Car. & P. 470.

[3] *Lake* v. *Campbell* (1862) 5 L.T.N.S. 582. Upon the refusal of the plaintiff to leave the house, the defendant had removed his goods and furniture into a barn, from which the plaintiff might have taken them if he had chosen to do so. During the time that the goods were there the barn was broken into, and some of the goods damaged, and £70 taken from a bureau.

[1] *Fulton* v. *Heffelfinger* (1899) 54 N.E. 1079, 23 Ind. App. 104; *Odell* v. *Webendorfer* (1900) 64 N.Y. Supp. 451, 50 App. Div. 579, (held to be error to permit jury to consider an assessment of damages use of house rent free, use of house, etc., there being no evidence as to value).

Where a person was employed for a specified period, and given, as part remuneration for his services, the use of a house, and food for himself and family, the testimony of a witness as to what the house and living expenses were worth to him is competent as furnishing a proper basis for a part of the damages, and is not subject to objection as embodying a conclusion of the witness. *Western Union Beef Co.* v. *Kirchevalle* (1895) (Tex. Civ. App.) 26 S.W. 147.

the expiration of the term in a jurisdiction where damages are assessable prospectively for the portion of the term subsequent to the trial, a sum equal to the rent and the value of the other accompanying privileges, if any, for the residue of the term should be allowed [2].

The value of the servant's board and lodging should be assessed as a part of his damages in any case where he is entitled to them under the contract [3].

Contingent advantages of a commercial nature, but of an uncertain value, which the servant would have derived from his employment if he had been allowed to enter on his duties constitute damages too remote and speculative to be recovered [4].

7. **Personal expenses.**—The allowance of personal expenses as one of the items of the damages of a wrongfully dismissed employé will not be discussed in this article, in so far as it depends upon the question whether it was an express or implied stipula-

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Where a man employed by another as a farm hand at monthly wages, with the use of a house, garden, etc., and pasture for a cow, was discharged and required to quit the premises before the expiration of the agreed term, it was held an allowance to the discharged employé of compensation on the basis of the difference between the contract price per month and what the employé was enabled to earn, plus what he had to pay for house rent, was proper where the circumstances were such that it might be inferred that the rental value of the house given up was as great as that of the house taken. *Hessel* v. *Thompson* (1898) 65 Ill. App. 44.

[2] *Re English Joint Stock Bank* (1876) L.R. 4 Eq. 350.

[3] *Sphan* v. *Williams*, 1 Penn. (Del.) 125, 39 Atl. 787.

[4] Where a merchant employed a clerk for four months, agreeing to sell him goods for his use at wholesale prices during the term of his employment, but refused to allow him to enter on his duties, it was held that the clerk could not immediately recover the difference between the wholesale and retail prices of goods which he would probably have bought had he entered the merchant's service. *Harris* v. *Moss* (1900) 37 S.E. 123, 112 Ga. 75.

A salesman employed on commission, cannot recover damages for loss of sales on goods which he was to sell for other parties on commission in connection with the employer's goods, where such additional service did not enter into the contract of employment, but was an independent agreement on his part. *Wiley* v. *California Hosiery Co.* (Cal. 1893) 32 Pac. 522.

tion of the contract that those expenses should be defrayed by the employer. Whenever that question is involved, the amount of the servant's expenses represents essentially a portion of the remuneration of the employé, and in the assessment of the damages is considered on the same footing as that portion of the remuneration which is paid by a direct transfer of money or other valuable property. In the present connection it will merely be necessary to state the effect of those decisions which bear directly upon the question of the propriety of allowing such expenses as special damages, on the ground that they were incurred in consequence either of the original formation, or of the subsequent interruption, of the contractual relations between the servant and his master.

With regard to the allowance of an indemnity for the expenses incurred by the servant in travelling to the place where the contract is to be performed there is a conflict of opinion. Some cases proceed upon the broad ground that, as such expenses must in the nature of the case have been within the contemplation of the parties, and are incurred in part performance of the contract, they are properly treated as a portion of the loss occasioned by the defendant's default in refusing to allow the servant to proceed with the stipulated work after his arrival [1]. In another case a position directly opposed to this seems to have been taken [2]. But the circumstances were somewhat peculiar, and possibly the court did not intend to repudiate the general doctrine laid down in the cases just cited. In other cases the propriety of allowing such expenses has been treated as a matter dependent upon the question whether the

[1] This is the ratio decidendi in *Woodbury* v. *Jones* (1862) 44 N.H. 206. In Missouri the allowance of such expenses is held to be proper, although they are not set out in the pleadings, since they are such damages "as may be presumed necessarily to have resulted from the breach of the contract." *Moore* v. *Mountcastle* (1880) 72 Mo. 605.

[2] In *Benziger* v. *Miller* (1873) 50 Ala. 206, while the plaintiff was travelling in a foreign country, with a view to finishing her education her father had made a contract in her behalf with the proprietor of a school for her employment as a teacher. *Held*, that she could not recover, as a part of her damages the expenses of her return journey to her own country.

servant was in the employment of the master from the time that the proposal of the latter was accepted, or only from the time when the performance of the contract was actually commenced [3].

The expenses incurred by a servant in returning home after a wrongful dismissal are not allowed, in the absence of an express stipulation in that regard, or a statutory provision applicable to the particular employment [4].

The preponderance of authority is in favour of the view that the expenses incurred by a servant in attempting to find

[3] In *Noble* v. *Ames Mfg. Co.* (1873) 112 Mass. 492, the proposal of the defendant to the plaintiff, who was then at a distant place, was embodied in the following words of a letter: "I am ready to offer you a foreman's situation at these works as soon as you get here." This was held to import, not a promise to pay the expenses of the plaintiff's removal or compensation for the time spent in removal, but merely to employ him upon his arrival. It was accordingly declared that the expenses which he had incurred in coming to the place where the employer carried on business had been incurred before the contract took effect and were for this reason not recoverable as a part of the damages. The court distinguished *Tufts* v. *Plymouth Gold Min. Co.*, 14 Allen, 407, upon the ground that in that case the contract of employment included an agreement to pay the expenses of travelling to the place where the work was to be done. The doctrine thus laid down seems to be essentially antagonistic to that applied in the cases cited in note 1, supra. It is scarcely possible to base any valid distinction upon the fact that those cases involved a refusal to accept the plaintiff's services from the very outset, and not a wrongful dismissal after the work had been entered upon.

A ship master employed under a general contract at one place, to go to another and take charge of a vessel, is in the service of the owners as soon as he starts; and, in case of a wrongful discharge, they are bound to repay the expense of his journey. *Woodbury* v. *Brazier* (1861) 48 Me. 302.

[4] In the absence of a special stipulation, the master of a ship who is discharged in a foreign port cannot recover of the owner the expenses of his homeward journey. After the discharge he is no longer in their service, and he cannot rightfully charge them with any of his expenses for the reason that such expenses are not incurred in the prosecution of their business. *Woodbury* v. *Brazier* (1861) 48 Me. 302 (assumpsit by owners of a ship against captain for balance of earnings in his hands). It was pointed out that the rights of seamen under the given circumstances were defined by statute, but not those of a captain.

In *Tufts* v. *Plymouth Gold Min. Co.* (1870) 14 Allen, 407, it was held that one who had been employed to act as agent for a term of years at a

other employment are assessable as a part of the damages recoverable [5].

