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LIABILITY FOR INJURIES CAUSED BY DEFECTS IN PREMISES.

In a recent decision in Ontario, *King* v. *Northern Navigation Co.*, 24 O.L.R. 643, the liability of an owner of property to persons who are injured owing to defects in the premises is again discussed. In the result the court followed the principle affirmed by the Judicial Committee of the Privy Council in *Grand Trunk Ry. Co.* v. *Barnett* (1911), A.C. 361, and held that the case was not governed by the earlier decision of the House of Lords in *Lowery* v. *Walker* (1911), A.C. 10. In the case referred to, *King* v. *Northern Navigation Co.*, 24 O.L.R. 643, the plaintiff claimed to recover under the Workmen's Compensation for Injuries Act (query, the Fatal Accidents Act) for the death of her husband, which was occasioned by his falling into an unprotected hatchway on the defendants' vessel. It appeared that the defendants were owners of three vessels the "Huronic," "Ionic," and "Saronic" which were moored alongside of each other at a wharf, and in order to get to the Ionic it was necessary to pass over the other two vessels. The plaintiffs' husband had been employed on the Ionic, but had been paid off in February. In March he left his home at 9 a.m., and was found dead next day, lying at the bottom of the hatchway on the Huronic. No one saw him fall, as far as the report of the case shews, and there was no evidence as to how, or on what business, if any, he came there. The jury do not appear to have been asked to find on the question of whether or not the deceased was a trespasser, but they found the defendants guilty of negligence in leaving the hatchway uncovered. Clute, J., who tried the action gave judgment for the plaintiff for the damages assessed by the jury; but the Divisional Court found as a fact that the plain-

tiff's husband was a trespasser, and following the *Barnett* case dismissed the action. The decision does not seem to be quite satisfactory for two reasons; first, the Divisional Court assumed the functions of the jury in finding the deceased to have been a trespasser, and it is open to question whether it drew the proper inference from the facts proved. The deceased's recent employment on the Ionic raised a not unreasonable presumption that he was visiting that vessel on business, or in circumstances that would make it perfectly lawful for him to be on the Huronic, and that fact not having been submitted to the jury, we are inclined to think the case ought to have been sent back for a new trial.

Lowery v. *Walker* seems to establish that even as against trespassers, an owner of premises is not justified in harbouring on his premises into which, to his knowledge, trespassers are accustomed to enter, dangerous animals, of vicious propensities, of which no notice is given. It is true in that case the House of Lords concluded that the plaintiff was not strictly a trespasser, but a licensee. But it arrived at that conclusion on the ground that it was known to the defendant that numbers of the public (not the plaintiff in particular) were in the habit of crossing his field to get to a railway station and that he made no objection, but as far as the plaintiff was concerned, there was no evidence of any licence or consent on the part of the defendant, and yet their Lordships inferred a consent on the defendant's part to the plaintiff crossing the field in question. But on the same principle might not a jury have equally reasonably found that the deceased King was also a licensee, and had entered the vessel with the consent of the defendants?

The case is interesting in regard to the general principle involved. It may be compared to the spring gun cases, where the opinions of the courts in England seemed to have fluctuated as to what was the common law as to the liability of the owner of the premises to persons injured by such concealed engines.

In *Ilott* v. *Wilkes*, 3 B & Ald. 304, 22 R.R. 400, it was held that a trespasser could not maintain an action for injuries

so received, but that case turned on the fact that notice was given of the existence of the spring guns.

In *Bird* v. *Hollander*, 4 Bing. 628, it was held that where the plaintiff had gone into the defendant's premises in search of a strayed fowl, and was injured by a spring gun, of the existence of which there was no notice, the defendant was liable. But in the later case of *Wooton* v. *Dawkins*, 2 C.B. (N.S.) 112, the court held such an action would not lie; and in *Jordin* v. *Crump*, 8 M. & W. 782, the placing of dog spears in the defendant's own premises to protect his game was held to give no cause of action to the plaintiff, whose dog was injured thereby; but in *Townsend* v. *Walton*, 9 East 277, 9 R.R. 553, a contrary decision was arrived at, and in *Deane* v. *Clayton*, 7 Taunt. 489, 18 R.R. 553, the court of Common Pleas was equally divided whether such an action would lie or not.

In *Blithe* v. *Topham*, 1 Ro. Abr. 88, it was held that a man digging a pit on a waste land 36 feet from a highway, was not liable to the plaintiff whose horse escaped into the waste and fell into the pit and was killed, because it was the plaintiff's fault that the horse escaped. In a case before Lord Kenyon, *Brock* v. *Copeland*, 1 Esp. 203, 5 R.R. 730, that learned judge held that a defendant who kept a mischievous bull in his close, which injured the plaintiff, who was crossing the close with the licence of the defendant, was liable in damages. This decision is practically the same as in *Lowery* v. *Walker*.

But there are some expressions of the learned Lords in the case of *Lowery* v. *Walker* which as we have said, rather lead to the conclusion that a person may not, without notice to the public, maintain, even on his own premises, an animal likely to be dangerous to persons entering thereon, even though they do so without right, and if that proposition be sound, then it would seem to follow, neither can a man maintain dangerous engines, or pitfalls, about his premises liable to cause injury to persons likely to come innocently thereon.

It seems to be assumed in the *King* case that the being on premises not your own is conclusive evidence of a trespass,

but is it so? Are not all the circumstances to be considered? the fact, for instance, that the man had been recently employed on the vessel on which he is found dead, in the absence of any evidence, one way or the other, does not lead to the necessary inference that he was a wrongdoer. He may have gone to get his tools, or to speak with the defendants' foreman, or a hundred things without in any sense being a trespasser.

The fact that a man is found on premises not his own, is surely not conclusive evidence of trespass and we doubt if it is even prima facie evidence of trespass and yet that seems to be all the evidence on which the court based its finding of fact in the *King* case. Whether the fact that the locus was a vessel afloat over land of which the defendants were not owners can make any difference we are not prepared to say—at any rate the trespass, if any, would seem to have been to a chattel and not to land.

There can be no doubt that the subject is surrounded with difficulties, and not the least of them is to determine when a person is to be regarded as a trespasser. Every entry on another's premises is not a trespass, when the butcher comes to deliver his meat, or the baker his bread, he is not in any sense a trespasser, when a man goes to call upon a friend, he is not a trespasser on the friend's premises, because he enters thereon without an express licence. It is, therefore, for these reasons, difficult to lay down a general rule in cases such as *King* v. *Northern Navigation Co.*

It would be hard on the owners of vessels to make them liable to all comers for injuries they may sustain through some defect in the ways about the vessel; at the same time, the leaving of traps for the unwary, about one's premises whereby persons coming thereon without any unlawful intent may be injured, does not seem to be a justifiable proceeding. It could hardly be said that if a friend were calling on a neighbour, who had negligently suspended over his door steps a lamp which fell and killed the friend, that the neighbour would not be liable under the Fatal Accidents Act; and yet all that might

be susceptible of proof might be that the friend was on his neighbour's premises and was killed by the falling of the lamp, known to be insecure, and according to the *King* case, unless it could be proved that the deceased was lawfully, or with the defendant's licence, on his premises, then the inference would be that he was a trespasser to whom the neighbour owed no duty.

It seems to us that such a question is eminently one on which the opinion of a jury might be asked under proper directions and having due regard to the character of the deceased and the surrounding circumstances; and that when a case has been tried by a jury who have not passed on the question, an appellate court should not usurp the functions of the jury, unless, upon the evidence adduced, it is reasonably clear that no other conclusion can possibly be drawn than that which the appellate court adopts.

THE RULE IN SHELLEY'S CASE.

In a recent number of this Journal (vol. 47, p. 363), we offered some observations on the case of *Re McAllister*, 24 O.L.R. 1, and ventured to ask whether the rule in Shelley's case is to be considered to be abrogated in Ontario. The case went to appeal and the decision of the Court of Appeal affirming the decision of the Divisional Court is now reported, 25 O.L.R. 17, and after perusing the judgments of the learned judges of the Court of Appeal who gave reasons for their decision we are inclined to think that the answer to our inquiry ought to be in the affirmative.

