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It is much to be regretted that the condition of his health renders it necessary that the Hon. Edward Blake should relinquish his position as one of the counsel for the British Government in connection with the Alaska boundary dispute. His retirement will be a great loss to the Commission, following, as it does, the death of Mr. Justice Armour. His place will be taken by Sir E. H. Carson, Solicitor-General of England.

A recent number of the *Canada Gazette* contains the announcement that the Hon. Mr. Justice Britton has been appointed one of the Commissioners to enquire into and report upon matters and things concerning certain powers and privileges granted to Mr. Treadgold and others in the Yukon Territory. Holding the views we do as to Judges doing extra-judicial work, we can only express regret that the Government has called upon a Judge thus to act, and that the Judge has thought proper to accept the position. The circumstances attending this enquiry are of course of a different character from those concerning the bribery charges made in the Ontario House of Assembly; but as the learned judge who has now been appointed took an active part as a member of Parliament and as a Government supporter in connection with the discussion of these matters on the floor of the Dominion House the political element cannot be entirely eliminated, at least so far as the mind of the public is concerned. For this and other reasons we venture to think that it would have been better if the burden of this enquiry had fallen upon someone else.

MR. JUSTICE KILLAM.

We congratulate the Dominion Government upon its recent appointment to the Supreme Court Bench. From the time that Mr. Albert Clement Killam, K.C., a pronounced politician of the Reform stripe, was chosen by Sir John A. Macdonald to fill a vacancy in the Manitoba Bench, the wisdom of the selection then made has been shewn. Mr. Justice Killam's reputation as a lawyer has grown with his years and he has proved to

be a most painstaking, able and impartial judge. It is not inappropriate that the best of our judges in the West, transplanted from the extreme East, should succeed the most able jurist of our premier Province in the position he held in the highest court of the Dominion. His removal will be a great loss to Manitoba, but a gain to the country at large.

Mr. Justice Killam was born in Yarmouth, N.S., Sept. 18, 1849. He was a prizeman at the University of Toronto, and in that city received also his legal education. He was called to the Ontario Bar in 1877, and after practising a few years in that Province removed to Manitoba, residing in the City of Winnipeg, one of the ridings of which he represented at the time of his elevation to the Court of Queen's Bench in February, 1885. On the retirement of Chief Justice Taylor he was, with the unanimous approval of the Bar of the Province, appointed his successor.

ORIGIN OF CONTRACT IN ROMAN LAW.

While Sir Henry Maine's contention that "neither ancient law, nor any other source of evidence, discloses to us Society entirely destitute of the conception of Contract" (*a*) is probably correct, yet no one may expect to find a measurably complete system of conventions in existence at an earlier period in social development than the decline of the regal period in Roman history.

Contract arises from the commercial relations necessarily existing between men in civilized Society; and Trade, as we know it, began its history in the above-mentioned epoch (*b*). It is quite true that a system of transfer of commodities is to be found at the very dawn of social life. For instance, we learn in the Iliad (*c*) that "the long-haired Greeks bought, from the Lemnian ships, wine—some for bronze, some for gleaming iron, some with hides,

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(*a*) Maine's Ancient Law, p. 312. The oldest embodiment of positive law, the Code of Hammurabi (circa 2250 B.C.), discovered at Susa recently, shews that the Babylonians at that time had made remarkable strides towards an organized law of Contract.

(*b*) "Trade is throughout the result of an express or implied contract." Hare on Contracts, cap. 1, p. 11.

(*c*) Bk. vii. 472.

some with living kine, and some with captives." And in the Odyssey (*d*) we meet with the very suggestive phrase—

πρίατο κτεάτεσσιν ἑοῖσιν.

But, as Paul points out in Bk. xvii., Tit. I. of the Digest, although these transactions were relied on by a certain school of Roman jurists as indicating that there was a complete system of contracts of sale in use at as early a period in history as the date of the Homeric poems, the passages quoted disclose simple transactions of barter and nothing more. Even at the most flourishing period of their national existence the ancient Greeks shewed a fatal inaptitude for business methods. Their curious, not to say stupid, failure to apprehend the true function of "money" was alone sufficient to prevent them from becoming a commercial people. Profit derivable from the use of money was prohibited by law, and even so enlightened a thinker as Aristotle could confound "interest" with "usury" (τόκος), and denounce it as unjust (*a*). Indeed the whole social atmosphere of ancient Hellas was inimical to the development of systematized commerce. The Greek States were constantly at strife between themselves; their peoples despised foreign traders; they attempted to prohibit both exports and imports of certain staple commodities; above all, they were known to the outside world as a dishonest race, who would not scruple to repudiate their obligations (*b*). Hence we naturally turn from the annals of Hellenic civilization to those of the Roman in order to discover the foundations of the modern law of Contract.

Although at a very early period in Roman history commerce is seen to follow upon the footsteps of military conquest, yet, as has been before pointed out, we must not expect to discover any normalization of mercantile transactions until Rome came to be recognized as the commercial centre of the world. Dr. Muirhead, in his work on Roman Law, says:

"To speak of a law of obligations in connection with the regal period, in the sense in which the words were understood in the later jurisprudence, would be a misapplication of language. It would be going too far to say, as is sometimes done, that before

(*d*) Bk. i. 430.

(*a*) See his Politics, i.

(*b*) Cf. Cicero: Pro Cæcina; also Mahaffy's Social Life in Greece, cap. xi.

the time of Servius, Rome had no law of contract; for men must have bought and sold, or at least bartered, from earliest times—must have rented houses, hired labour, made loans, carried goods, and have been parties to a variety of other transactions inevitable amongst a people engaged to any extent in pastoral, agricultural, or trading pursuits. It is true that a patrician family with a good establishment of clients and slaves had within itself ample machinery for supplying its ordinary wants, and was thus to some extent independent of outside aid; but there were not many such families, and the plebeian farmers and the artizans of the guilds were in no such fortunate position. There must, therefore, have been contracts and a law of contract; but the latter was very imperfect." (*c*).