8. Money paid to obtain the employment from which the plaintiff was dismissed.—In one case where a collector for a society had been dismissed, it was intimated that, if the dismissal was wrongful, the fact of his having paid money to obtain the posi-

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distant place upon a certain salary, could not upon being wrongfully dismissed, recover the expenses of his return home as a distinct item of charge, but that, in estimating the actual loss to which he was subjected by reason of his discharge, the compensation agreed to be paid him might be considered; that from this was to be deducted such sum as, by reasonable effort, he might have obtained for his time; and that, in determining how much he might have obtained for his time, regard might be had to the necessary expenses in reaching a place where he might obtain suitable employment.

[5] This doctrine was adopted in *Pennsylvania Co.* v. *Dolan* (1892) 6 Ind. App. 109, 32 N.E. 802; *Van Winkle* v. *Satterfield* (1891) 58 Ark. 617, 23 L.R.A. 853, 25 S.W. 1113.

In *Atkinson* v. *Fraser* (1852) 5 Rich. L. (S.C.) 519, the expenses incurred by the servant in changing from his original employment to that which he obtained after dismissal were assumed to be an element proper for consideration.

In *Dickinson* v. *Talmage* (1806) 138 Mass. 249, it was held that such expenses, when incurred by a father in obtaining new employment for his minor son, were properly included in the damages in an action by the father for the wrongful discharge of the son, and that this rule was properly applied, even though the son had been emancipated.

In *Tickler* v. *Andrae Mfg. Co.* (1897) 95 Wis. 352, 70 N.W. 292, it was held that the servant could not recover as part of damages the expense of removing himself and his family to another place where he had accepted employment for the purpose of reducing the damages, after finding that he could obtain no employment in the place from which he removed. This decision is essentially inconsistent with the cases cited above, and is in the opinion of the writer, erroneous. If the servant is bound to do his best to procure employment, after he had been dismissed, he must, as it would seem be entitled to use all reasonable means for the attainment of that object, and consequently to incur the expenses of removal to another place after an unsuccessful search for a suitable position in the place where he was working up to the time of the dismissal. This being the situation, the further deduction is apparently inevitable, that such expenses should not be included in an estimate of the sum to be deducted from the amount prima facie recoverable by him, a proposition which for practical purposes is plainly equivalent to asserting that they may properly be added to the damages.

In *Waxelbaum* v. *Limberger* (1888) 78 Ga. 43, 3 S.E. 257, it was held that permitting the plaintiff in the action for damages for a wrongful dis-

tion might be a matter to be considered by the jury with relation to the proper measure of damages [1].

9. Loss of profits sacrificed when plaintiff accepted employment from defendant.—A person who gives up profitable employment and devotes himself to an agency may, in case of the employer's failure to perform stipulations necessary to enable him to succeed therein, recover as part of his damages the profits of his former employment which were lost by withdrawing from it [1].

10. Value of plaintiff's inventions.—On the ground that, except in so far as he may by special stipulations have provided for certain contingencies, a servant is not entitled to recover anything more for a wrongful dismissal than the actual damages resulting from his not being allowed to continue working at the price agreed, it has been held that the damages for the master's breach of a contract, assigning letters patent, and providing for the employment of the assignor by the assignee for a definite period, at a compensation consisting in part of shares of capital stock of the assignee, to be delivered at the end of the term of employment if the assignor shall fulfil his part of the contract, do not include either the value of the patents at the time of the assignment, or the loss resulting from being deprived of the opportunity to develop the patents and thus increase the value of his stock [1].

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charge to prove expenses in endeavouring to obtain other employment, in order to lessen or absorb a set-off claimed by the defendant for the profits or wages made in other employment during the time he had contracted to serve his employer, was, even if erroneous, not a ground for reversal, where the trial judge had as to the condition upon which the verdict should be allowed to stand, required the plaintiff to remit the amount against which the expenses had been set off.

[1] *Elwood* v. *Liverpool, etc., Soc.* (1880) 42 L.T.N.S. 694.

[1] *Mylert* v. *Gas Consumers Ben. Co.* (Sup. Ct. 1890) 20 Abb. N. Cas. 262, 14 N.Y. Supp. 148.

[1] *Crescent Horseshoe & I. Co.* v. *Eynon* (1897) 27 S.E. 935, 95 Va. 151. (evidence as to value of patents, held to be incompetent). Discussing the competence of certain evidence offered as to the value of the patents at the time the defendant in error assigned them, and as to what provision in the

The value of an invention made by the servant and adopted by his master is not competent evidence with regard to the question of damages where by the terms of the contract, the employer was to have the use of any invention made by the servant during the stipulated period of employment[2].

11. Money invested in, or expended so as to benefit the defendant's business.—If the purchase of an interest in the employer's business was made a condition of the appointment of the employé to the position from which he was removed, the jury may, in assessing the damages, take into account any loss that this purchase has entailed[1]. But an employé of an insurance company is not entitled to recover as damages for his dismissal premiums paid by him upon a policy of insurance, if it was no condition of his employment that he should insure his life, and there was no connection between the two contracts[2].

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contract induced him to accept the price named in it for the patents, the court said: "It was wholly immaterial in this action what the patents were worth when assigned, or which of the provisions of the contract induced the defendant in error to enter into it. The rights of the parties were to be determined by the terms of the contract. There is nothing in the contract to justify the contention of the plaintiff that he was entitled to recover the value of the patents at the time he assigned them, or at any other time, because he was not permitted to continue in the service of the defendant company so as to develop the patents, and thus increase the value of his stock."

[2] *Pape* v. *Lathrop* (1897) 18 Ind. App. 633.

[1] *Trimble* v. *Glasgow Flax Spinning Co.* (1868) 5 Sc. L.R. 385 (plaintiff had purchased shares of the defendant company upon being made its manager).

[2] *Laberge* v. *Equitable L. Assur. Soc.* (1895) 24 Can. S.C. 595, Aff'g Que. R. 3 Q.B. 513, which rev'd Que. R. 3 S.C. 334.

PROLIXITY.

Prolixity, or the use of unnecessary words, either in ordinary conversation, in the narration of events, or the stating of an argument, is always objectionable. In the first case it may be merely wearisome to the listeners, but in the others it may mean the loss of valuable time, and, often, the cause of confusion and misunderstanding. It is sometimes merely the indulgence in a habit which should be corrected; sometimes it is resorted to for the purpose of hiding the weak points of a case; sometimes it is due to the weakness of the person who uses it, and who seeks by a flow of words to conceal his real incapacity. In the reports of our Parliamentary debates we have prolixity in every form, and in every degree, and in a very costly form too, not merely in the printing of speeches, which nobody listens to when being delivered, or reads when reproduced by the printer, but in the prolongation of the sessions with all the expenditure involved.

It is, however, proxility in the Courts with which we are concerned; and our attention is drawn to the subject by a recent Rule of Court passed by the Supreme Court of Canada, following the example of the Supreme Court of the United States. This rule is as follows: "Except by leave on special grounds no more than two counsel on each side shall be heard on any appeal, and but one counsel shall be heard in reply. Three hours on each side will be allowed for the argument, and no more, without special leave of the Court. The time thus allowed may be apportioned between the counsel on the same side at their discretion."