As far as the abstract merits of the case go, we may frankly admit in the outset that we have no doubt that both the Divisional Court, and the Court of Appeal have really given truer effect to the obvious intention of the testator, than they would have done had the rule in Shelley's case been applied. But no one has ever supposed that the rule in Shelley's case was devised for the purpose of effectuating the intention of test-

ators. There is hardly a case in which it is applied in which it does not obviously defeat the testator's real intention. The late Lord Esher, M.R., as quoted by Magee, J.A., affirmed that he had heard some judges say that in their opinion it was the most unjust decision that ever was come to; and it was one, he said, which he himself could never understand how anybody could come to. At the same time there it is, a rule of law governing the rights in real property, and not now to be set aside by judicial decision but rather by the action of the Legislature, as was done when the equally absurd doctrine of *Cumber* v. *Wane*, 1 S.W. 426, had to be got rid of. It was the graphic and virile criticism of that case by Jessel, M.R., which led to its legislative reversal.

That, it seems to us, is the only legitimate way of getting rid of judicial absurdities, which have practically become a recognized part of the law—and it is for that reason, and that reason alone, that we consider the decision now in question objectionable. If the rule in Shelley's case is the law, a suitor is entitled to have the benefit of it, and to deprive him of its benefit in a case to which it reasonably applies is practically a denial of the "justice" which he is entitled to, though it may be a kind of justice, viewed from the abstract, which looks very like injustice to other persons.

To return to the case of *Re McAllister*, the judgment of the learned Chief Justice appears to be based on what we venture to think is the wholly untenable ground, that the rule in Shelley's case was not applicable to this case because it would defeat the intention of the testator. It is true he does not put the case explicitly on that ground, but the whole trend of his remarks seems to lead inevitably to that conclusion. But if that consideration were, as we have already remarked, to determine the applicability of the rule, it would never apply in any case, for it is absolutely certain that in every case it defeats the testator's real intention.

Mr. Justice Meredith places his decision on the ground that the rule was not applicable because the estate of the father was

legal, and that of the heirs equitable, but this view we think is amply refuted by Magee, J.A., who while conceding that if the devise were to be treated as a devise of land, the rule would be applicable, comes, however, to the conclusion that as the will gave the executors a power of sale for the purposes of division in case the beneficiaries could not agree to a partition, therefore the land devised must be deemed to be personalty to which the rule in Shelley's case would not be applicable, and for that reason he agreed in the result arrived at by, though not in the reasons of, the other members of the Court. But assuming that Mr. Justice Magee be correct as to the character of the devise or bequest, one would have thought, but for the learned judge's contrary opinion, that a bequest of personalty to A. for life and in trust for his heirs would give A. the absolute property in the subject of the bequest, because it seems to us that in such a bequest the word "heirs" would have to be read as "executors and administrators," and a bequest to A. for life and in trust for his executors and administrators seems to be an absolute gift to A.

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*THE CONDUCT OF AN ACTION.**

A year ago I had the pleasure of addressing the Ontario Bar Association upon a somewhat difficult subject, "The Art of Cross-examination." For some reason or other, you and your colleagues in office have asked me to devote some time at this session to the discussion of a similar subject, not so much, as I understand it, from a legal or technical standpoint as from

*An address delivered by E. F. B. Johnston, K.C., before the Ontario Bar Association, on the 27th of December last.

We make no apology for devoting considerable space to this address, as it is both instructive and continuously interesting. It is, moreover, a valuable reminder to students of the law and young practitioners, of the standard of professional ethics which should govern their conduct, as well as a luminous discussion by a lawyer of long and varied experience of the salient features of an action at law, and the best way of dealing with them. He speaks from an outside standpoint, as an observer who knows the game, and who has "played the game" himself as it should be played.

the standpoint of an outsider, that is, the man on the fence who watches the game as it progresses.

Approaching a case as one must in looking at it from an outside standpoint, you have to consider first, the mental attitude of the solicitor, because after all, much depends upon his mental condition and upon his personal attitude towards the subject-mater in hand. Then you have to consider more or less the human elements at work in the client himself, and you also have to consider what motives are underlying the litigation quite apart from the legal rights or the liabilities of the parties.

Now, it has been said, and I have heard some very learned and able judges say, that law is good business and common sense, and that when any particular Act of Parliament ceases to be business or common sense, we find an amendment or a repeal. The practical operation of the law, therefore, being more or less based upon business and common sense, we have to take this view of the situation, namely, that good judgment is absolutely necessary as well as legal knowledge. The ablest lawyer, the keenest mind, the man who knows the most law, may not be, and very often is not, the safest counsel for the client to employ. Indeed, when one comes to consider the question of an action at law, it is surprising what a very small portion of an action the law is; I think I would be safe in saying that in the ordinary course of litigation, law is the smallest part of the case. The knowledge of law is, of course, a foundation, the first step, but the whole superstructure of an action is not so much law as it is a question of fact, as it is a question of dealing with facts, the relation of facts to each other, the weight to be given to the individual or collective facts, the generalship in maintaining them or presenting them to the court or jury, and the skill in handling these facts under changed circumstances, which always change more or less from the beginning to the end of the suit. So you see, if I am right, the questions arising in an action have mainly to do with the management and control of your case, with the knowledge of the situation, with a careful appreciation of the facts and what they will lead to, and

what certain lines of evidence may, perhaps, relate to. You have all these things to consider.

The law itself may be comparatively simple, and indeed there may be little or no law in the case at all. Perhaps that is one reason why you very often find the solicitor who is not much known, who may not be known beyond practically his own firm, making a splendid judge. You find, of course, that if you have a leading counsel with great knowledge of human nature, with good business capacity, and with good judgment, he, generally speaking, makes the best judge you can get, because his knowledge extends beyond the mere technique of the law and embraces all that goes to make up the action at law.

But taking the view I have of the matter and looking at what the objective point of an action is, one is forced to the conclusion, that what our efforts are more directed to is to prove our own case or to disprove the case of our opponent without very great regard to what the legal situation is beyond the general principles governing the particular issue before us. In the great bulk of cases to-day, the law is well settled. Occasionally one comes across a case in which even the ablest lawyers are at sea and in which even the most learned judges find difficulty in coming to a conclusion; but, as a rule, the ordinary run of cases is found to embrace matters which depend largely upon fact and upon the personal, individual management and control of the case itself. Therefore, I deal with the matter, as I say, more from the psychological standpoint than I do from the actual legal condition.

I shall try and be as practical as possible in what I have to say, because I am speaking, I think, perhaps more with an object of addressing the younger lawyers than some of those I see before me, whose knowledge of law is greater than that of the beginner, and whose skill in matters of this kind is unquestioned.

The conditions under which every young lawyer begins his career are not favourable to absolutely sound advice, because his mind is not taken up so much with the question of that particular case as it is with himself. Why do I say that? In the

first place, every lawyer who begins must make a living, and, therefore, a case is not a matter of choice, but a matter of necessity, and he looks at his first case with a sort of fondness, and a fatherly eye, as it were. It is a case in which he sees hidden treasures, and which he feels a peculiar sympathy for, which a lawyer looking at it in a clear, concise and impersonal way does not see. Well, first of all, he has to make his living, then his ambition is that some day he will be a judge; another ambition is, perhaps, he will be a great counsel, and another ambition is that he will, perhaps be a great orator before a jury. These are all personal matters acting upon the mind of the young solicitor, when the first opportunity to start and shape his life presents itself to him by the presentation of a case at the hands of some client. Strangely enough, I do not know why it should be, but I never knew a young lawyer to begin with the idea of being rich; he has always the idea that his ambition will lead him on to a judgeship or a great counsel; that he will become a man well known all over his province or his country, a man who will stand very high, and perhaps highest in his profession, but never, I venture to say, does he begin life in his profession with the object of and the hope and intention to become a rich man. Of course, in that he shews his wisdom, because if he thought otherwise he would be sorely disappointed.