Now, the basis and vital principle of pure Contract in its origin was, of course, the "Conventio," or agreement of the parties, in respect of the subject-matter of the transaction between them; but in the early Roman law it was impossible to obtain the aid of the civil tribunals to enforce an agreement unless it was embodied in some precise form, or was accompanied by some ceremonial act of the parties before witnesses. Passing over the more or less indeterminate archetypes of Contract, "Jusjurandum" and "Sponsio," we arrive at an important stage in the process of development when "Nexum" appears—and "Nexum" is a province of Roman jurisprudence which may properly be said to be the Armageddon of the critics (*a*). In this form of transaction, which was primarily one of loan, when the parties were "ad idem" in respect of the subject-matter of their negotiations the ceremonial operation necessary to be superimposed upon their agreement, to make it capable of legal enforcement, proceeded in this wise: The raw copper, which stood for the money that was being advanced, was first weighed in a pair of scales by an official "libripens" (*b*); then

(*c*) Sec. 12, p. 49.

(*a*) Anyone desirous of studying the controversy surrounding the subject may refer to Bechmann, Der Kauf, I., p. 130; Mommsen, Hist. Rome, I., ii., p. 162 n; Bekker, Aktionen des röm. Privat. I., 22 ff; Huschke, Das Nexum, p. 16 ff; Clark, Early Roman Law, sec. 22; Buckler, Orig. and Hist. Contr. in Rom. Law, pp. 22-31.

(*b*) Mr. Buckler (op. cit., p. 52) controverts the view that the libripens was a public official. He bases his opinion upon the following clause of the XII Tables: "Qui se sierit testarier libripensue fuerit ni testimonium fatiatur improbus intestabilisque esto." There is, however, strong authority for the view that the libripens was an officer of the State. Cf. Kelke's Rom. Law, p. 61.

a single piece of it was weighed in the presence of five witnesses and delivered by the lender to the borrower as a symbolic delivery of the whole; thereafter (according to Huschke (*c*) and Giraud (*d*), whose formula Dr. Muirhead (*e*) considers might not be wide of the mark, although history has not preserved the precise words) the lender, the sole speaker in the transaction, addressed the borrower as follows: "Quod ego tibi mille libras hoc aere aeneaque libra nexas dedi, eas tu mihi post annum jure nexi dare damnas esto." The effect of this formula was to establish what has been indifferently called the "nexum," "obligatio," or "vinculum juris" between the parties. The ceremony closed with an appeal to the witnesses for their testimony to the consummation of the contract. It should, perhaps, be mentioned here that after the introduction of coinage the etiquette of the scales was so far modified that they were simply touched with a single "aes," representing the money transferred by the contract of loan—hence the transaction was designated "per aes et libram."

The remedy for breach of the contract on the part of the debtor (nexus), at least before the Code of the XII Tables, extended to the loss of his personal freedom, and his reduction to the status of a slave of his creditor. The release ("nexi solutio") of the obligation could only be effected by a ceremony similar to thatattending its creation; the amount of the loan being weighed by the libripens and solemnly returned to the creditor by the debtor in the presence of witnesses (*a*).

It is quite true Sir Henry Maine's view (*b*) that Contract was but an extension of the ancient "Conveyance," and that the "Nexum," with its similar ceremony of the scales and witnesses, was, therefore, the earliest form of Contract to be found in the Roman law, has been keenly disputed by Mr. Hunter (*c*). The latter holds the opinion that the "Stipulatio" (a survival of the primordial "Sponsio") at least synchronizes with the contractual

(*c*) Ueber das Recht des Nexum, p. 50.

(*d*) Des Nexi, ou de la condition des débiteurs chez les Romains, p. 67.

(*e*) Roman Law, sec. 31, p. 153. Cf. Salkowski, Roman Private Law, bk. iii., p. 553, et seq.

(*a*) Cf. Gaius, iii. 174, 175; Buckler's Origin and Hist. Contract in Rom. Law, p. 31; and Hunter's Rom. Law, 3rd ed., p. 459.

(*b*) Ancient Law, 14th ed., pp. 319-322.

(*c*) Hunter's Rom. Law, 3rd ed., pp. 525, 536-540.

"Nexum" in its origin, if, indeed, it is not older. Bearing in mind, however, that the "Sponsio," with its religious sanction for enforcing the agreement of the parties, was not peculiar to the Roman people, but was known to other Aryan civilizations (*d*), and that with the advent of the "Nexum" appears the first evidence of a secular sanction, there is, it seems to us, very strong reason for treating it as the earliest form of Contract indigenous to the Roman system of law.

The oppressive sanction of the "Nexum" was bound to give way before the growing humanitarianism of civilization. By the Lex Poetilia (A.V.C. 428), it was enacted that no one should thenceforth be enslaved for borrowed money, and that all insolvent debtors then in bondage should be liberated by their oath that they had faithfully endeavoured to pay their creditors. Thus, it may be said, by the way, that Roman legislation for the relief of insolvent debtors began at a very early stage in national development as compared with that of England.

In addition to its semi-barbarous features, the cumbrous machinery of the "Nexum" was unsuited to the needs of commercial activity; and so we are not surprised to find that before the time of Justinian nexal contracts had become obsolete, the simpler form of the "Stipulatio" being used in its stead. Mr. Buckler (*a*) inclines to the view that about the time of the creation of the office of Prætor Peregrinus, the "Stipulatio," stripped of the religious character appertaining to it under its old name of "Sponsio," and extended to contracts between Romans and aliens, came into general commercial use.

The form of "Stipulatio" in the later Roman jurisprudence, although simple, was peculiar, and the law exacted full conformity with it in all cases. The contract was effected by the utterance of what are called "formal words of style," consisting of an interrogation by the promisee and a categorical answer by the promissor, e.g., "Quinque aureos mihi dare spondes?" —"Spondeo;" "Promittis?" — Promitto;" "Dabis?" — "Dabo;" "Facies?" — Faciam." (*b*).

(*d*) Cf. Buckler's Orig. and Hist. Contract in Rom. Law, p. 22.

(*a*) Origin and Hist. of Contract in Rom. Law, p. 98. Cf. Muirhead's Rom. Law, pp. 228-9.

(*b*) See Lord Mackenzie's Roman Law, 6th ed., p. 228; and Gaius, iii., secs. 92-93. Cf. Bracton's application of this formula to his "Donatio," in bk. ii. of his De Legibus, etc., Angliae, cap. V.