The intention, of course, is to prevent unnecessary time being occupied by addresses of counsel. We venture to suggest, however, that the vice of this rule is that upon every argument counsel will feel themselves at liberty to take the three hours which they are allowed. It would be better to educate loquacious barristers into the belief that "Brevity is the soul of wit," and trust to their discretion not to exceed the limits of necessity, common sense and good taste.

No one, except when compelled by the rules of politeness, need listen to the endless iteration of the drawing room bore, or that of the parliamentary bore who thinks it incumbent upon him to say over again, in as many words as he can bring to bear, what has already been said in more forcible terms than his own. But in Court the man who has undertaken the responsibility of conducting a cause, in which the interests of others are concerned, has a right to be heard, and must be listened to, no matter how prolix or prosy he may be. It is for him to judge what it is necessary to say, and say it he must after his own fashion. The judge may protest against his taking up the time of the Court, and may in various ways rebuke him, but stop him he cannot.

In the English Courts very long speeches are the exception, though some are recorded as having lasted for days. Of such long speeches a writer in a recent issue of a leading English journal discussing the subject now under consideration, gives some remarkable instances. After mentioning some causes in which the addresses of counsel had taken from two to five hours in delivery, the writer goes on to say: "But these examples sink into insignificance when compared with the speech of Sir Edward Clarke in the Lake Mines Case, which occupied three and a half days; with a famous speech of Sir John Rigby, which took seven days to complete; and with a remarkable effort of Mr. Robert Wallace, when he was a junior, which began on Monday and was brought to an end, under pressure, on the following Saturday. These were all cases in which the matters to be dealt with were full of perplexity."

In the United States speeches of such length are of frequent occurrence. Counsel there do not feel themselves bound to keep within the record, nor do the judges feel it their duty to restrain the most distant flights of imagination. A trial for murder, such as that which recently took place in New York, becomes a matter of national sensational interest and was dealt with accordingly. Consequently a case which in England, or in this country, would be disposed of in a few hours, occupied

as many weeks, only to result in a disagreement of the jury or in endless appeals. An instance in given in which even an American judge, wearied with the prolixity of a counsel, said to him, when he ventured to express a fear that he was taking up too much time, "Oh, never mind time, but for goodness' sake do not trench upon eternity."

In the article referred to the following remarks are worth quoting: "Counsel, it is sometimes said, are paid to talk. That is obviously true in a certain sense. But it must not be taken literally. If it be, then the heaviest briefs would, on the commercial basis, go to the most loquacious. Far more important, as litigants quickly learn, is the *quality* of a forensic speech than its *length*. This is an elementary lesson which many young counsel never thoroughly learn. As a biographer of Chief Justice North remarked, some talk not so much for the cause they represent as for their own sakes. In other words, they seek the doubtful credit of being notable for enduring eloquence. Hence creeps in the fault of repetition, so common and so irritating. A very humourous illustration of this failing is related by the late Serjeant Robinson. A certain counsel was arguing before four judges, and constantly repeated himself. At length one of the judges testily interposed, 'You have dealt fully with that matter, Mr. ——, four times already.' 'No, my Lord, I think only three; it is a point very difficult to understand, and as there are four of your Lordships, I think I ought, in justice to my client, to dwell upon it once again.' It was under similar annoying circumstances that Mr. Justice Channell, some time ago, interrupted a loquacious counsel with the remark: 'Counsel always seem to think that a judge cannot understand anything unless it is repeated at least ten times. I assure you that I understand it, say, the second or third repetition.'"

This reminds me of a story told of the late Bishop Strachan of Toronto. A deputation from a certain congregation waited upon him to complain of their minister who, they said, had preached the same sermon on three successive Sundays. "And

what was the text," said the Bishop, in his well-known Aberdonian accent. None of the deputation could answer. "Go home," was the reply, "and I will write to Mr. Blank and tell him to preach the same sermon again next Sunday."

Speaking of the duty of counsel the writer referred to says: "After all, the duration of speeches must bear some relation to the importance and difficulties of the cases in hand, and in many matters it would clearly be impossible to present all the facts and all the arguments that may legitimately be directed to them in any given space of time. So long as indulgence is not violated, serious complaint is not heard. As was remarked to the writer by a barrister yesterday, only those who have pondered over a case for many days, searching out its weaknesses and how they can best be met, probing into precedents that tell one way or the other, can appreciate the difficulty of being brief. The fixing of an arbitrary limit to speech would inevitably end in many a case being inadequately presented, and would incur protest from both counsel and litigant."

As was well remarked by Lord Justice Mathew, when speaking of the waste of time by frequent repetition, "In my judgment the arguments most often repeated are the worst; the good ones take care of themselves."

A fine example of the way in which brevity of language may be combined with power of argument, and strength of expression, is to be found in that most brilliant of many brilliant chapters in Macaulay's History, in which he describes the trial of the seven bishops at the close of the reign of James the Second. The charge against the bishops was that a petition which they presented to the King was a false, malicious, and seditious libel. The youngest of the counsel for the defence was John Somers, then unknown to fame, but later known to history as a great lawyer, a great judge, and a great statesman. He was the last to speak for the bishops, and he only spoke for five minutes, but that five minutes' speech established his reputation as a orator and a constitutional lawyer. We quote from Macaulay: "The offence imputed was a false, a malicious,

and a seditious libel. False the paper was not; for every fact which it set forth had been proved from the Journals of Parliament. Malicious the paper was not, for the defendants had not sought an occasion of strife, but had been placed by the Government in such a position that they must either oppose themselves to the royal will, or violate the most sacred obligations of conscience and honour. Seditious the paper was not, for it had not been scattered by the writers among the rabble, but delivered privately into the hands of the King alone; and a libel it was not, but a decent petition such as by the laws of England a subject who thinks himself aggrieved may with propriety present to the Sovereign."

In contrast to this we may refer to a speech addressed many years ago by a Canadian barrister to the Parliament of the then Province of Canada on a question of great national importance. A bill for the abolition of the seignorial tenure in Lower Canada was before the Legislative Assembly, and Mr. Christopher Dunkin, afterwards a member of Parliament, and later a judge, appeared at the bar of the House in opposition to the measure. His speech, in which it was necessary for him to deal with a number of questions, legal, historical, and constitutional, occupied several days, though expressed in as concise a form as the nature and importance of the case permitted.

In the first instance above referred to all details and technicalities had been previously dealt with, and it only remained to present to the Court the great principles which had been arrived at from the evidence before it. The merit of Mr. Somers was that in the most effective words, and in the briefest possible terms, he said what was necessary, and did not allow himself to utter a syllable more.

The merit of Mr. Dunkin was that, having a great mass of details to lay before his audience, he so marshalled them that there was no redundancy of language, no useless repetition, and yet nothing was left out which was essential to his cause. He did not weary his hearers because they felt that they were not called upon to listen to a single statement that was useless

to the argument, that there was nothing said merely for effect, and that there was nothing of that most aggravating form of prolixity, vain repetition.

RUSTICUS.

MARRIED WOMEN'S PROPERTY ACT.