Now, all these feelings must be eliminated from the lawyer's mind who desires to give the full benefit of his ability and knowledge to his clients. If we eliminate these feelings, then we come down to the impersonal, and to conditions that are necessary to the proper conduct of a case, and the proper appreciation and management of it. And I may say that amongst the conditions necessary to carry out the theory I am advancing here is, that the solicitor should have no bias or prejudice either for or against any kind of a case or in favour of or against his own case or that of his opponents. He should exercise, apart from his own personal feelings, the best judgment. All people cannot acquire good judgment, and you cannot teach people good judgment; it is a sort of thing that is born in a man, but it

may be cultivated, and it becomes one of the most important elements in the conduct of the case, much more even than the mere knowledge of law. There is another quality we all ought to have, we ought to determine to see both sides of the case, and if we do not do that, we are so much in default in getting at the true situation. Then there is another thing that has often occurred to myself, I do not know how it has struck any of you gentlemen here, but I think I may safely say this to young lawyers as a truism and that is, that a man should not begin his case with the idea that he knows all the law, because if he does, he is bound to come to grief. There are other people who know a good deal of law, and some of the judges will convince him that they know more law than he does, and the result is, that whilst he thought he knew the law, he discovers—at the final stage that he was greatly mistaken.

Here is another matter that I often think is worthy of consideration. We see that when a man approaches a case, particularly if he is a young solicitor, not able to distinguish or take a firm stand in matters between himself and his client, that the conditions usually present are the worst conditions that could possibly exist. One condition is, that we have the solicitor looking anxiously for a case, and the client, looking for satisfaction. Under these circumstances it is very difficult, indeed, for anyone, even with the best judgment and great experience, to know just exactly where he is at. As I said before, we should endeavour as much as possible to be impersonal. The solicitor ought to eliminate all ideas of his own ability and his own ambition, all ideas and preconceived notions that he may have in regard to his profession, and he should as much as possible take the position of a judge on the Bench, who has no personal feeling, and who is absolutely impartial in dealing with the action when it comes before him. Now, the attitude of the client, as you will see, being of course, dragged into litigation, or himself seeking litigation, is in this position: he comes with a wholly one-sided case—we do not always remember that as a fact, but it should be ever before the eyes of the lawyer who

is called upon to advise—that there are facts necessarily complicated by reason of the temperament or the feelings of the client himself; there are facts that are omitted, not intentionally, but because the client is not familiar with the practice of the law, or because he does not consider many of these facts important enough to state them to his advisor. Thus you have a one-sided case told to the solicitor; you have facts complicated and exaggerated; and you have facts omitted altogether. Then you have the wrongs of your client exaggerated and his rights magnified, and that has an impression upon the mind of the solicitor, which he should resent, as much as possible, or, rather, prevent it operating upon his mind when he comes to consider what the real rights of his client are. And remember also, that the client who consults you has not always an exclusive monopoly of honesty. His opponent may not always be the villain; your client may not be the saint; there are good and bad on both sides, and it is in the effort of getting at what is really the truth in the matter, where the solicitor's or counsel's duty becomes very difficult indeed.

Judging from what I have said, it seems very important that the conditions should be right at the beginning, and I think I can appeal to all the lawyers who are here, I can appeal to the learned judges who hear the cases when they come before them in a concrete form and have the wheat presented instead of the chaff, that the great point in the conduct of an action is to start right—I do not mean as a mere matter of technical pleading, or as a mere matter of writing upon paper—but the idea I have, and what I wish to convey is, that, if you can see along the whole line of your litigation to the ultimate result, and you know that by starting right you are going to follow along the true line to the end, then the action is half won, if it is capable of being won at all. If you start wrong, with a wrong sizing up of the situation, or an erroneous view of the circumstances, the result is that you are wrong all the way through, and the end is worse than the beginning. Law suits, quite apart from the legal aspect, have the most wonder-

ful faculty for getting twisted about, and once they get a sufficient twist, there is no way of getting them straightened out except by a judgment of the court often against you. Then, if the mind is biased at all, and if the lawyer takes the part of his client in a personal sense, he is at once seized with the same obliquity of vision that the client has. He begins to look at things from an entirely wrong focus, and loses in the course of a very short time all sense of proportion, the facts become distorted in their relation to each other and to the real issue between the parties, until he, the lawyer, is in no higher, no better and no safer position than the client himself. Indeed, the solicitor becomes, to all intents and purposes, the client. As a rule, what do we all do? I venture to say in nine cases out of ten, we start to see what the facts are to substantiate the client's story, not what the facts are irrespective of the client's story, but what facts there are that will corroborate our client, the plaintiff or defendant in his action, and then we begin to look up the law. But, we do not look up the law as to what it really is, as a rule, but we hunt through our books from one end of the reports to the other for the purpose of finding cases that will apply in support of the case in hand, not what the law is, but how far the law we are looking for will support our contention. Then, we are influenced, by the one-sided story. More or less, every man is so influenced, but we have only half the story, and there is the principal difficulty. Unless we can eliminate these conditions, unless we can get the mental attitude along a different line, or placed in a different balance, we fail mentally and practically in our judgment, no matter what our ability may be as lawyers. We fail to grasp the whole situation of the case. The absolutely essential and necessary element in the conduct of a case is to know the general situation. Now, the opposite course is the right one, and that is, first of all to find out what is against us, not so much what is in our favour, our client will supply that if he has any intelligence, but what is there in the future proceeding that is going to turn up against our contention—can we surmise it; can we guess from the cir-

cumstances leading up to the issue what that evidence and that contention will be? Then, another most important thing is, that whether it is a matter of courtesy, or because we do not desire to offend our client, we never question our clients or cross-examine them sufficiently to get at the real truth. I believe that if our client, if every client who comes into an office, was thoroughly cross-examined upon all the details, we would get as a result a very different version of the facts to what we got when the man first came in and gave his story. We should also consider the weakness of our own case. Remember that I am dealing with this matter more on general lines and not attempting or pretending to dictate or to say that I can instruct you upon these points. I am only dealing with these questions as they strike me in a general way, and I might perhaps use the word psychologically only. The weakness of our case is even more important to us than the strength of it, because that is where the guns should be placed to protect. The weak part requires nursing and attention more than the strong point. This would, therefore, lead one to the conclusion that there are three matters which we should consider as essential to success in starting a case.

1. What the solicitor should do. As I pointed out, he should take the side opposite to his client, he should look out for dangers instead of successes, he should ascertain what the other side are likely to prove, he should consider what is the legal evidence that may be against him, what are the probabilities that are likely to be shewn in the witness-box when he comes to trial, and above all, what is the law on the other side. Very often, whilst I have felt great difficulty in getting law to suit the case I happened to be in, I have always been surprised at the enormous amount of law there is on the other side. Why it should be, I do not know; but generally speaking, when a man has a case and finds a few authorities, he is happy and satisfied, and he seldom appreciates the fact, until he finds them quoted against him, that there are volumes of cases quite the contrary to the view he took when he launched his action.

2. Then the second question is what the solicitor should be, in dealing with his case. The answer follows as a matter of course from what I have briefly indicated. It is quite clear that his mind should be absolutely calm, not agitated or affected by any consideration other than the subject that he has in hand, and if he is actuated by the subject in hand, his mind will naturally be calm. Then he should be clear. If there is any doubt, he should resolve that doubt in some way or another, so that he can clearly make up his mind as to what he should do. If he has any doubt, any step is dangerous. He should be as far as possible, judicial, that is, he should take a view of both sides of the case; he should place himself in that position which he hopes some day to attain to, and he will find far greater benefit in exercising that faculty than he will in looking forward to a judgeship. He should not be satisfied with the mere story, but he ought to find out from the man he is acting for and his witnesses, the whole details of the matter.