The "Stipulatio," although it came to be applied to many transactions which we have no space to mention in detail here, never lost its ceremonial character. A promise given without being a formal answer to an enquiry from the promisee was nudum pactum; but where the "formal words of style" were employed, the transaction became an act in the law and gave rise to an obligation.

This was the origin of the "Formal" Contract in the law of Rome, which prepared the way for (a) the "Literal," (b) the "Real," and (c) the "Consensual" species in regular order of historical development. Taken together, they constitute beyond all doubt Rome's greatest contribution to the jurisprudence of modern civilization.

CHARLES MORSE.

DAMAGES FOR MENTAL SUFFERING.

This has been a much debated subject and there is much diversity of judicial opinion thereon. A writer in a recent issue of the *Central Law Journal*, discussing the subject from a somewhat novel and apparently the correct point of view, arrives at the conclusion that an action for mental suffering alone, unaccompanied by physical injury, will lie against a telegraph company when the mental suffering is made the foundation of the action and the damages treated as actual or compensatory. The writer in inquiring into the legal relationship of a telegraph company to the sendee and to the public, states the proposition that the legal status of the company is that of a common carrier of messages which is bound to serve the public with impartiality, and is liable as such in case of either negligence or wilful default. We give our readers the benefit of his research without referring to the numerous authorities which he cites. The article will be found in full in vol. 57 of the journal referred to at page 44. We quote as follows:—

"The legal status of a telegraph company is that of common carrier of messages, bound to serve the public with impartiality, and liable for losses caused by their negligence, or willful default. Some of the earlier cases held telegraph companies liable as insurers, the same as common carriers of freight, but this is not the true rule. The telegraph company owes an active duty to deliver the

message in writing to the addressee within as reasonable time as practicable. What would be negligence or willful indifference in the delivery, must depend ugon the facts of each case. It will not be denied that the telegraph company violates this duty which it owes to the sendee and the public by a failure to deliver, within a reasonable time, messages announcing death, etc. But the contention is, "that where only mental suffering is the result of the wrong then there can be no recovery in damages for mental suffering unaccompanied by physical injury."

"When this salutary rule of the common law was established, telegraphy was unknown to the world, and the conditions under which it is being exploited, by common carriers under charters with large franchises, constantly extending a business that earns fabulous profits until its use has become as universal and common as the postal service makes the question here under consideration "sui generis." It is a boast of the common law that it affords a remedy for every wrong, and that its principles are so universal and elastic as to be readily applied to new conditions and new facts. Let us look at the question now from a contractual viewpoint. For while I have little patience with the refinement of those courts which would rest the decision of so important a question upon the character of an action brought, yet there are certain settled principles which distinguish rights arising ex contractu from those ex dilicto, and which, if observed, will throw light on this much vexed question. One of these principles is, that inasmuch as contracts generally deal alone with pecuniary benefits, only a pecuniary standard of damages could be applied for the breach of contracts. And this rule is seized upon to exclude damages for mental suffering when it arises from breach of contract and the contract is appealed to, because there is no pecuniary standard by which mental suffering can be measured. This, of course, is misleading, for the contract need only be appealed to for pupose of shewing the relationship and status of the parties. And the misconception is still greater when you seek to apply this rule to a contract which never sought to deal with pecuniary benefits, but with feelings alone. What earthly analogy has the subject matter of a contract, which deals only with feeling, to that of a contract which deals exclusively with pecuniary benefits. This difference between the subject matter of the two classes of contracts is of the utmost importance, and must be remembered and observed if we are to

reach a correct conclusion. The subject matter of the contract in this class of cases then, is feeling, sentiment. The telegraph company is a public carrier of intelligence, and a large class of intelligence they daily transmit consists in messages of sickness, death, etc. They know when such a message is accepted for transmission and delivery, that there is no pecuniary standard by which its value can be ascertained; then there is no escape from the conclusion that it is within the contemplation of the parties that for a breach, the damage will be ascertained by means other than the pecuniary standard. Otherwise, what power could require them to observe such contracts? The citizen would be entirely at their mercy; and that too in matters of greatest importance touching such service. While on the other hand, if required to compensate the injured party for his mental suffering, it would speedily put a stop to the intolerable litigation which so concerns some of the courts. For the telegraph company would see that such messages were transmitted and delivered within a reasonable time, etc.

"There is another misconception as to the character of such damages for mental suffering alone, which has led to much of the confusion that surrounds the discussion of this question by the courts. They want to make it depend upon the right to recover actual or nominal damages, and then include the mental suffering as matter of aggravation; or, in other words, they want to assign to it the character of vindictive or exemplary damages, while it should be treated as compensation. We call especial attention here to the recent article of Mr. G. C. Hamilton in vol. 52, pp. 126-9 of *The Central Law Journal* in which he ably discusses this question of mental-suffering-damages from the view of point of compensation. When treated as compensatory damages, the same general rule announced in the case of *Hadley* v. *Baxendale*, 9 Exc. 341, will apply, viz.: 'Only such damages as are the proximate consequence of the injury and within the contemplation of the parties,' can be recovered. But it is only necessary that the negligence be the efficient cause of the injury. The fact that some other cause operates with the negligence of the telegraph company in producing the injury, does not relieve the defendant from liability. Both the North Carolina and Mississippi cases (supra), were cases of combined and concurrent causes. In the North Carolina case, the court said: "It was a question for the jury to decide, under charges from the court, whether the suffering and danger from

child birth was the proximate cause of the injury or the mental suffering on account of the absence of the husband," caused by the failure to deliver the telegram. In the Mississippi case the court sustained a verdict of $2,050.00 which held that the failure of the boat to stop at the landing was the proximate cause of the injury, and not the delicate and enfeebled condition of the wife. Where the message itself is evidence of its importance and announces "the death, etc.," it is not necessary that it should reveal the kinship of the addressee to the deceased.