When the Royal assent is given to the new Married Women's Property Act now before the British Parliament, an end will be put, as the *Law Times* tells us, to the "extraordinary position which *Re Harkness and Allsopp's Contract*, 74 L. T. Rep. 652; (1896) 2 Ch. 358, eleven years ago disclosed. Previously to the new Act a married woman could convey her own property, if it was acquired or she was married after the coming into operation of the Married Women's Property Act, 1882, as a feme sole; but if she was a trustee, even if one of many trustees, her husband had to join, and, in the case of freeholds, the deed be acknowledged by her. There were exceptions to this rule, some statutory, and some made by the judges in order to avoid the absurdity of the strict interpretation of the law. As the Act is retrospective, *Re Harkness and Allsopp's Contract* and all the curious learning which was founded on it can now happily be dismissed to the limbo of things to be forgotten."

An amendment similar to that now proposed to be made in England would seem to be required, also, in Ontario. The enabling section of the Married Women's Real Estate Act (R. S. O. c. 165, s. 3), would appear to apply only to a married woman's beneficial interest in real estate. Even as regards personal property held in trust, except as to such as comes within section 10 of R. S. O. c. 163, there would still seem to be a necessity for the husband's concurrence. This as above said is an absurdity. The Law Department of Ontario might with advantage look into this matter.

We notice that for some unexplained reason the English Act is not to come into force until January 1, 1908. It is not clear why there should be this delay. Possibly it may be thought more convenient, as a matter of remembrance, that the change should be made at the beginning of the year.

There is nothing new in the legal proposition that citizens of a municipality have the right to the reasonable use of the streets on their surface and above their surface. Persons or corporations handling the little known agency of electricity, and having also the right to use the streets for its poles and wires have also their rights, but as they handle that most dangerous thing called electricity, they are bound to use the highest measure of skill and care in dealing with it. The rights are correlative, but the difficulty is the application of these rights to particular circumstances. In the case of *Temple* v. *McComb City Electric Co.* (*Miss.*) 42 Sou. Rep. p. 874, it appears that a small boy climbed into a small oak tree on the street and came in contact with an uninsulated wire and was injured thereby. The Court considered that this was just the kind of tree that juveniles would be likely to climb, that small boys are known to be in the habit of climbing on every favourable opportunity, and that the electric light company must be assumed to have known the habits of small boys in this regard. They should therefore have provided some proper safeguard, and not having done so, were liable for the injury sustained.

That judges as well as counsel are only human, and subject to the axiom, humanum est errare, a short experience at the Bar makes manifest. One, who himself now adorns a high judicial position in the Province of Ontario, was once somewhat nonplussed, when arguing a case, by being asked by the presiding judge (now deceased), "What I want to know is this, did his widow survive him?" Another counsel a little sententious perhaps in his manner, but both learned and able, after vainly labouring for some time to convince the Court, was suddenly asked, by one of the judges, "Who was the mother-in-law of the plaintiff?" The startling nature of the question probably threw him off his guard, for he promptly replied: "The mother-in-law of the plaintiff, my Lord, was a man named . . . ." The rest of his answer was lost in a general cackle from the Bar.

REVIEW OF CURRENT ENGLISH CASES.

PROBATE—INCORPORATION IN WILL OF UNATTESTED DOCUMENT.

University College of North Wales v. *Taylor* (1907) P. 228. The only question in this case was whether an unattested memorandum had been properly admitted to probate as part of the testator's will. The will was dated the 27th June, 1905, and bequeathed certain legacies for the founding of scholarships and prizes "to be held upon such terms, conditions and subject to such rules and regulations as are contained and specified in any memorandum amongst any papers written or signed by me." Among the testator's papers was a memorandum signed by him and dated March 12, 1905, which was proved by oral testimony to have been in existence at the date of the execution of the will and Barnes, P.P.D., held, that in these circumstances, it was incorporated in the will and had been properly admitted to probate.

PRACTICE—MOTION TO ATTACH FOR NOT ATTENDING FOR EXAMINATION PURSUANT TO ORDER—CONDUCT MONEY.

In re Harvey (1907) P. 239. Barnes, P.P.D., refused to make an order for attachment against a person for not attending to be examined pursuant to an order, no conduct money having been paid or tendered.

CLUB—RULES OF CLUB—POWER TO ALTER RULES—FUNDAMENTAL OBJECTS OF CLUB—GENERAL MEETING—RESOLUTION.

In *Thellusson* v. *Valentia* (1907) 2 Ch. 1 the Court of Appeal (Cozens-Hardy, M.R., and Barnes, P.P.D. and Kennedy, L.J.) have affirmed the judgment of Joyce, J. (1906) 1 Ch. 480 (noted ante, vol. 42, p. 347). The action was brought by the member of a recreation club, in order to have a rule passed at a general meeting of the club, abolishing pigeon shooting, declared invalid and ultra vires. The plaintiff rested his case on the ground that pigeon shooting was one of the purposes for which the club had been originally established, and that the rule in question was in effect an alteration of one of the fundamental objects of the club—but the Court of Appeal agreed with Joyce,

J., that although pigeon shooting was one of the objects for which the club was formed, yet that could not be considered to be any more a fundamental object than any of the other sports mentioned.

ANNUITY—WILL—DIRECTION TO PURCHASE—ANNUITY—DEATH OF ANNUITANT BEFORE PURCHASE OF ANNUITY—RIGHTS OF REPRESENTATIVES OF DECEASED ANNUITANT.

In re Robbins, Robbins v. *Legge* (1907) 2 Ch. 8. The Court of Appeal (Cozens-Hardy, M.R., and Barnes, P.P.D., and Kennedy, L.J.) have unanimously affirmed the judgment of Eady, J., (1906) 2 Ch. 648, holding that where a testator directs by his will the purchase of an annuity, and the annuitant survives the testator, but dies before the purchase is effected, the personal representatives of the deceased annuitant are entitled to be paid the sum which it would have been necessary to pay at the date of the testator's death to purchase the annuity.

LUNATIC—FOREIGN CURATOR—TRANSFER OF ENGLISH STOCKS TO FOREIGN CURATOR OF LUNATIC—DISCRETION.

In re De Larragoiti (1907) 2 Ch. 14. An application was made by the foreign curator of a lunatic resident out of the jurisdiction, for the transfer of certain stocks and shares standing in the lunatic's name in England. It appeared that the lunatic had been so found by a French Court, and, in pursuance of the request of the family council, the applicant had been appointed by the French Court curator, and the family council had authorized him to make the present application which had been approved by the French Court. The lunatic was an American, and prior to his lunacy, had carried on business in Paris, and was a man of considerable wealth, and the transfer of the stocks and shares in question was not required for payment of debts, or maintenance. The Court of Appeal (Cozens-Hardy, M.R., and Kennedy, L.J.) held that the matter was one entirely within the discretion of the Court, and, having regard to all the circumstances, the Court made the order asked.

MORTGAGE—SALE BY MORTGAGEE—SURPLUS PROCEEDS OF MORTGAGED PROPERTY—TRUST FOR MORTGAGOR, "HIS HEIRS OR ASSIGNS"—CONVERSION—REALTY OR PERSONALTY—LUNACY OF MORTGAGOR.

In re Grange, Chadwick v. *Grange* (1907) 2 Ch. 20. The

Court of Appeal (Cozens-Hardy, M.R., and Barnes, P.P.D., and Kennedy, L.J.) have affirmed the judgment of Parker, J. (1907) 1 Ch. 313 (noted, ante, p. 361), holding that though the trust declared by a mortgage of the surplus proceeds of the sale of the mortgaged property after satisfying the claim of the mortgagee was in favour of the mortgagor, "his heirs or assigns," yet upon a sale taking place in the lifetime of the mortgagor a conversion into personalty took place, and though the mortgagor before sale became and died a lunatic, yet the proceeds must be treated as his personal estate.