3. What he should remember. There is no question that the bulk of cases run in grooves. I venture to say that there is not a counsel in the city of Toronto, or in Canada, who has had a long experience, and there is scarcely a judge on the Bench, who would dispute the fact that the bulk of cases do run in grooves. There are facts, and many of them, common to all cases. I should imagine although I have never had the pleasure or the honour of sitting as a judge, between man and man—but I should imagine that a judge sitting on the Bench, when the hand touches the central or crucial point of the case, his mind at once is seized, not of the individual facts, but of the general character of the case in a very singular and forcible way, because he knows from his experience, that what has happened in 98 cases is going to happen in the 99th. You take, for instance, a case of negligence where a man meets with an accident in a factory, and you will invariably find the witness coming forward who has at some time in the past, perhaps within a month or two of the accident, told the superintendent or somebody else in connection with the factory that the knife was

dangerous or the saw was risky, and who has always a method by which the defect could be remedied. You find in ordinary cases of breach of promise, and one might say in moral actions, generally, the same material details running through all of those of the same class. You might almost shut your eyes and pick out the ordinary list of facts that would apply to the case in hand. Of course, there are other cases, such as real estate matters and actions of that kind that are very difficult, but I am speaking of the majority of cases that are tried in our present Courts of Assize and inferior courts. You find also in nearly all the cases, that the motives of these actions are the same. Humanity does not vary, and varies less, perhaps, in litigation than in any other class of business or occupation in life. Now, should not a solicitor, therefore, enquire into all these things, and have them operating upon his mind? Not that he can make an application of these individual matters to every case that comes up, but should not his mind be so governed and so actuated by the result of observation, that involuntarily, almost intuitively, the mind properly trained will turn to the case in hand with true appreciation, and thereby give the full benefit of that condition of mind and knowledge to the case entrusted to him.

I have no doubt that most lawyers will agree with me that it is not a very difficult matter to advise upon a client's story, that is, if you accept his story, but it is more difficult to advise upon the story told by the other side. If you are acting for the plaintiff, and you are advising him upon his statement of facts, and the statement of his wrongs and rights, etc., you have, perhaps, very little difficulty in telling him he is going to succeed, but do not forget that perhaps a block away, perhaps in the adjoining part of the same building, there is another solicitor sitting behind a brass plate, closeted with the defendant, and advising him to a contrary conclusion upon his statement of facts, thus shewing that both cannot be right, and shewing also the danger of relying entirely upon statements made by the most honest clients. I would like to mention in

this connection that the enthusiast, whether he is a lawyer or a doctor or a business man, has always to be taken a little cautiously. It is rather a bad feature for a lawyer to be an enthusiast for his client. This may seem rather a singular statement to make, but the solicitor who can keep away from the current that his client creates about him, and from the feeling that actuates his client is a safer adviser than the man who becomes enthusiastic through his client, and adopts, as it were, the personal feeling or the personal passion of the client in dealing either with his wrongs or the recovery of his rights.

Having got to this, I have given practically the substance of what I have to say, on matters prior to the trial, because when I come to the question of the writ, that again I relegate to Holmested & Langton and the Judicature Act, bearing in mind, however, that there are some features in connection with the writ that are not only interesting, but sometimes amusing. When a man comes to a solicitor's office seeking for litigation, he is loaded to the fullest extent of his carrying capacity; when he gets his lawyer on his side, and gets him somewhat enthusiastic, it relieves him, but when he gets his writ issued, and gets the other man in court, gets him there, as it were by the neck, then his mind is easy. That happy condition comes, as it often comes, we are told, by alienists, from an explosion in certain forms of lunacy. If the client is satisfied, now that he has got the man in court before the judge or will have him there very soon, and he will shew him a thing or two before he is through with him, and it is a case that should be settled, this is always a good time to settle. The only other time is at the door of the court-house; because, during the intermediate time, the edge is off, and things drift, the feeling is not so keen one way or the other, interest is not kept up strongly all the time, and the question of settlement is a matter like the question of an interlocutary motion—much said and little determined. Another reason why a solicitor should consider the question of settlement, at that time, is that the costs are not an important matter. The client has had some satisfaction by the issuing of the writ,

and that to some extent pacifies his mind and satisfies his claim; therefore, he is in a better humour to settle than he would have been a week before. And costs are not serious enough to be an obstacle.

We come now to the question of pleading. This again is technical and I do not propose to deal with that question further than to say this, that I believe—again I cannot speak from the experience of those who have had to deal judicially with these matters, and, therefore, I submit what I have to say with the greatest deference—I believe that in many cases the plaintiff claims too much, he does not claim intelligently, or, at any rate, does not claim it convincingly. Now a judge is human just the same as the rest of us, that is, his mental operation must run along some line similar to the mental operation of any lawyer who is possessed of a clear head and calm, cool judgment. You put into the hands of a judge or counsel, a complicated claim, with a statement of the facts which is accurate, clear, concise, consecutive and intelligent, and you at once get a convincing statement of claim; but if you put in a statement of claim that jumps from Dan to Beersheba, the first difficulty you have is one of your own creating; you cause the tribunal that has to deal with that very matter, a good deal of trouble sometimes in finding out exactly what you do want, and, therefore, you have to overcome that; whereas taking the opposite course, it would have been absolutely plain sailing; and it is always easier to sail before the wind than against it.

Then as to the defence. Now the defence differs—speaking again from an outside and not from the lawyer's standpoint—the defence differs from the claim in a very material way. The claim generally tries to get at the facts that are relied upon and to express the claim you are making. The defence is often set up for purposes that even a lawyer himself could not define, and if he were asked why he put in such a defence in that particular case, he could not perhaps tell you, but he would answer, "Well, I am trusting to luck, or I will take chances. Some judge," he will argue, "might think there was something in it, and it might

appeal to some court hereafter that there was some convincing element in the defence that is set up." This is a mistake. The solicitor should be as clear and definite as to the claim or the defence as he would be in endeavouring to present his argument to convince the tribunal before whom the case is tried.

Then a word or two might be said with reference to another important point, so important that one cannot deal with it properly in the short space of time which is allotted here, to a subject of this kind, and that is, the preparation for trial. The principal thing that one has to deal with is the question of witnesses and the evidence. The preparation should be thorough and careful, but not only should it be so on the part of the client, but it should be clear, thorough and careful with the individual witnesses. You will bear in mind that when a witness is called in to state his facts to the lawyer, or to state his evidence in court, he does not know or realize what all the facts are. He does not appreciate and does not realize what the effect of one fact is upon another, or one set of facts upon another set of facts may be. He does not understand the true relation of facts to each other in that particular case. He is not so familiar with the details as the solicitor or the client is, and, therefore, he may be honestly stating something which, if he knew the effect it had, would be stated in a different way, because the effect is perhaps totally different to what he then truthfully intended his evidence to be. I think it is always a safe plan, as far as one can, not to trust to a student to take the statement of facts. It is wiser to have the solicitor himself, or even his counsel, cross-examine every witness as he would cross-examine the witnesses of the opposite party, and he will thus stand the chance of getting at the real facts and will also reap this benefit, namely, when the witness goes into the box, he knows what the facts are, he is, moreover, possessed of the general bearing of the case, and without asking him to tell anything that is not true, he is enabled to give his version more intelligently and more convincingly by reason of what he has heard, and from what has come to him in his prior examination. He becomes

familiar with the case, he knows what the case is, he knows what it means, and he knows that the whole case does not depend upon his opinion or upon the ordinary expression of this or that fact, but upon a general combination of facts, the general result of which will in due course operate upon the legal mind or the jury mind.

In order to put in concrete form what I desire to say upon the subject of witnesses, I have noted three rules which seem to me to be much more important than perhaps at first sight they would appear to be. With these rules you may differ, I hope there will be a diversity of opinion, because it shews then that an intelligent appreciation of what has been said will have appealed to your mind, and it is a matter about which there may be a very grave difference of opinion. I can only state them as a conclusion from my own trend of mind resulting from the experience of 30 years or over at the Bar. The three rules I would indicate as being absolutely essential in regard to witnesses are these:—

1. I would only call witnesses who were familiar with the case. I would not take chances upon a man being brought in at the last moment to swear to some matters of which perhaps he did not know the bearing, and which might be the turning point of the whole issue. Only call those who are familiar or who have made themselves familiar with the facts as relating to that particular case.

2. The second rule is, I would never call a doubtful witness on general facts. If he helps you in one instance, he may destroys the effect of your case in something else. I am speaking now, not of the case of a man called to fix a date or to verify a signature, but I am speaking of a witness you have doubts about, whose evidence generally is doubtful where it applies to the general facts of the case. In such a case, I say it is not safe to call such a witness under any circumstances, I have observed again and again that on many occasions where he has been an important witness, he has wrecked the case of the counsel who called him.