"The suit is not for the death of the relative or friend, but for the disappointment and mental anguish in not being permitted to see him in death, and of being deprived of the privilege of paying our respect and love to his memory by attending his funeral obsequies. This is a natural feeling in the heart of every loving wife, relative and friend, and it is this natural feeling the defendant company outrages by violating its contract. Its negligence in failing to deliver the telegram within a reasonable time alone causes this mental suffering. That the telegram announces a fact that brings great sorrow to plaintiff cannot affect the damage sought to be recovered. It was the defendant's contractual duty to have ameliorated that sorrow; instead of which it wrongfully did that which aggravated the sorrow. It was bad enough, and sad enough at most; but the telegraph company by its wrong, makes it many times worse. It is not difficult to disassociate the two feelings, and the jury can be instructed not to take into account the mental sorrow caused by the death of the relative or friend. Let us examine the question now on principles controlling in actions ex delicto. The telegraph company is a common carrier of intelligence and owes a general duty, under the law, to both the sender and sendee to transmit and deliver its messages within a reasonable time. A large class of its business consists in forwarding messages of a social character, of sickness, death, etc. These messages, of all others, are most urgent and important. It deals alone with the feelings, the sentiment, the mental side of its patrons. The telegrams on their face give the defendant company notice of their urgency, their supreme importance, and the character of the subject matter they are called on to deal with. They are chargeable with the knowledge that no pecuniary benefits are within the contemplation of the parties; that no pecuniary standard can be appealed to in measuring the damage that will be inflicted by a

negligent failure to discharge their duty. They are given great powers and privileges under their charters, and make fabulous profits out of this class of their business. They hold themselves out to the world that they will transmit and deliver these messages of sickness, death, etc., within a reasonable time, as the business of telegraphy will permit. The contract made with its patrons may be appealed to for purpose of shewing the legal relation and status the telegraph company may bear to either the sender or sendee. To shew whether either has a right of action for any damage caused from its neglifience, to shew any aggravating circumstances that may exist that would prove the negligence was prompted by malice, wilfullness, or wantonness. There are no such rules or limitations on the admeasurement of damages in action ex delicto as arises out of the contract, i.e.: 'That only such damages can be allowed for the breach of contract as may be measured by a pecuniary standard.' 'That exemplary or vindictive damages are never allowed for breach of contract.'

Those courts which hold that there can be no recovery for mental suffering alone, unaccompanied with physical injury, invoke these limitations on the measure of damage when the contract is referred to or appealed to in actions ex delicto. But we submit we have the legal right to look to the contract for the purpose of shewing the legal relationship, and any aggravating circumstance that would shew malice, etc. And that on principle the question when viewed simply as a tort, cannot be fettered by any of these rules limiting the law of damage when the contract is relied upon. Here then are new conditions, new facts, growing out of telegraphy, unknown to the common law. Here it is conceded that a wrong has been done the plaintiff, that the telegraph company has violated its general duty as a common carrier of intelligence; that the plaintiff has sustained an injury, and that if the common law rule invoked here, touching mental suffering be applied, there is no remedy. In the face now of the frequent application of that principle of the common law, which has been its glory in all ages, that by reason of its universality and elasticity, no breach of a plaintiff's legal right can go without a remedy, does it not seem puerile in the courts to say in so important a case as this, that we are helpless because mental suffering cannot be measured by a pecuniary standard. To say that the suffering of the human mind, the best and grandest part in the trinity of man, is so vague,

shadowy and uncertain of admeasurement that we will not undertake it. And that too when the books are full of cases in which mental suffering has been the true gravamen of the action, although the courts rest the action on a fiction, and when it has been satisfactorily measured by the juries, without applying the pecuniary standard. Or to say, that as courts we will not meet this responsibility of seeing a wrong righted, because it will result in importuning us too often with intolerable litigation.

With this kind of case before us let us see now, on principles as hoary as the rule invoked here, what is the law of tort, and what is the law of damages applicable to this wrong? The act complained of is negligence in the failure to deliver, say a telegram, within a reasonable time, as required by a general duty owed the plaintiff. The telegraph company is engaged in a business sanctioned by law to promptly transmit and deliver messages relating to deaths, etc. It undertakes this duty and negligently fails to discharge it. Here is the wrong; here is the breach of the plaintiff's legal right; and the negligence complained of is the proximate, efficient cause of the violation of plaintiff's legal right. The subject matter dealt with is feeling; the injury inflicted is mental suffering. If the act complained of be the proximate cause of the injury of the mental suffering, and violates some legal right of the plaintiff, then the damages for the mental injury inflicted are compensatory. That the act complained of violates a legal right of plaintiff, I quote from Judge Lumpkins in *Chapman* v. *Western Union Telegraph Co.*, most relied on as the leading case against our contention here: 'That the argument that the telegraph company undertakes to serve the feelings of their customers is unanswerable, so far as it proves a right of action arising out of a breach of duty.'

"The wrongful act must not only give the cause of action, but it must also be the efficient and proximate cause of the mental suffering. The same negligent act here that caused the wrong, that violated plaintiff's legal right, was also the proximate, efficient cause of the injury. The mental suffering inflicted was the proximate result of the wrong complained of, and the injury was within the contemplation of the parties at the time service was undertaken. The mental suffering thus caused by simple negligence, falls directly within the principles of the old English case of *Hadley* v. *Baxendale*, and alone constitutes an independent cause of action. Now, if on principle, mental suffering alone, independ-

ent of physical injury or nominal damages, be the proximate result of the wrong complained of, then a fortiorari, the measure of damage must be compensatory instead of exemplary or punitive in such case. In all actions for physical injury, and in actions where exemplary or punitive damages were allowed, mental suffering has been admitted in aggravation of damages. It could only be put in evidence in cases where punitive damages were allowed. It has never been made a substantive cause of action. But like the case of seduction, the gravamen of which is loss of services, mental suffering has been tacked on to physical injury or nominal damage of a pecuniary nature, and it is in this respect that the subject matter now before us is sui generis. And many of the courts that have admitted mental suffering alone as an element of damage, have felt constrained to admit it as punitive damages, or as in aggravation of damages. Thus making the gravamen of the complaint nominal damages growing out of the breach of the contract, in order that the pecuniary standard of admeasurement might be first applied, thinking thus to avoid the difficulty of applying another rule of admeasurement. And although the proper results have been reached in these cases, we think they have beclouded the consideration of this question by putting the right of discovery on false grounds. The common law in keeping apace with these new conditions and facts arising out of telegraphy should apply these settled principles by making mental suffering the gravamen of the action. Then when the same act which commits the wrong, also inflicts the injury to the mentality, the true rule of the measure of damages is compensation. And when you apply the rule of compensation, then this law of tort and the law of damage is systematically developed on well settled principles to meet new conditions and new facts.