WILL—CONSTRUCTION—LIFE INTEREST TO WIFE "IF SHE SHALL SO LONG CONTINUE MY WIDOW"—BIGAMOUS MARRIAGE—"WIDOW."

In re Wagstaff, Wagstaff v. *Jalland* (1907) 2 Ch. 35. In this case a testator who had to his knowledge contracted a bigamous marriage, by his will left certain personal estate to his "dear wife Dorothy Josephine Wagstaff," and after making other gifts, left all his residuary estate to his said wife and two others in trust for sale and to invest the proceeds and pay the income to "my said wife during her life if she shall so long continue my widow," and upon her death or marriage in trust for the plaintiff. After the testator's death the pretended wife had confessed to bigamy and had been sentenced, her true husband being still living. As there had been no legal marriage with the testator the plaintiff claimed that the gift to the "wife" during life or widowhood was null and void; but Kekewich, J., held that the words "wife" and "widow" had been used by the testator in a secondary sense, and sufficiently designated the person intended to be benefited though she could not legally claim either designation, and that she was therefore entitled to the life estate until she contracted another marriage subsequent to the death of the testator.

LESSOR AND LESSEE—COVENANT FOR RENEWAL—COSTS OF INVESTIGATING LESSEE'S TITLE.

In re Baylis (1907) 2 Ch. 54. There is one point in this case which deserves attention. By a perpetually renewable lease the lessors covenanted that they would make renewals "at the request, costs and charges of the lessee." The lessors incurred certain costs in investigating the title of applicants for a renewal, which were disallowed on taxation; on appeal, however, Keke-

wich, J., held that the covenant meant that the lessors were to be at no cost, and that, therefore, the lessors were entitled as against the lessees to the costs in question so far as they were reasonably and necessarily incurred.

COMPANY—DIRECTOR—QUALIFICATION SHARES OF DIRECTOR HELD IN TRUST—RIGHT OF CESTUIS QUE TRUST OF SHARES TO CLAIM ACCOUNT OF REMUNERATION RECEIVED BY TRUSTEE AS DIRECTOR.

In re Dover Coalfield Extension (1907) 2 Ch. 76. A somewhat novel attempt was made to compel a director of a company, whose qualification shares were held in trust, to account to the cestuis que trust of the shares for the remuneration he had received as director. The facts were briefly as follows: There were two companies, the D Company and K Company. The D Company purchased shares in the K Company and in order to be represented on the directorate of that company, transferred a thousand shares to one Cousins to qualify him for election. He was accordingly elected and received the ordinary remuneration of a director of the K Company. The D Company having been ordered to be wound up the liquidator claimed that Cousins should account to the D Company for the remuneration he had received as director of the K Company. Warrington, J., however, held that the claim was ill-founded, and that the remuneration was for work done by Cousins, and was not in any sense profit received as holder of the shares.

WILL—PARTNERSHIP—SPECIFIC DEVISE OF PARTNER'S SHARE IN PART OF PARTNERSHIP ASSETS.

In re Holland, Brettell v. *Holland* (1907) 2 Ch. 88. A partner in a solvent partnership by his will devised his share in certain realty belonging to the partnership in trust to sell the same and divide the proceeds between his brother and a niece. A question was raised whether in ascertaining the testator's share in the partnership business the realty in question was to be treated as part of the assets of the partnership, or whether a moiety thereof or the proceeds thereof was effectually disposed of by the devise above referred to. Neville, J., held that, as between the beneficiaries of the testator's estate, there had been an effectual disposition of the testator's share in the realty in question, and that, as the other assets of the partnership were sufficient for the payment of the debts of the partnership, as between the bene-

ficiaries, the realty in question was free from liability to contribute to the partnership debts.

LANDLORD AND TENANT—LEASE BY MORTGAGEE "AS AGENT"—LESSEE'S COVENANT NOT TO SELL OR REMOVE MANURE—COVENANT RUNNING WITH THE LAND.

In *Chapman* v. *Smith* (1907) 2 Ch. 97 the action was to enforce a covenant by a lessee not to remove or sell manure from off the demised premises. The lease in question was made by one Robinson, who was mortgagee of the property, but who also acted as agent of the mortgagor in collecting the rents. Robinson was not in possession when the lease was made and he was described in the lease "as agent hereinafter called the 'landlord.'" Subsequently to the lease he sold and conveyed the property to the plaintiff, who claimed that the covenant in question was one running with the land which he, as assignee of the reversion, was entitled to enforce. The defendant contended that the lease was made by Robinson as agent for the mortgagors and that there was consequently no legal demise; but Parker, J., came to the conclusion that looking at the surrounding circumstances, the use of the word "agent" was not sufficient to prevent the legal estate vested in Robinson from passing, and that the plaintiff as assignee of the reversion was entitled to enforce the covenant.

MORTGAGE—PRIORITY—LEGAL ESTATE—POSTPONEMENT OF LEGAL TITLE—FRAUD—NEGLIGENCE.

Walker v. *Linom* (1907) 2 Ch. 104 is a case which, owing to our system of registration of deeds is not of much direct value, but it may be briefly referred to here as shewing that a trustee of the legal estate who neglects to take reasonable precautions to obtain possession of the title deeds, is liable to be postponed to a subsequent mortgagee. In this case the land in question was conveyed to trustees by way of marriage settlement. Certain deeds were handed over to the trustees, but they neglected to inquire for, and were ignorant that the settlor retained, the conveyance to the settlor himself. After the settlement the settlor mortgaged the property and handed over to the mortgagee the conveyance, and the mortgagee sold the property, both he and the purchaser having no notice of the settlement. The action was brought by the wife against the trustee, the mortgagee and the purchaser from him and the settlor, claiming that the wife under

the settlement was entitled to priority, but Parker, J., held that the leaving of the conveyance in the hands of the settlor was such negligence on the part of the trustees that they and the plaintiff were postponed to the equitable title of the mortgagee and the purchaser from him.

LIQUOR LICENSE ACT—SALE OF LIQUOR BY AGENT—AGENT LICENSED, PRINCIPAL UNLICENSED.

Dunning v. *Owen* (1907) 2 K.B. 237 may be briefly noted. It was a prosecution for selling liquor without a license. The sale was made by the agent of an unlicensed person, but the agent who made the sale was licensed. The magistrate held that no offence had been committed and dismissed the summons; but the Divisional Court (Darling and Phillimore, JJ.) held that he was wrong, and that the principal on whose behalf the sale was made should have been convicted.

INSURANCE—FRAUD OF INSURANCE AGENT—PAYMENTS OF PREMIUMS INDUCED BY FRAUDULENT REPRESENTATIONS OF AGENT—AVOIDANCE OF POLICY—RECOVERY OF PREMIUMS—FAILURE OF CONSIDERATION.