3. Never call a vindictive witness, no matter how important, no matter how urgent the case might be. If I were left entirely to my own judgment, where I found a witness who was vindictive, I would not put him in the box.

I have a word or two to say in addition to this about another part of the preparation of the case, and that is, the examination for discovery. The examination for discovery has always appeared to me to have been invented for the purpose of giving your opponent a clear idea of what your case is, not of getting the idea of his case. The usual methods of examinations for discovery are very dangerous. If you get the simple facts, if you get a narrative and the reasons perhaps, if you can get them, well and good, but how few of us are satisfied with that. We always think that there is something that by probing a little further we will get, and we too often get it, but we do not get it as we want it. The moment we begin to cross-examine for discovery, unless astutely done, that moment we make the party examined familiar with our methods, and expose to him and his solicitor, our whole case, and create in his mind that curious intellectuality, that mental feeling of what our case is based upon, even if we do not put it in so many words. Well, he tells his story, he is cross-examined and he is re-examined, and you may get him to make contradictions, but by the time you come to the trial, he tells you, "Oh, yes, I said that, but that is easily explained," and he explains it, and the whole object of your cross-examination in that way, and the whole benefit you gained by your questions may be lost by reason of the fact that the witness knows what he said, has thought over what the explanation is, and is ready with the explanation when he is put in the box. I think if we all adopted the right method it would reach not only to the whole root of the examination for discovery, but to the whole principles of cross-examination and examination-in-chief, and that is, if we made up our minds to be content with a fairly good, practical answer to the questions, we would be much better off in the conduct of our litigation. It is when we are not content with what the man has said,

because he has not said it quite as fully as we wished, or sufficiently explicit for our purpose that we go a step further, and by the time we have reached the fourth or fifth step in our questions he has put a different phase on the whole matter, and he has undone the advantage which we gained on the first question put to him. I have often noticed, and I have often heard judges say, that "the answer does not mean what you contend for, that it is a different question and has a different application. It is true it may be connected with a particular question, which may mean that which you say, but you will find in the next four or five answers he has given a totally different meaning, or perhaps explained away some defect, thereby giving a very different impression of what took place." Now, if you get an answer, being fairly satisfied with a good, reasonable answer, if you get an answer reasonably clear, drop it, and you then have something that does not perhaps disclose your hand to the enemy, and something, you can read at the trial without controversy. The difficulty is to get the answer fairly reasonable, to get the answer clear, and to have it without any misunderstanding, so that when it is read at the trial, if you require to read it, it carries weight, requires no explanation and speaks for itself. In other words, I think that the best rule to adopt in examination for discovery would be, first of all, to know what you want, which is all-important, and then to get it as best you can without opening up other questions and other issues in the getting of it.

The trial is, of course, a very important part, and I am looking at a trial from an outside point of view. You see I am looking at this matter also entirely from the standpoint of the man watching the game. At the trial, the sins of omission and commission are like the facts in the case, they run more or less in grooves. A man cannot help being elated if he succeeds and makes a good stroke at the trial, or help being disappointed if something goes against him. At the same time, it is most important that no evidence of either elation or disappointment should shew itself at the trial. One has to keep his mind on

the case, not trying any tricks, because tricks are soon found out, and there is no body of men that will find them out more quickly than the judges who are trying cases every day and who are familiar with all the ins and outs of human nature and the moving spirit of lawyers as well as that of the witness. The man who endeavours to win his case with tricks or by undue cleverness, in the sense in which I refer to it, will soon discover that he has neither advanced his own interests, nor the interests of his client.

I suppose we all think when we are conducting a case, and have reached the stage of trial and come into the limelight of publicity, we are in a different position to what we were when we were sitting in our office advising our clients. There is no doubt we are, but after all there is not very much difference between the two. It is true that the counsel, and particularly the younger counsel, has an idea that when he stands up in court before the judge or before the judge and jury, that the world for the time being has stopped its revolution around the sun, and he has an idea that the public, generally speaking, throughout the whole of this province are waiting for his words of wisdom. We know that this does not happen. The public does not care two straws about that, and the only people interested in the case are the two clients and perhaps one or two of their friendly witnesses. The court is not concerned particularly with the result of the case, because it is a matter that the court has to determine. The judges are not concerned as to whether the lawyer is making a very brilliant effort or making a very common-place one, so long as they are both doing their best in the interest of justice. It is not a matter which stops the court to listen to the brilliant conduct of the lawyer, who conducts the case; the world and the judge go on just the same. But the very consciousness that some people have, that there is a large public interest taken in the effort, a large number of spectators hanging on our words, that the whole interest of our town or county is centred in this particular case and on the way in which we are going to handle it, causes a degree of nervousness in

the counsel, which he cannot very well obviate; whereas, if he eliminated the personal element and thought only of his case and not of his cleverness or his want of it, he would not be nervous at all, and would conduct his case infinitely better than he can possibly do under the ordinary circumstances when he allows a feeling of this kind to invade his mind.

In connection with the trial, I was once told by a very leading counsel, and I have never forgotten it, that the result of cross-examination at trial and of skill and ability in handling adverse witnesses, important as these are, is never as powerful, or convincing as getting your own witnesses' stories before the court and on record in a clear and convincing manner. Without the intelligible story of your own client and his witnesses, you present a disjointed narrative; therefore, regularity and consecutiveness are things that have to be looked to and followed. Cross-examination may destroy a single witness, but it does not necessarily destroy the whole structure of the opposite party's case; whereas, unless you get your own case clearly, cogently, and convincingly before the Court, your whole fabric is weakened, and the general character of it is deprived of that strength which the facts might and would be entitled to if they were properly presented.

Then, there is another very important matter, which, of course, appeals to everybody, although some lawyers sometimes hesitate to do it, and that is, if there is danger ahead at the trial from some facts that are likely to be proved, face them as quickly as possible. You, for instance, are acting for the plaintiff, and you have the witness in the box who is going to make statements that are dangerous. The only safe course to adopt is that the sooner you get that evidence out of your witness the better. Do not wait for the other side to give it in a partisan way, but take it up and deal with it boldly and courageously. Present your evidence, in your own way, and let the matter be disposed of at once.

I do not propose to deal with the question of trial before jury, because jury trials are going out of fashion, more or less. We have

the court sitting in the city of Toronto practically from one year's end to the other; we have two or three weeks at a time for the holding of the jury sittings; we have certain criminal courts, which, of course, deal with a different phase of the law entirely, a different phase of practice; but most of the cases are now so dependent upon trial by a judge that any remarks upon jury trials are remarks that would not be of particular interest to the profession as litigation is now conducted.

I have a word or two to say with reference to the settling of cases, and then, I think, I shall have covered all that I might be expected to say on this occasion. The art of settling cases is perhaps one of the most difficult arts connected with our profession. There are lots of good lawyers, able counsel, clever solicitors, but few have the art of being able to settle a case. There are many reasons for this. You have to consider the chances of success in your own case, and to consider what the chances of your opponent may be. You have to deal with the matte upon this principle, not what you want, but what you can get, because if you deal with it upon the principle as to what you want, you would never settle any case unless the other party simply withdrew his defence and allowed you to get judgment. Then another important matter is, that the responsibility generally rests with the solicitor, and this the solicitor is not always willing to assume. The client leaves it to the solicitor as a rule. Sometimes the client is hard to convince, even where the counsel is satisfied that he has not a good case and may lose; but in the ultimate result, the counsel or solicitor must accept the responsibility to a great extent. The costs, when we come to trial, are important, sometimes more important than the whole issue, and that again is a reason why I say that the time for settling is soon after the issue of the writ. The settlement is not a matter of law, but purely a matter of business, and the exercise of keen common sense and good judgment. The client's opinion is generally unsafe, because he is more or less prejudiced, and is either to make or lose by the transaction, and you have to fall back as it were upon your

own view, upon your own judgment, and do the best you possibly can under the circumstances. The financial conditions of your client and of the opposite party are always important factors in dealing with settlement, because one would take less as against a man who is worthless than you would from the man who is rich. In view of any settlement, no matter what your own view may be, the fact is that when you approach this feature in litigation, you have to drop the legal end of it entirely, and take up the business end, because if you begin to assert your client's rights, that he is bound to succeed and the law is in his favour, that the opposing litigant has no chance and the law is against him, you will hardly ever get a settlement in any case. It is only by frankly admitting that there is doubt about the case, that both parties perhaps stand to lose, and that one cannot tell who is going to succeed in this matter, that settlements are brought about. Then the question is, what would be a fair, reasonable basis upon which a settlement could be arranged. If you are acting for the plaintiff and you admit that the defendant might be quite right and you may be wrong, the very fact of exercising frankness leads to a certain degree of confidence of the other party in your judgment, and it looks always to be a fair proposition at any rate under which you can approach a settlement. But if you are standing up for your strict rights and you insist upon it that the law is with you and all against the opposite party, no settlement could be arrived at or hoped for. Therefore, my idea is that the great secret of settling cases lies in the absence of insistence on the part of the man who is seeking settlement, either that he is right or that the other man is wrong, but he comes down to a fair, frank, business proposition, and he says in effect—"Let us abandon the law, let us see what we can do for these parties, to get them together."