" Justice Mabry, in a dissenting opinion in *Int. Tel. Co.* v. *Saunders*, second column, says " that there can be no question that the failure to deliver a telegram can directly cause substantive injury and damage to the mind." And Judge Cooper in the Rodgers Case in order to maintain his position, was forced to criticize those courts which held that damages for mental suffering in breach of promise cases were compensatory. He claimed they should be punitive. Judge Lumpkin is confronted with the case of *Coleman* v. *Allen*, in which his own court says that in " an action for false imprisonment or malicious prosecution, mental suffering was a

proper subject for compensatory damages." In the technical action of assault, where no physical injury in inflicted, many of the courts give damages for mental suffering alone. Thus making it the foundation of the action, and the damages growing out of the injury compensatory. The same may be said of the actions of slander, libel and seduction; for the fiction introduced to support these actions, do not take them out of the principle we are here contending for. The Minnesota courts are confronted with the case of *Purcell* v. *Ry. Co.*, where fright, unaccompanied with physical injury, unless the illness which followed can be so denominated, was made the foundation of the action and compensatory damages given. But the Minnesota court has put itself on both sides of this question, the reasoning though in *Larson* v. *Chase*, is unanswerable

"We gather from this examination of the precedents, that fully one-half of the courts, which have passed on the question, have misconceived it in refusing to recognize such damages as actual, to be measured by the rule of compensation; and this misconception grows out of the failure to recognize that mental suffering alone can be made the foundation of an action for damages in this class of cases. We, therefore, submit that on principle, in this class of cases mental-suffering-damages should be allowed whether the action be ex contractu or ex delicto, and that the Texas doctrine is the true doctrine, and will finally, in the development of the common law to new facts and conditions, prevail.

"Mr. Joyce in his new work on Electric Law agrees with Sherman and Redfield, Sutherland, Sedgewick, Lawson and Thompson in the conclusion that in the class of cases under consideration, mental suffering alone does constitute the basis of an action for damages. And shews that when the federal court first applied the contrary rule, or rather the old common law rule, which required that mental suffering must be connected with physical injury, it was because it happened to be the law of the state from which the case originated."

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

CONTRACT FOR CONSTRUCTION OF WORKS—PLANT AND MATERIALS TO BE PROPERTY OF OWNER.

In *Hart* v. *Porthgain Harbour Co.* (1903), 1 Ch. 690, the effect of a clause in a building contract, providing that the whole of the plant and materials brought on the ground by the contractor was to be the property of the owners for whom the buildings were to be erected, was under consideration. In this case the contractor who had contracted with the defendants to build a harbour, had mortgaged the materials and plant brought on the ground for the purposes of the work to the plaintiff; the contractor had been adjudicated bankrupt, and failed to complete the contract. All payments due to the contractor up to the time of his quitting the job had been paid, but the defendants had been unable, from lack of funds, to complete the work. The plaintiff, as mortgagee, claimed to be entitled to the plant and materials notwithstanding the clause in the building contract declaring them to be the property of the defendants. Farwell, J., was of opinion that the contractor having failed to complete the contract his mortgagee was not entitled to the plant and materials, they being a security to the defendants for the performance of the work, and the fact that the defendants had not completed the works made no difference.

VOLUNTARY SETTLEMENT—ASSIGNMENT OF EXPECTANCY—ENFORCING VOLUNTARY ASSIGNMENT OF EXPECTANCY.

In re Ellenborough, Law v. *Burne* (1903), 1 Ch. 697, a lady having a spes successionis, made a voluntary settlement of her expectancy by deed whereby she granted to trustees the real and personal estate to which she might possibly become entitled under the wills, or through the dying intestate of certain named persons. The persons having died and property having devolved upon her in consequence, she now applied to the court on summons to have it determined whether she was bound by the settlement to transfer the property to the trustees. Buckley, J., having ruled that the

point could not be decided on a summons, it was agreed that a writ should be issued by the trustees, claiming a transfer of the property, and in an action so to be brought, he held that as the settlement only operated as an agreement to convey and was voluntary it could not be enforced; the case being covered by *Meek* v. *Kettlewell*, 1 Hare 464; 1 Ph. 342, which he held not to be overruled by *Kekewich* v. *Manning*, 1 D.M. & G. 176, 187.

COMPANY—ARTICLES OF ASSOCIATION—FORFEITURE OF SHARES—RESCINDING FORFEITURE.

In re Exchange Trust (1903), 1 Ch. 711, the directors of a limited company in pursuance of the articles of association forfeited shares for non-payment of calls, and notified the shareholder thereof; the articles provided that, notwithstanding the forfeiture, the shareholder should continue liable for all calls, interest and expenses owing in respect of the shares at the time of the forfeiture, and the shareholder on being notified of the forfeiture paid up all calls, interest and expenses then due, and repudiated all further liability on the shares. The articles provided that the shares when forfeited should be the property of the company, and that, until the shares were disposed of, the directors might annul the forfeiture upon such conditions as they thought fit, and, nine months after the shareholder had paid up, the directors passed a resolution rescinding the forfeiture, and gave notice to the shareholder that he was registered in respect of the shares, but he declined to let his name be reinstated as a shareholder. The company having resolved on winding up, the liquidator placed the shareholder of the above mentioned shares on the list of contributories and he applied to have his name removed therefrom. Buckley, J., granted his application, holding that the articles only gave power to the directors to make a new contract with the shareholder whose shares had been forfeited, if he was willing, but that they had no power to reinstate him as a shareholder against his will.

FORFEITURE CLAUSE—DISPOSE OR ATTEMPT TO DISPOSE—ASSIGNMENT TO TRUSTEES OF MARRIAGE SETTLEMENT.

In re Tancred, Somerville v. *Tancred* (1903), 1 Ch. 715, deals with the effect of successive appointments and a question of election, which it is not necessary to dwell upon here. Buckley, J., however,

discusses another point of more general interest and holds that where a person entitled to a life interest determinable if he should dispose or attempt to dispose of it, assigned his interest to trustees of his marriage settlement upon trusts under which he was to receive the income for life, and appointed the trustees, his attorneys, to receive the income and gave them power to pay the expenses of managing the trusts, that this was not a disposition or attempted disposition of his life interest so as to create a forfeiture thereof.