Kettlewell v. *Refuge Assurance Co.* (1907) 2 K.B. 242 was an action to recover premiums paid in respect of a policy on the life of the plaintiff. The plaintiff effected the insurance in question, and obtained a policy from the defendants whereby they in consideration of a weekly premium agreed to pay the plaintiff a certain sum on the death of a third person. After the policy had been in force for a year, the plaintiff proposed to let it lapse, whereupon the defendant's agent, with the view of inducing the plaintiff to continue the payment of the premiums, without any authority from the defendants, represented to the plaintiff, that if she continued to pay the premiums for the further period of four years only, that then she would be entitled to a paid-up policy. Relying on this representation the plaintiff continued the payment of the premiums for four years, and then applied to the defendants for a paid-up policy which was refused. The plaintiff then brought her action to recover the premiums which she had been induced to pay in consequence of the agent's misrepresentation. The defendants contended that there had not been a total failure of consideration inasmuch as the plaintiff had been, during the four years, pro-

tected against the contingency of the life insured dropping, and that therefore the policy could not be treated as void. The County Court judge gave judgment in favour of the plaintiff, and on appeal the Divisional Court (Phillimore and Bray, JJ.) affirmed his decision. That Court held that the policy was void at the plaintiff's option, and that she was entitled to exercise that option whenever she discovered the fraud, and that her right to do so was not affected by the fact that in the meantime the contract had been binding on the defendants: also, that though the representations of the agent were made without authority, they were nevertheless as to a matter within the scope of the agent's authority, and the defendants could not retain any benefit resulting to them from such misrepresentation.

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

Andersen v. *Martin* (1907) 2 K.B. 248, was an action to recover on a policy of marine insurance. The policy excepted inter alia the loss of the vessel by capture. The vessel had, in fact, been captured by a belligerent, but after her capture, and before her condemnation by a Prize Court, she became a total wreck. The vessel was subsequently condemned as a prize, by a Prize Court, and Channell, J., held that though the capture of a vessel does not of itself divest the owner's property in her, yet upon the ship being subsequently condemned by a Prize Court, the title of the captors relates back to the time of the capture, and consequently the plaintiff was not entitled to judgment.

PRACTICE—JOINDER OF SEVERAL CAUSES OF ACTION—PAYMENT OF LUMP SUM INTO COURT—RULE 123—(ONT. RULE 185).

Benning v. *The Ilford Gas Co.* (1907) 2 K.B. 290 was an action by several plaintiffs claiming relief for injuries arising out of the same transaction, viz., the obstruction by defendants of a stream or water course. The action was constituted under Rule 123, (Ont. Rule 185). The defendants paid into Court a lump sum of £100 in satisfaction of the claims of all the plaintiffs. The aggregate of the plaintiffs' claims was £1,115 15s. The action was tried before a referee who treated the payment into Court as valid and assessed the aggregate damages of the plaintiffs at £79 10s. And he found that the payment into Court was more than sufficient to satisfy the plaintiffs' claims. He

accordingly gave judgment for the defendant with costs up to the date of payment into Court less the costs of the plaintiffs up to that date. The plaintiffs appealed, on the ground that the referee ought not to have treated the payment into Court as properly made because the defendants did not specify particularly how much of the £100 was paid in respect of each of the plaintiffs' claims but the Divisional Court (Darling and Phillimore, JJ.) held that the payment was regular, and if plaintiffs felt embarrased by it, their remedy was to obtain particulars of the payment.

CRIMINAL LAW—SUMMARY JURISDICTION—"COMPLAINT BY OR ON BEHALF OF PARTY AGGRIEVED"—OFFENCE AGAINST PERSON—INJURED PARTLY DISABLED FROM ACTING.

In *Pickering* v. *Willoughby* (1907) 2 K.B. 296 the Divisional Court (Lord Alverstone, C.J., and Darling and Phillimore, JJ.) held that where a person is unlawfully assaulted and beaten, and is so old and infirm and so much under the control of the assailant as to be unable to institute or authorize proceedings for the prosecution of the offender, an information laid by a relative of the injured person in respect of the assault is a complaint "on behalf of the party aggrieved" within a statute authorizing justices to exercise jurisdiction on complaint made "by or on behalf of the party aggrieved"; and that the assailant had been properly convicted on such information.

ELECTION PETITION—BALLOT PAPER—MARKING BALLOT—POSITION OF VOTER'S MARK.

In Pontardawe Rural District Election (1907) 2 K.B. 313 the Divisional Court (Ridley and Phillimore, JJ.) held that a ballot paper is not rendered void under the Ballot Act, 1872, because the voter has placed his mark thereon outside the ruled compartments on the paper intended to receive the voter's mark; provided that the name is opposite the name of a candidate, so as to leave no doubt for whom the voter intended to vote.

TRESPASS—DAMAGES—REMOTENESS—FOWLS STRAYING ON HIGHWAY—DAMAGE TO BICYCLIST—LIABILITY OF OWNER.

Hadwell v. *Righton* (1907) 2 K.B. 345. This was an action brought by the plaintiff to recover damages from the defendant

in the following circumstances. The plaintiff was travelling along a highway on a bicycle, the defendant's chickens had, as the custom of chickens is in rural parts, escaped from his premises and were quietly pursuing their way along the road, when as the plaintiff approached a dog owned by some other person suddenly darted out and frightened the chickens, and in the confusion one of the chickens flew into the wheel of the plaintiff's bicycle, and upset the plaintiff and damaged his wheel for which he claimed to recover compensation from the defendant; but the Divisional Court (Phillimore and Bray, JJ.) agreed with the judge of the County Court that the damages were too remote, following *Cox* v. *Burbidge*, 13 C.B. (N.S.) 430, and they held that the damage occasioned was not what could be reasonably apprehended from suffering chickens to go upon the highway—as the chickens would have done no harm but for the wrongful act of the dog.

NUISANCE—TRADE DISTRICT—NOISY NEIGHBOURHOOD—PRINTING MACHINERY—INCREASE OF NOISE—RESIDENCE—INJUNCTION.

In *Polsue* v. *Rushmer* (1907) A.C. 121 the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, James, Robertson, and Atkinson) have affirmed the judgment of the Court of Appeal (1906) 1 Ch. 234 (noted ante, vol. 42, p. 335). The appeal was brought on the ground, as the appellants contended, that the Court below had failed to take into account the fact that the neighbourhood was a noisy one due to the presence of other manufacturing establishments besides the defendants, and that the plaintiff was not entitled to insist on the same amount of comfort and freedom from noise as in a quiet neighbourhood. Their Lordships, however, thought that on the facts the injunction was rightly granted and dismissed the appeal.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

EXCHEQUER COURT.

Burbidge, J.] MONTGOMERY *v.* THE KING. [April 15.

Tort by Crown's servants—Diversion of flowing water—Liability—Amendment of petition of right.

The suppliant, by his petition of right alleged, in substance, that the Crown through the Minister of Railways and Canals, and his servants, agents, and employees, having no right to do so, had diverted the water of a certain brook which flowed through his property in the Parish of Dalhousie, N.B., and used the same for supplying the engines and locomotives of the Intercolonial Railway and vessels in the harbour of Dalhousie.

Upon argument of objections in law to sufficiency of petition,

Held, that the suppliant's action was laid in tort, that a petition of right would not lie therefor.

Upon an application by the suppliant to amend his petition, the Court declined to grant the same until a draft of the proposed amendments was submitted and the Court had an opportunity of considering how far it was necessary for the suppliant to depart from his original petition.

Magee, for suppliant. *Newcombe*, K.C., for respondent.

Burbidge J.] THE KING *v.* ROGERS. [April 22.

Expropriation—Licensed hotel—Special value of premises to owner arising from liquor license—Compensation.