POWERS OF NOTIFICATION IN CONTRACTS.

No court of interpretation can ignore the effect of a clear statement. Hence, if it be stipulated that a notice is to be under "the respective hands" of the parties, or of their respective heirs or executors, a notice signed by two of three executors, even if it purport to be given on behalf of all, and be assented to by the one who does not sign, is obviously worthless: (*Right dem. Fisher* v. *Cuthell,* 5 East. 491). And if a notice is "to be left" at a certain place, or on certain premises, however often persons speak colloquially of having left a message with the servant, the cautious practitioner will serve a written notice, for he remembers that, in construing an Act of Parliament, it was held many years ago that a verbal notice cannot be left: (*Wilson* v. *Nightingale,* 8 Q.B. 1034). Furthermore, whenever a notice is to be "sent by post," semble that the posting of a proper notice is the essential matter, that proof of delivery, and of receipt, is unnecessary (*Dunn* v. *Hales,* 1 F. & F. 174), and that delivery and receipt will be assumed at the time a letter, in the ordinary course of post, would be delivered: (*Browne* v. *Black,* 104 L.T. Rep. 392; (1911) 1 K.B. 975).

Indeed, for that matter, any lawyer, or any layman with experience of evidence in court, would always, in the absence of some powerful countervailing reason, given a written, rather than a verbal, notice for the sake of clearness of proof, by a true copy indorsed with a memorandum of service: (*cf. Stapleton* v. *Clough* 2 El. & Bl. 933). That course is dictated by the general principle of good practice always, whenever it is practicable, to obtain, and preserve, clear evidence, in case it should be ever required. And it must be an arch-grumbler who would take exception to a stipulation for a notice in writing.

But what will be thought of the vigilance, and attention, of any peruser who should pass, without remark, a stipulation that the efficacy of an important notice shall be conditional upon his client performing certain acts which may be unwittingly neglected, or inadvertently left undone? In the case of a lease, for

instance, it would appear that if a power to determine it—often a power of considerable practical, if not pecuniary, value—be so expressed as to be made conditional on the performance of covenants, a breach of one of these covenants, however unwittingly committed, terminates the power: (*Porter* v. *Shephard*, 6 T.R. 655; *Gray* v. *Friar*, 4 H.L. Cas. 565).

Nor will a draftsman neglect to observe that the person to be served is clearly defined, and, to obviate any difficulty, protect his client by adding an option of service at some place, or on some property. Non-provision for the contingency of a person being abroad, or (remote as it may appear) having absconded, has caused before now very considerable hardship, as is shewn by two very interesting and suggestive cases in recent years. A lease of a shop in Regent street was determinable by notice to be "delivered to the tenant or his assigns." This tenant mortgaged the property by way of underlease, and afterwards disappeared. The Court of Appeal held that a notice, in proper form, sent to the tenant's last address, and delivered to both his mortgagee and the occupier, was of no avail in an action of ejectment, because by the terms of the power the notice to determine the lease was to be served, and could only be effectually served, by delivery to the tenant: (*Hogg* v. *Brooks*, 14 Q.B. Div. 475). And in another case it was a stipulation that a notice to determine a lease of some Old Kent road property was to be given by "the lessee, his executors, administrators, or assigns." The second assignee of the term disappeared, and left the property unoccupied. It was decided that a notice given by the original lessee; and the first assignee was insufficient to break the lease; for, to be good, the notice had to be given by the man who had disappeared: (*Seaward* v. *Drew*, 78 L.T. Rep. 19). That which is done, is done, and brings its consequences; and alien as the interpretation of the clear English of the record in each of these cases may have been to the liking of one of the parties, such an interpretation seems inevitable, unless a court were to rewrite the record, and hold it fallible.

It would be going too far to assert that a precise or technical form is essential to make a notice good and valid. So long as the notice given accords with the stipulations respecting its form, signature, service, and otherwise agreed upon by the parties, and communicates the fact required to be communicated clearly and correctly, we apprehend that it is quite sufficient for its purpose. Thus, the common power to break a lease at a fixed time, by previous notice, is well exercised by a notice that does not expressly refer to the power, and, *semble*, by one which in terms is a simple peremptory notice to quit: (*Giddens* v. *Dodd*, 3 Drew. 485). And, in connection with any doubtful cases, it is very useful to remember that generally a man may waive the right to notice. It is true that a notice of an intention to pay off a mortgage cannot be withdrawn (*Santley* v. *Wilde*, 80 L.T. Rep. 154; (1899) 1 Ch. 747). But if a mortgagor come forward and join in a conveyance of the mortgaged property, the purchaser cannot object that the mortgagor has not had the notice to which he was entitled under the power of a sale in his mortgage deed: (*Re Thompson* v. *Holt*, 62 L.T. Rep. 651; 44 Ch. Div. 492). On the other hand, it should be noted that neither a landlord nor a tenant can bind himself by acquiescence in a lame or imperfect notice to quit, so long as what has been done does not amount to a surrender (*Bessell* v. *Landsberg*, 7 Q.B. 638; *Johnstone* v. *Hudlestone*, 4 B. & C. 922; *Doe* v. *Johnson*, M'Cl. & Y. 141). And the student who wishes to ascertain what does, and what does not, amount to a surrender may, with advantage, read the interesting modern case of *Fenner* v. *Blake* (82 L.T. Rep. 149; (1900) 1 Q.B. 426), and consider, in such cases of an imperfect notice, the possibility and effect of a discharge of the existing obligation, and the substitution, by a new agreement, of a shorter notice.

In conclusion, it is not too much to say that whenever by a contract of a commercial or domestic nature a power of notification is given, the terms of that power demand an attentive consideration: certainly more comprehensive thought, than they did sixty years ago, and possibly more care than they appear sometimes to receive to-day.

The public does not appear apt to think of, much less to provide for, future contingencies. It is more than likely that persons unassisted by a legal adviser will leave uncertain, beside more obvious points, what is to happen in the event of the illness or absence abroad of one of the parties, or what they precisely mean by providing that a notice is to be served at the place of abode or business of a person who has more than one mansion, or place of business, and, possibly, some in England and others elsewhere. They would hardly think of refreshing their memory or revising their views by an attentive perusal of the extensive manners of service sanctioned by the Legislature —in, for example, the Conveyancing Act, or the Companies Acts —or recognise that, by taking such enactments as a precedent, they have not only authority in their favour, but a form the practice under which is well known in solicitors' offices, and may also have had judicial explanation.—*Law Times.*

THE CONVEYANCER.

Can a Vendor Obtaining Rescission Retain the Deposit?