INSURANCE—POLICY IN FAVOUR OF WIFE "OR IF SHE BE DEAD" FOR CHILDREN—SECOND MARRIAGE—CHILDREN BORN BEFORE OR AFTER POLICY—CHILD OF SECOND MARRIAGE.

In re Griffith (1903), 1 Ch. 739, a policy of insurance had been effected by a husband in 1877 "for the benefit of his wife, or if she be dead between his children in equal proportions." He had a wife then living and four children. After the date of the policy four other children were born of the same wife. She died in 1891, and in 1895 the insured married again and left his second wife a widow, and eight children of the first marriage, and one of the second, and the question for Joyce, J., to determine was who was entitled to the policy of insurance. The widow claimed to be entitled to the whole, or else to an equal share with the children, but it was held that she was entitled to neither. The words "or if she be dead" were held to limit the benefit of the policy to the wife living at the time it was effected. The four children born to the first wife after the policy, and also the child of the second marriage were, however, held entitled to share equally with the children in existence when the policy was effected.

WILL CONSTRUCTION—GIFT TO A. AND HIS HEIRS AND IF HE DIE OVER TO ONE WHO MIGHT BE HIS HEIR—ESTATE TAIL—CONTINGENT REMAINDER.

In re Waugh, Waugh v. *Cripps* (1903), 1 Ch. 744. A neat little point of real property law was here decided by Farwell, J. A testator devised two cottages, Nos. 9 and 12, to his daughter Catherine for life, after her death No. 12 to go to her youngest daughter Elizabeth and her heirs and No. 9 to her son William and his heirs, "if either Elizabeth or William should die without an heir their share is to go to the survivors, 'heir or heirs.'" Elizabeth had died a spinster in 1891 and William had died a bachelor in 1897. The question was who was entitled to the

cottage devised to Elizabeth in the events that had happened and this, of course, depended on the interests Elizabeth and William took respectively under the will. The rule stated in Jarman, 5th ed., vol. 2, p. 1175, and in Fearne on Contingent Remainders, 10th ed., vol. 1, p. 466, viz.: "If the person to whom the limitation over is made be a relation and capable of being collateral heir to the first devisee, in that case the first devisee takes only an estate tail," was held to apply, and therefore that Elizabeth only took an estate tail, with a contingent remainder over to the survivor William in fee. The proper parties not being before the court in regard to the property devised to William, no decision was given as to that. Did his estate vest in him in fee as survivor, or did it revert to the heirs of the testator as upon the failure of the estate tail?

SOLICITOR AND CLIENT — SOLICITOR'S AGENT — COMPROMISE — SCOPE OF AGENT'S AUTHORITY.

In re Newen, Carruthers v. *Newen* (1903), 1 Ch. 812, Farwell, J., decides that a solicitor's agent has in the performance of business entrusted to him a general authority to make a compromise which will be binding on the suitor for whom his principal acts, although there is no privity between the agent and the suitor, provided the solicitor's agent acts bonâ fide and not contrary to express and positive instructions.

SETTLED ESTATE — STATUTORY POWER OF LEASING — LEASE TO DONEE OF POWER AND HIS PARTNERS — SETTLED ESTATES ACT, 1877 (40 & 41 VICT., C. 18 — (R.S.O. C. 71, S. 42 (1)) — COVENANT — LEASE TO TRUSTEE FOR DONEE OF POWER.

In *Boyce* v. *Edbrooke* (1903), 1 Ch. 836, the validity of a lease of a settled estate, purporting to be made by the tenant for life under the powers conferred by the Settled Estates Act, 1877 (see R.S.O. c. 71, s. 42 (1)), was in question. The lease was made by the tenant for life to himself and his co-partners in business, and the lessees covenanted with the lessor (the tenant for life) for payment of the rent. The tenant for life having died, those entitled to the estate in remainder objected to the validity of the lease on the ground that the tenant for life was himself one of the lessees, and that the covenant made by the tenant to himself was null and void, and therefore the statutory requirements had not been complied with. The lease contained a stipulation allowing

the lessor to reside in a house on part of the demised premises, rent free, and that when he ceased to reside there he should be entitled to £16 as rent for the house. This was also objected to as reserving a special benefit to the tenant for life. Farwell, J., upheld all these objections as well taken, and decided against the validity of the lease, because the best rent was not reserved; because the covenant was joint and was therefore not a legal covenant such as the lessor could have enforced at law; whereas revisioners were entitled to have proper covenants enforceable against all the lessees; and lastly because the tenant for life was himself one of the lessees. On this point the learned judge took occasion to review the cases which seem to sanction the view that a tenant for life may, under the statute, grant a lease to a trustee for himself, and came to the conclusion that they were exceptional in their circumstances and do not warrant the general proposition that the donee of a power of leasing can validly make a lease to a trustee for himself.

TRUST—ALTERING TRUST PROPERTY—INFANT CESTUI QUE TRUST—SANCTION OF COURT ON BEHALF OF INFANT.

In re Wells, Boyer v. *Maclean* (1903), 1 Ch. 848, an application was made to Farwell, J., to approve of a compromise in reference to a trust estate in which infants were interested whereby the trust property was to be altered for the benefit of the infants. Under the will of Henry Wells his residuary estate was vested in trustees on trust to pay certain annuities, and after the death of the surviving annuitant for such of the children of the testator's two daughters who should be then living and attain 21 or marry. The annuitants, and the surviving children of the two daughters, who were all adults, and all other persons interested under the will, had agreed (subject to the approval of the court) that the trusts of the will should be put an end to, that the trustees should purchase government annuities for the annuitants, and pay the residue to the children of the two daughters then living or to the trustees of such of them as had settled their shares. Two of the children had executed settlements of their shares under which infants were or might become interested, and it was on their behalf the sanction of the court was needed. Farwell, J., held that the Court had jurisdiction to approve of the arrangement on behalf of the infants, and in the exercise thereof he sanctioned it accordingly.