The Crown expropriated for the purposes of a public work certain premises which the owner used as a hotel licensed to sell liquors. The license was an annual one, but, as the license laws then stood, it could be renewed in favour of the then owner, or in case of his death, of his widow; but no license could be granted to any other person for such premises. If the

owner sold the property it was shewn that the use to which he put it could not be continued.

Held, that while this particular use of the property added nothing to its market or selling value, it enhanced its value to the owner at the time of the expropriation and that such was an element to be considered in determining the amount of compensation to be paid to him for the premises taken.

MacIlreith, and *Tremaine*, for plaintiff. *W. B. A. Ritchie*, and *Tobin*, for defendants.

Burbidge, J.] THE KING *v.* THOMPSON. [April 22.

Expropriation—Foundry—Depreciation in value of machinery and tools by reason of expropriation—Compensation.

Where a building used as a foundry is expropriated for the purposes of a public work, the owner who is unable to find suitable premises elsewhere to carry on his business is entitled to compensation for the depreciation in value of the machinery, tools and other personal property with which his foundry is fitted up.

MacIlreith, and *Tremaine*, for plaintiff. *McKinnon*, for defendant.

Burbidge, J.] THE KING *v.* STAIRS. [April 22.

Expropriation—Claim for damages for business—Claim for depreciation of value of machinery—Compensation.

Where the whole property is taken and there is no severance the owner is entitled to compensation for the land and property taken, and for such damages as may properly be included in the value of such land and property. He is not entitled to damages because such taking injuriously affects a business which he carries on at some other place.

Defendants, in expropriation proceedings, at the time their premises were taken had them fitted up as a boiler and machine shop. The machinery was treated as personal property by the defendants and sold for less than it was worth to them when used for such purposes,

Held, that they were entitled to compensation for the depreciation in value of the machinery by reason of the taking of the premises where it had been used.

MacIlreith, and *Tremaine*, for plaintiff. *Bell*, for defendant.

Burbidge, J.] SEDGEWICK, *v.* THE KING. [June 10.

Public work—Government railway—Injury to the person—Negligence of Crown's servant—Liability.

The suppliant, while waiting on the platform of the Intercolonial Station at Stellarton, N.S., to board a train, was knocked down by a baggage truck and injured. The truck was being moved by the baggage master. The evidence shewed that the accident could have been prevented by the exercise of ordinary care on the part of the baggage master.

Held, that as the injury of which the suppliant complained was received on a public work and resulted from the negligence of a servant of the Crown while acting within the scope of his duties and employment, the Crown was liable therefor.

Judgment for the suppliant for $600 and costs.

Drysdale, K.C., *Mellish,* K.C., and *Sedgewick,* for suppliant. *MacIlreith,* and *Tremaine,* for respondent.

Burbidge, J.] ARMSTRONG *v.* THE KING. [June 24.

Government railway—Injury to the person—Negligence—Liability of Crown 50-51 Vict. c. 16, s. 16(c)—Interpretation—Art. 1056 C.C.L.C.—Right of Action—Waiver by accepting indemnity.

The provisions of section 16(c) of 50-51 Vict. c. 16 (now R.S.C. 1906, c. 140, s. 20(c)) not only gives exclusive original jurisdiction to the Exchequer Court of Canada to hear and determine claims against the Crown arising out of any death or injury to the person or to property on any public work resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, but imposes a liability upon the Crown to answer in such cases for the wrongful acts of its officers or servants.

The suppliant's husband, in his lifetime a locomotive engineer employed on the Intercolonial Railway, was killed in an accident on the railway while on duty. The accident happened by reason of a fireman, who was employed on another train belonging to the same railway, failing properly to set and lock a switch in the performance of his duty.

Held, that the case fell within the provisions of s. 16(c) above mentioned, and that the Crown was liable in damages.

Held (following *Miller* v. *Grand Trunk Ry. Co.*, (1906) A. C. 187, the result of which is to overrule *The Queen* v. *Grenier*, 30 S. C. R. 42), that the right of action conferred by art. 1056 of the Civil Code of Quebec on the widow and relatives of a deceased employee whose death has been caused by negligence for which the employer is responsible, is an independent and personal right of action; and is not, as in the English Act, known as Lord Campbell's Act, conferred on the representatives of the deceased only; and that a provision in a by-law of a society to which the deceased belonged, and to the funds of which the Crown subscribed, that in consideration of such subscription no member of the society or his representatives should have any claim against the Crown for compensation on account of injury or death from accident, did not constitute a good defence to the widow's action.

Laflamme, and *Mitchell*, for suppliant. *Newcombe*, K.C., for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Boyd, C.] PLENDERLEITH *v.* PARSONS. [June 20.

Interest—Mortgage—No provision for interest after maturity—Interest at statutory rate—"Liability"—Meaning of.

63 & 64 Vict. c. 29 (D.), which provides for the statutory rate of interest being five, instead of six per cent., as under the Interest Act, R.S.O. 1886, c. 129, contains the proviso that the Act is not to apply to "liabilities" existing at the time of its passing.

Held, that the proper construction of the word "liabilities" is with reference to interest only.

Where, therefore, in a mortgage, bearing interest at seven p.c. there was no provision for the payment of interest after maturity, no interest by virtue of the mortgage itself would thereafter be payable, and interest would only be allowed by

way of damages, so that no liability existed as to which the proviso would apply, and, therefore, after said maturity interest at the statutory rate of 5 p.c. only was allowable.

Heaslip, for the mortgagor. *Irwin*, K.C., for the mortgagee.

DIVISION COURTS.

FIRST DIVISION COURT—ALGOMA DISTRICT.

ROGERS *v.* DINSMORE.

Woodman's Lien Act, R.S.O. c. 154, *s.* 16, *sub-ss.* 1, 2—*Logs and timber—Lumber.*

No lien attaches on "lumber," that is, i.e., logs or timber sawn into board, scantlings, etc., under the Woodman's Lien Act, which, being an exception to the common law, must be strictly construed.

[Sault St. Marie, O'Connor, J. J., Aug. 15, 1907.

This was an application by certain workmen of the defendant seeking to enforce liens against lumber made, sold and delivered by defendant before their liens were filed to the Simms Lumber Co. It was admitted that the lumber seized under the lien was the product of logs sawn in defendant's mill, and the sole question in dispute was whether any lien attached to the product of the timber or logs after the same had been sawn and converted into lumber.

O'CONNOR, J.J.:—It was contended by counsel for the lienholders that lumber is a species of timber, and that so long as it can be identified as the product of the "logs or timber" in respect of which a lien would attach before being sawn, that the same right existed after being sawn. He quoted sub-s. 2 of s. 16 of the Woodman's Lien Act as authority for this contention from which he urged that if the lumber can be identified, the lien still attaches.

The Woodman's Lien Act was passed for the special benefit of woodmen to enable them to secure their wages in a summary way. It is not in force in any of the counties of Ontario, only

in the districts. It is an exception to the common law and must be strictly construed. See *Dallaire* v. *Gauthier*, Q.R. 24 S.C. 495, Can. An. Digest, 1904, p. 170.

By a strict interpretaion of sub-s. 1 of s. 2 the words "logs or timber" mean and include only what the sub-section defines them to mean, viz.: logs, timber, cedar posts, telegraph poles, railroad ties, tan bark, shingle bolts or staves or any of them, also by amendment of the Act, pulp wood.