There is now a conflict of authority as to whether a vendor of land is entitled at the same time to rescission of the contract and to the deposit, in the absence of any express stipulation to the contrary in the contract. *Howe* v. *Smith,* 50 L.T. Rep. 573, 27 Ch. Div. 89, C.A., certainly seems to be an authority for the proposition that the deposit, although to be taken as part payment if the contract is completed, is also a guarantee for the performance of the contract, and that, if a purchaser fails to perform his contract within a reasonable time, he has no right to a return of the deposit. In that case the deposit was paid to the vendor. The action was by *the purchaser* for specific performance, and before the defence was delivered the vendor resold the property—apparently an absolute owner and not under the clause in the contract which authorised him to resell if the purchaser failed to comply with the agreement—and in his

defence the vendor relied on the plaintiff's delay as justifying the rescission of the contract. The contract contained no clause as to what was to be done with the deposit if the contract was not performed. That was a strong case, because the purchaser was insisting on specific performance, but, as pointed out by Lord Justice Bowen, he may look as if he wished to perform the contract, but in reality he had put it out of his power to do so—he had, in the language of the Roman law, receded from his contract. Lord Justice Fry in the course of his judgment said that money paid as a deposit must be paid on some terms express or implied, and that the terms most naturally to be implied appeared to him to be that in the event of the contract being performed it should be brought into account, but that if the contract was not performed by the payer it should remain the property of the payee; that it was not merely a part payment, but was then also an earnest to bind the bargain so entered into, and created by the fear of its forfeiture a motive in the payer to perform the rest of the contract. In *Jackson* v. *De Kadich* (1904), W.N. 168, on signing the contract the purchaser paid the auctioneers a deposit of £1,000 as stakeholders. The contract did not contain a clause forfeiting the deposit if the purchaser made default in completing. The vendor brought an action for specific performance and obtained the usual judgment for it. The purchaser failing to complete, the vendor subsequently moved for an order in the usual form asking for rescission of the contract and a stay of proceedings, except for the purpose of taxing and paying the costs of the action and motion. The notice of motion also asked for a declaration that the vendor was entitled to the deposit of £1,000 and any interest thereon. The judge refused to declare that the vendor was entitled to the deposit, on the ground that he could not have rescission and at the same time damages for the breach of the contract. The judge also made the observation that in *How* v. *Smith* there was in fact no rescission. The question came before Mr. Justice Eve in the recent case of *Hall* v. *Burnell*, 105 L.T. Rep. 409, (1911) 2 Ch. 551. The facts were very similar

to those in *Jackson* v. *De Kadich*, the deposit being paid to the vendor's solicitors as stakeholders, and there being no provision in the contract as to the retention of the deposit in the event of any failure to complete by the purchaser. Mr. Justice Eve in the course of a comparatively short but clear judgment considered (adopting the view of Mr. Cyprian Williams in his work on Vendor and Purchaser, vol. 2, p. 1055, 2nd ed.) that there had in fact been rescission in *Howe* v. *Smith*, because the vendor before delivering his defence had resold the property under his absolute title, and in his defence he relied on the plaintiff's delay as justifying the rescission, and the case was therefore one in which the vendor was held entitled to rescind the contract and at the same time to retain the deposit. The learned judge accordingly declared that the deposit was forfeited to the plaintiff, the vendor. The balance of authority therefore is distinctly in favour of the proposition that, whether the deposit is paid direct to the vendor, or to a third party as stakeholder, the vendor who obtains rescission owing to default in completion by the purchaser is entitled to the deposit in the absence of any express stipulation to the contrary in the contract. It is noticeable that neither in *Jackson* v. *De Kadich* nor in *Hall* v. *Burnell* did anyone appear for the purchaser.—*Law Times.*

EJUSDEM GENERIS.

A magistrate at Hull (England) gave an important decision on the 29th December last relating to the construction of sec. 7 of the Conspiracy and Protection of Property Act, 1875. That section provides that an offence under the Act is committed by "every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, and without legal authority—(3) hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof . . ." A charge was pre-

ferred under that section against a man for that he "with a view to compel one E. T. to abstain from doing a certain act which the said E. T. had a legal right to do—to wit, the delivery of certain oil-cakes—unlawfully, wrongfully, and without legal authority, did hinder the said E. T. in the use of certain property—to wit, a horse and lorry used by the said E. T." It was argued on behalf of the defendant that no offence within the meaning of the section was disclosed, in that the words "other property" in sub-sec. 3 related only to words ejusdem generis with tools and clothes. The cases of *Reg.* v. *Payne* (L.R. 1 C.C. R. 27) and *Anderson* v. *Anderson* (72 L.T. Rep. 313 (1895), 1 Q.B. 749) were relied upon. The learned stipendiary held that a horse and lorry were "other property" within the meaning of the section, and that those words were not ejusdem generis with "tools and clothes," except that they could include only such property as was capable of being hidden, or of whose use a person might be deprived, or in whose use a person might be hindered. The case arose out of the late strike disputes in Hull, and would appear to be one which the 7th section of the Act was designed to meet—an object which would have been frustrated by the application of the ejusdem generis doctrine of construction.—*Law Times.*

REPORTS AND NOTES OF CASES.

England.

HOUSE OF LORDS.

From Court of Appeal.] [Nov. 10, 1911.

WARNER *v.* COUCHMAN.

Employer and workman—Injury by accident—Compensation—Accident "arising out of" employment—Frostbite—Workmen's Compensation Act, 1906 (6 *Edw. VII. ch.* 58).

An accident which is merely a consequence of the severity of the weather, to which all persons in the locality, however employed, are equally liable, is not an accident "arising out of" the employment of a person injuriously affected by such weather, within the meaning of the Workmen's Compensation Act, 1906.

Judgment of the Court of Appeal affirmed.

From Court of Session in Scotland.] [Nov. 13, 1911.

MORGAN *v.* WILLIAM DIXON LIMITED.

Employer and workman—Injury by accident—Compensation—Medical examination—Right of workman to have his own medical adviser present—Workmen's Compensation Act, 1906 (6 *Edw. VII. ch.* 58), *sched.* 1, *sec.* 4.

A workman who has been injured by an accident arising out of and in the course of his employment, within the meaning of the Workmen's Compensation Act, 1906, and has given notice of the accident, and has been required by his employer to submit to examination by a medical man under schedule 1, sec. 4, of the Act, has no right to have his own medical adviser also present at such examination, in the absence of special circumstances shewing that his presence would be desirable. Whether it is reasonable under the circumstances of the case that such medical adviser should be present or not is a question of fact

for the arbitrator, but the burden of proving that it is reasonable that he should be present is on the workman.

Judgment of the court below affirmed, Lord Shaw dissenting.

From Court of Appeal.] [Dec. 4, 1911.

DE BEERS CONSOLIDATED MINES LIMITED *v.* BRITISH SOUTH AFRICA COMPANY.

Mortgage—Debentures—Floating charge—Grant of exclusive mining rights—Clog on equity of redemption—Monopoly.

The appellant company advanced money to the respondent company, and agreed to accept debentures in satisfaction of the loan, and also an exclusive license to work certain diamondiferous ground the property of the respondent company. The debentures were issued, secured by a floating charge upon the entire assets and undertaking of the respondent company. The loan was afterwards paid off.

Held, that the exclusive license was not a clog upon the equity of redemption, and remained in force after the repayment of the advances; and was not void as being a grant of a "monoply of trade" within a prohibition contained in the charter of the respondent company.

Judgment of the Court of Appeal reversed.

Province of Ontario.

COURT OF APPEAL.

Full Court.] REX *v.* YOUNGS. [Dec. 22, 1911.

Criminal law—Offer of bribe to procure office under the Crown—Indictment—Offence—Criminal Code, ss. 158 (*f*), 162 (*b*), 1014.

Case stated for the opinion of the Court, under sec. 1014 of the Criminal Code, by BRITTON, J., before whom and a jury the defendant was tried upon an indictment charging that he did promise to pay one Robert E. Butler the sum of $1,000 to induce the said Butler to use his influence to procure the de-

fendant's appointment to the office of keeper of the common gaol in and for the county of Oxford, and to procure the consent of the said Butler to such appointment. The defendant was found guilty; and, at the request of his counsel, the learned judge stated the case, in which was set forth that the material part of the evidence was, that the defendant promised Butler, a private individual (except that, being a defeated candidate for the legislature, he had the patronage of his riding), $1,000, if he would assist him in getting or recommend him for the position of gaoler of the common gaol at Woodstock.

Moss, C.J.O.:—The first question, and, as it appears to us, the only one necessary to consider, is: "Does the indictment upon its face disclose an offence?"