MORTGAGE ACTION—JUDGMENT NISI FOR SALE OR FORECLOSURE—POWER OF SALE—EXERCISE OF POWER OF SALE PENDENTE LITE.

Stevens v. *Theatres* (1903), 1 Ch. 857, was a mortgage action in which the plaintiff mortgagee had obtained a judgment nisi for foreclosure. He then, before the time for redemption had been fixed, assumed to exercise the power of sale contained in the mortgage and sold the mortgaged property to a third person. His right to do so being disputed by the mortgagor, the question was submitted to the court, and Farwell, J., decided that after the mortgagee had obtained a judgment nisi for foreclosure he could not without the leave of the court properly proceed to exercise his power of sale, but inasmuch as the power was not extinguished but merely suspended, the rights of a purchaser under such circumstances would depend on whether he could establish that he had purchased bonâ fide without notice of the judgment, and had got a conveyance of the legal estate.

CROWN GRANT FOR SERVICES—ESTATE TAIL—REVERSION IN CROWN—ESTATE TAIL WHETHER BARRABLE—FINES AND RECOVERIES ACT, 1833 (3 & 4 W. 4, c. 74) s. 18.—34 & 35 HEN. 8, c. 20, s. 2—(R.S.O. c. 122, s. 6).

Robinson v. Giffard (1903), 1 Ch. 865, is a case which serves to shew that sec. 6 of R.S.O., c. 122, is not an absolutely dead letter, although probably it has never been invoked in Ontario. That section excepts from the operation of the Act estates tail whereof the reversion is in the Crown, where the original grant was made in respect of services. In other words such estates tail cannot be barred by an ordinary conveyance. In this case the grant purported on its face to be made "for divers good causes and considerations" by Charles II., and there was evidence to shew that the grant was made for aiding that king's escape after the battle of Worcester. It was objected that he was not then king de facto, but Farwell, J., held that he was, because at the restoration, statutes were passed wiping out the legislation of the commonwealth. It was contended that the grant was merely matter of bounty, but Farwell, J., held that "divers good causes and considerations" imported services rendered by the grantee. He therefore held the estate tail was within the exception and not barrable. It may be noted that 34 & 35 Hen. 8, c. 20, is not included in R.S.O. vol. 3. What effect its omission may have on R.S.O. c. 122, s. 6, is a problem which may hereafter have to be judicially solved; see 2 Edw. VII, c. 13, ss. 4, 7.

REMOTENESS—RULE AGAINST PERPETUITY—EQUITABLE CONTINGENT REMAINDER—CHILD EN VENTRE SA MÈRE—RELATION BACK.

In re Wilmer, Moore v. *Wingfield* (1903), 1 Ch. 874, Buckley, J., decided that the rule against perpetuities was not violated by a disposition contained in a will of a testatrix who died in October, 1880, whereby she devised real estate to trustees upon trust to pay the income to the testatrix's daughter, Anna, during her life, and after her death to stand possessed of the real estate upon trust for the second and every younger son of Anna born or to be born, successively, with remainder, after the death of each such son, upon trust for his first and other sons successively in tail male, so that every elder (except the eldest) son of Anna and his first and other sons and their issue respectively shall take before every younger son and his first and other sons and their issue respectively. One of the sons of Anna was at the time of the testatrix's death en ventre sa mère, and on his behalf it was contended that the remainders in tail were too remote, because, he not being actually born at the time when the will took effect, there was a possibility that the remainders might not have taken effect within a life or lives in being and twenty-one years after, and that it was not for this son's benefit that his birth should be deemed to relate back to the date of the testatrix's death, and he claimed to be entitled as tenant in tail. But Buckley, J., held that it was immaterial that the doctrine of relation back was disadvantageous to the child who was en ventre sa mère that and thus prevent him taking a larger estate; that the rule applied, and the equitable contingent remainders in tail took effect.

CONFLICT OF LAWS—POWER OF APPOINTMENT—WILL OF DOMICILED FOREIGNER—CONSTRUCTION—UNATTESTED WILL—WILLS ACT, 1837 (1 VICT., C. 26) SS. 9, 10, 27—(R.S.O. C. 128, SS. 13, 29.

In re D'Este, Poulter v. *D'Este* (1903), 1 Ch. 898. By s. 27 of the Wills Act (R.S.O. c. 128, s. 29) a general devise or bequest of realty or personalty is to be deemed to include property over which the testator has a general power of appointment, but by s. 10 (R.S.O. c. 128, s. 13) no will made in exercise of a power is valid unless executed as prescribed by s. 9 (R.S.O. c. 128, s. 12). A domiciled French lady having a general power of appointment over personalty in England made her will which was unattested, but

valid according to the law of France. The will contained a general bequest of all her personalty, but did not refer to the power of appointment, nor purport to be an exercise thereof, and the question was whether it was under the English Wills Act to be deemed an execution of the power. Buckley J., decided that it was not, because s. 27 is, as he holds, a rule of construction applicable only to wills of which the English courts are the courts of construction, and, for want of words in the will making that rule of construction applicable thereto, it could not be construed as an execution of the power.

CLUB—GENERAL MEETING—ALTERATION OF RULES OF CLUB—DISSENTIENT MINORITY—INJUNCTION.

In *Harington* v. *Sendall* (1903), 1 Ch. 921, the plaintiff, a member of the Oxford and Cambridge University Club, claimed an injunction to restrain the defendants, the committee of management of the club, from interfering with the plaintiff's enjoyment of the privileges of the club. It appeared that the plaintiff became a member of the club subject to certain rules, one of which fixed the annual fee at eight guineas. The rules did not provide for any increase being made in the annual fee, or for any other alteration or amendment of the rules. At a general meeting of the members of the club a resolution was passed, contrary to the votes of the plaintiff and other dissentient members, raising the annual fee to nine guineas. The plaintiff, notwithstanding the resolution, tendered his fee of eight guineas, which was returned, and his name was posted as in default. During the existence of the club the fees had been previously, from time to time, raised by a similar resolution, without dissent of the plaintiff and other members, and the defendants claimed that this procedure had ripened into a uniform practice binding on the members, and that there was an implied power to alter the rules, but Joyce, J., held that the rules practically constituted a written contract on which the plaintiff became a member, and as they did not provide for their being altered or amended, they could not be so altered without his consent. See *Wise* v. *Perpetual Trustee Co.* (1903), A.C. 139.