I might here note that before the amendment, it had been decided by some of the district judges that pulp wood came within the definition of "logs and timber," and so was subject to the operation of the Act. Nevertheless the Legislature deemed it advisable to amend the Act by having the words "pulp wood" added. It is reasonable to assume that if it was intended to include lumber that it would have been specially named.

Applying the principle of strict construction to the present case, I cannot so far stretch the literal meaning of the Act as to hold that the word "timber" includes boards, planks, scantling, etc., when, if it had been the intention of the Legislature to include these, the word "lumber" would have naturally been inserted in order to express such an intention. Tan bark and shingle bolts are specially named, although, according to the same reasoning employed on behalf of the plaintiff, they might be included in the word "timber." Cordwood might also, according to the same reasoning come within the meaning of the word "timber," but it could not be successfully argued that cordwood is subject to the Act. The only authorities cited all go to shew that when the logs are sawn and converted into lumber the lien ceases to attach.

The case of *Baxter* v. *Kennedy*, 35 N.B. Rep. 179, is directly applicable. In that case it was held that the words "logs and timber" were not intended to include deals and other manufactured lumber. In the absence of any Ontario case deciding the point, I must give effect to the cases cited, and to the language of the statute defining the meaning of the words "logs and timber."

I am of the opinion, therefore, that the liens of the plaintiff and the other lien-holders who have come in and proved their claims against Dinsmore do not attach and cannot be enforced against the lumber seized thereunder belonging to the Simms Lumber Co. This lumber must be released from seizure and the liens vacated and the action dismissed as against the Simms Lum-

ber Co. with costs. The plaintiff and other lien-holders who have proven their claims against Dinsmore will have judgment against him therefor, with costs to include the costs of the liens.

Province of Manitoba.

KING'S BENCH.

Mathers, J.] [July 8.

BLACK *v.* WINNIPEG ELECTRIC RY. CO.

Injunction—Municipality—By-law or resolution—Approval of plans.

Motion to continue an ex parte injunction to prevent the defendants from constructing a loop line on certain streets of the City of Winnipeg which they had been authorized to construct by a resolution of the council, on condition that they should also construct another loop line on certain other streets of the city.

Held, 1. Notwithstanding the provision of s. 472 of the Winnipeg charter that "the powers of the council shall be exercised by by-law when not otherwise authorized or provided for," such an authorization may be given by resolution. *Toronto* v. *Toronto Ry. Co.*, 12 O.L.R. 534, followed.

2. It was not a valid objection to the resolution that it was an approval of a report of the Board of Control, even if such Board had no power to deal with the matter.

3. The council having approved of the construction and of the plan submitted, and the city engineer having also, except in one particular, approved of the details as required by law before construction should begin, it was not a sufficient ground for an injunction that the council had not passed the plans as varied by the engineer.

4. The council had power to give the conditional approval, and the fact that the city might be unable afterwards to enforce the condition would not make that approval void.

A. J. Andrews and *Burbidge*, for plaintiff. *Munson*, K.C., and *Haffner*, for defendants.

Province of British Columbia.

SUPREME COURT.

Martin, J.] REX *v.* FORD. [May 24.

Criminal law—Direction to jury—Assault committed by prisoner to recover money out of which he had been cheated—Whether he is guilty of robbery or assault.

Where the prisoner acted in the bonâ fide belief that he had been swindled, and in the belief that he was entitled to retake the money, committed an assault for that purpose alone, and did retake the money or a portion of it, in that sole and bonâ fide belief, the jury, on consideration of the facts, would be justified in acquitting him on a charge of robbery, although it was open to them, on the same facts, to convict on a charge of assault.

Maclean, K.C., (D. A.-G.), for the Crown. *Howay,* for the prisoner.

Full Court.] [July 22.

EASTERN TOWNSHIPS BANK *v.* VAUGHAN.

Waters and water rights—Riparian owners—Effect on water record of abandonment of pre-emption.

V. and M. held separate pre-emption records, and, as partners, a joint water record dated January, 1888. In October, 1889, they formally abandoned their separate pre-emptions and re-located the same area as partners, obtaining to it in due course a pre-emption record to it in their joint names. The water record was left unchanged, standing in the names of V. and M.

Held, on appeal, reversing the decision of Morrison, J., that when V. and M. abandoned their pre-emptions, the water record obtained in connection therewith lapsed.

S. S. Taylor, K.C., and *Hanington,* for appellants, plaintiffs. *Davis,* K.C., for respondents, defendants.

Flotsam and Jetsam.

Daniel O'Connell was once defending a prisoner indicted for murder. The principal witness against the defendant swore that the prisoner's hat had been found near the place of the murder. The hat was then produced in Court, and the witness swore positively that it was the same one that was found, and that it belonged to the prisoner.

"By virtue of your oath, are you positive that this is the same hat?"

"Yes."

"Did you examine it carefully before you swore that it was the prisoner's?"

"Yes."

"Now, let me see," said O'Connell, as he took up the hat and began carefully to examine the inside of it. He paused with a curious expression on his face, and then spelled aloud, "'J-a-m-e-s.' Now, do you mean to say that that name was in the hat when you found it?" he asked, turning to the witness.

"I do."

"Did you see it there?"

"I did."

"And this is the same hat?"

"Yes."

"Now, my Lord," said the lawyer, turning to the Judge, "there's an end to this case. There is no name whatever within this hat."

The prisoner was instantly acquitted.

LONG DISTANCE JUSTICE.—From Wyoming comes a new idea in the administration of the criminal law. On August 10, at the Bear Creek Ranch, some fifty miles from Cheyenne, Albert Bristol pulled Miles Fitzgerald off a mowing machine and dusted the contiguous territory with his person. Fitzgerald thereupon telephoned a complaint to town and a warrant was issued for Bristol's arrest. Hearing of this Bristol also resorted to the telephone, got into communication with the Court, and entered a plea of guilty. The Justice announced a fine of

fifteen dollars and costs over the telephone, and Bristol promised to send a check for the amount by the first mail.—*Law Notes.*

INJURIA SINE DAMNO.—A correspondent writes from St. Louis that a husky Ethiopian recently came into his office, and exhibiting a scalp wound about three inches long on top of his head, wanted to know if he could "git anything foh dis heah." In response to a query from the lawyer he explained: "Well, boss, it was like dis: Ah was wuking down by dis heah new buildin' an' a fo'poun' brick fell off'n de sixteenth story an' hit me smack on top de haid." "It is discouraging to be obliged to add," writes our correspondent, "that a grasping and heartless construction company, although admitting the facts and their liability, refused to pay more than ten dollars, on the ground that the evidence failed to disclose any material damage."

Those who knew the forceful and practical prelate referred to, ante p. 613, will see how true to life is the story there related. Dr. Parkin in his preface to the life of Chief Justice Robinson, the life-long friend of Dr. Strachan, speaks of the latter as "a man whose masculine intellect has left a profound impression upon the educational, ecclesiastical and political life of Upper Canada." Many anecdotes are told of him. One recently related to the writer of the article referred to shewed that "totes" alluded to the other night by that other masterful and genial prelate, the Bishop of London, were not as common amongst the clergy in Bishop Strachan's time as they are now. Some one told him that one of the clergymen in his diocese was too fond of his toddy, alleging that he bought his whiskey by the gallon. "Hoots, mon," answered the Bishop, "more fule he, I buy mine by the bar-r-el."