We are of opinion that this question should be answered in the affirmative. The indictment does not purport to be framed under any particular section of the Code; but the language of the charge plainly brings it under the latter part of sec. 158 (f), viz., the case of one who offers or promises compensation, fee, or reward to another, under the circumstances and for the causes stated in the earlier part of the section. We are also of opinion that the evidence is sufficient to sustain the conviction under sub-sec. (f) of sec. 158.

Makins, K.C., for the defendant. *Cartwright*, K.C., and *Bayly*, K.C., for the Crown.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P.] [Dec. 23, 1911.

Re Robertson and Defoe.

Vendor and purchaser—Building restrictions—Detached houses —Use of as residential or business premises—Apartment house.

This was a motion by a proposed purchaser, under the Vendor's and Purchaser's Act, with respect to requisitions on the title. Under the contract of sale it was provided that no detached or semi-detached house should be built, but that one detached three-suite dwelling house, not more than three stories in height might be erected, etc. It was also provided that no such building should be used for any business purposes, but only for residential purposes.

Held, that a detached dwelling house divided into three suites of apartments; each of which was to be separately let and occupied with one front door and a common entrance and staircase, did not come within the restrictions.

F. J. Dunbar, for purchaser. *R. D. Hume*, for vendor.

Middleton, J.] VANHORN *v.* VERRAL. [Dec. 27, 1911.

Discovery—Examination of defendant—Disclosing names of witnesses.

Appeal by defendant from an order of the Master in Chambers directing further discovery. The accident giving rise to the action was a collision between the plaintiff's waggon and the defendant's automobile. On the examination the defendant declined to give the name and address of the driver of the automobile or the names of the passengers in the automobile.

Held, 1. The defendant was compelled to give the name and address of the driver, but not the names of the passengers.

2. Discovery must be confined to the matters in issue in the action. The issues in this case related to the happening of the accident and the negligence of the parties; and the fact that there may have been spectators is not relevant, nor is their identity of any importance, save as possible witnesses.

Thurston, K.C., for defendant. *McCullough*, for plaintiff.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] KELLY *v.* MCLAUGHLIN. [Dec. 19, 1911.

Restraint of trade—Covenant not to carry on named business in certain territory during specified term—Injunction—Evidence.

On transferring to the plaintiffs his shares in a company dealing in automobiles and their accessories, the defendant covenanted that he would not engage in, carry on, be interested in, have money invested in or hold shares in any business similar to or in competition with the business carried on by the said company in the Provinces of Manitoba, Saskatchewan, or Alberta, for a period of five years. The company had power to engage in other lines of business.

Held, 1. The covenant only extended to the business actually carried on by the company at the time of the signing of it and was, therefore, not too wide to be enforceable. *Maxim* v. *Nordenfelt*, [1893] 1 Ch. 630, [1894] A.C. 535, distinguished.

2. Extrinsic evidence might be given to shew what was the business carried on by the company at the time.

3. The plaintiffs were entitled to an injunction in the terms of the covenant against the defendant who had accepted the position of manager for another company carrying on, at Winnipeg, the business of dealers in automobiles, limited to dealing in automobiles.

Pitblado, K.C., and *T. J. Murray*, for plaintiffs. *Whitla*, and *W. L. Garland*, for defendant.

KING'S BENCH.

Robson, J.] RE TOMLINSON. [Dec. 5, 1911.

Infant—Custody of—Contest between father and mother—Infants Act, R.S.M. 1902, *c.* 79, *s.* 32—*Habeas corpus—Conditions attached to order.*

Application by the father for the custody of two children, aged seven and five respectively, who had been brought into court by their mother under a writ of habeas corpus. The evidence shewed, in the opinion of the judge, that it was more in the interest of the children that they should remain with their mother than that the father should have the custody of them, and that, under s. 32 of the Infants Act, R.S.M. 1902, c. 79, an order should be made for the delivery of the children into the sole custody of the mother notwithstanding the prima facie common law right of the father. *Re Foulds*, 9 M.R. 23, referred to. Conditions were attached that, without leave of a judge, the children shall not be removed from the Province, and that they shall not be taken out of the city of Winnipeg without the father being kept informed of their whereabouts. Liberty to the father to apply again in any way in the matter should he desire to do so because of circumstances arising hereafter.

Moody, for applicant. *Thornburn*, for respondent.

Province of British Columbia.

COURT OF APPEAL.

Full Court.] TAYLOR *v.* B.C. ELECTRIC RY. CO. JAN. 9.

Damages—New trial—Excessive verdict—Assessment of damage by Court of Appeal—Marginal rule 869a.

Where a plaintiff had recovered damages which, in the opinion of the Court of Appeal were excessive, the Court ordered a new trial. On the second trial a jury increased the damages from $15,000 (granted in the first trial) to $17,500, and the Court of Appeal, under marginal rule 869*a* assessed the damages at $12,000.

See *Praed* v. *Graham* (1889), 24 Q.B.D. 53, 59 L.J.Q.B. 30; *Johnston* v. *Great Western Ry. Co.* (1904), 2 K.B. 250, 73 L.J.K.B. 568.

G. McPhillips, K.C., for appellant company. *McCrossan*, and *Harper*, for respondent.

Bench and Bar.

ONTARIO BAR ASSOCIATION.

The annual meeting of the Ontario Bar Association was held at Osgoode Hall, Toronto, on December 27-8, 1911. The proceedings of the meeting were both interesting and instructive, and indicated that the Association has justified its existence. The retiring President, Mr. Elliott, delivered his farewell address, and was followed by the Honorary President, Mr. E. F. B. Johnston, K.C., who discussed "The conduct of a case at common law." Mr. J. E. Farewell, K.C., of Whitby, gave some reminiscences of the *Anderson* trial, a notable event in the annals of Canadian history.

A number of reports were read, which told of the large scope of the work undertaken by the Association, dealing, amongst other things, with the following subjects: Law reform; Legal ethics; Legal history; The jury system; The abolition of the right to dower; Allowances to jurors, The establishment of a Divorce Court; Revision and consolidation of the rules of practice and tariff of fees; also some matters connected with

Crown Attorneys and criminal practice. A resolution was passed, calling for an enquiry and report as to the feasibility of assimilating the laws of the various provinces in connection with commercial matters. The advisability of transferring the educational functions of the Law Society of Upper Canada to a faculty of law in the Provincial University was also mooted. Notice of motion was given to take into consideration at the next annual meeting the question of the present chaotic condition of law reporting; as to which, by the way, it will probably be found that all difficulties will be solved by the new Series of Reports, known as the Dominion Law Reports which have just been commenced by the Canada Law Book Company.

Mr. E. F. B. Johnston, K.C., and Mr. F. E. Hodgins, K.C., were appointed to attend the coming convention and banquet of the New York State Bar Association.

The election of the Council for the ensuing year resulted as follows:—Hon. President, E. F. B. Johnston, K.C.; President, W. C. Mickel, K.C.; Vice-Presidents, M. H. Ludwig, K.C., F. M. Field, K.C., W. J. McWhinney, K.C.; Recording Secretary, Geo. C. Campbell; Corresponding Secretary, R. J. Maclennan; Treasurer, A. McLean Macdonnell, K.C.; Historian, Lt.-Col. W. N. Ponton, K.C. Past Presidents: A. H. Clarke, K.C., F. E. Hodgins, K.C., S. F. Lazier, K.C., and Chas. Elliott, J. E. Farewell, K.C., Whitby; A. Lemieux, Ottawa; Walter Mills, K.C., Ridgetown; F. W. Harcourt, K.C., Frank Denton, K.C., James W. Bain, K.C., C. A. Moss, C. F. Ritchie; were the other members.

The banquet at the King Edward hotel on the evening of Wednesday was a great success from every standpoint. It is the earnest wish of the Council that members residing outside Toronto will take a greater and more active interest in the Association, and the council will be pleased to receive and consider any suggestions from members with the view of benefitting the profession.

Judicial Appointments.

Simeon Beaudin of the city of Montreal, Quebec, K.C., to be the Puisne Judge of the Superior Court of the Province of Quebec. (Jan. 4.)