CONFLICT OF LAWS — SCOTCH SETTLEMENT — HUSBAND AND WIFE — DOMICILED ENGLISHMAN—MORTGAGE BY HUSBAND OF HIS INTEREST.

In re Fitzgerald, Surman v. *Fitzgerald* (1903), 1 Ch. 933, a curious point arising on the conflict of the laws of Scotland and

England was decided by Joyce, J. On the marriage of a domiciled Englishman to a Scotch lady, her property consisting of heritable bonds which, according to Scotch law, are deemed to be real estate, was settled by a settlement in Scotch form, under which the husband in the event of surviving his wife was entitled to the income of the settled property for life, "all such payments to be strictly alimentary and not liable to assignment or arrestment" by the husband's creditors. According to Scotch law, if in such a case the husband fails to support the issue of the marriage they are entitled to attach the alimentary provision made for him by the settlement. The wife died and the husband assigned his interest under the settlement to his creditors. There was one child of the marriage. An application was made to the court by the trustees of the settlement to determine whether or not in view of the Scotch law the husband's assignment was valid and binding, and Joyce, J., held that it was, as the validity and operation of the Scotch settlement must be governed by English law, under which a prohibition against alienation of the alimentary provision was repugnant and contrary to public policy, and that therefore the husband's assignees were entitled.

TENANT FOR LIFE—REMAINDERMAN—LOSS—APPORTIONMENT.

In re Phillimore, Phillimore v. *Herbert*, (1903) 1 Ch. 942. A loss having occurred in respect of a security for money in which a tenant for life and remainderman were entitled, it became necessary to determine the principle on which the amount realized should be apportioned between them, and Eady, J., held that the account must be taken from the time when it was first ascertained that the security was insufficient up to the date of realization, the life tenant bringing all income during that period into hotchpot.

TRUSTEE—BREACH OF TRUST—UNAUTHORIZED INVESTMENT—DEATH OF CO-TRUSTEE—LOSS—CONTRIBUTION.

Jackson v. *Dickinson*, (1903) 1 Ch. 947, was an action by a trustee against the representatives of a co-trustee to obtain contribution towards a loss occasioned to the trust estate by reason of an unauthorized investment of the trust funds by the plaintiff and the deceased trustee in partly paid shares of a joint stock company, and in respect of which shares the plaintiff had been compelled to pay calls. The defendants admitted their

liability to contribute to the loss sustained by the trust estate, but denied their liability in respect of the calls. Eady, J., was of opinion that the evidence shewed that the trustees when making the investment had agreed to contribute equally to any liability arising therefrom, and that even if there had been no such agreement the defendants would have been equally liable to contribute not only to the loss sustained by the trust, but also to the liability in respect of the calls.

TRUST—ADMINISTRATION—UNAUTHORIZED CHANGE OF INVESTMENT—SANCTION OF COURT TO DEPARTURE FROM TRUST—JURISDICTION.

In re Tollemache, (1903) 1 Ch. 955. The Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ. 434) have affirmed the judgment of Kekewich, J., (1903), 1 Ch. 457, that court being of opinion that it is only in cases of emergency the court will exercise the extraordinary jurisdiction of sanctioning a departure by trustees from the terms of their trust. (See ante p. 454).

TRAMWAY—OBLIGATION TO KEEP SURFACE OF TRAMWAY IN GOOD CONDITION—NEGLECT OF STATUTORY DUTY—DAMAGES—LIABILITY TO INDIVIDUAL.

In *The Dublin United Tramways Co.* v. *Fitzgerald*, (1903) A.C. 99, the appellants were by statute required to keep that part of the highway which lies between the rails of their tramway in a safe condition for passing traffic. They neglected this statutory duty, and the respondent, in consequence suffered damage by reason of his horse slipping on the slippery stones between the rails, and brought the action. The appellants contended that they were not liable, because the roadway was in a good structural condition; and that they were not liable for nonfeasance; or to an individual, or otherwise (if at all) than for statutory penalties. The House of Lords (Lord Halsbury, L.C., and Lords Shand, Davey, and Robertson) however, affirmed the decision of the Court of Appeal in Ireland, holding the appellants liable to the respondent, their suffering, the stones to remain in a slippery condition being declared to be a breach of their duty.

WILL—CONSTRUCTION—ESTATE IN SPECIAL TAIL—RULE IN SHELLEY'S CASE.

In *Clinton* v. *Newcastle*, (1903) A.C. 111, the judgment of the Court of Appeal (1902), 1 Ch. 34 (noted ante, vol. 38, p. 193) is affirmed by the House of Lords (Lord Halsbury, L.C. and Lords Macnaghten, Shand, Davey, Robertson, and Lindley). The case

turned upon the meaning of a devise to "Charles if he marries a fit and worthy gentlewoman and his issue male, to such issue male and their male descendants in failure of which," then over. The House of Lords agreed with the Court of Appeal, for the reasons given by Buckley, J., and Romer, L.J., that this was equivalent to a devise to Charles and such issue male as he may have by a fit and worthy gentlewoman and their male descendants, and this created an estate in special tail in Charles.

PRINCIPAL AND AGENT—POWER OF ATTORNEY—IMPLIED WARRANTY BY AGENT OF HIS AUTHORITY—FORGED POWER—INNOCENT MISREPRESENTATION —LIABILITY OF AGENT.

Starkey v. *Bank of England* (1903), A.C., 114, is a case which was known in the courts below as *Oliver* v. *Bank of England* (1901), 1 Ch. 652 (noted ante, vol. 37, p. 453). The point in controversy was whether an agent impliedly warrants the genuineness of a power of attorney under which he assumes to act in making a transfer of stock in the books of the bank of England. The Court of Appeal held that he did, and was liable to the bank for the loss it suffered in consequence, of the power proving to be a forgery, though the agent was himself ignorant of the fraud, and the House of Lords (Lord Halsbury, L.C., and Lords Ashbourne, Macnaghten, Davey, Robertson, and Lindley) unanimously affirmed the decision.

WILL—CONSTRUCTION—"SURVIVOR"

Inderwick v. *Tatchell*, (1903) A.C. 120, is a case which turns on the meaning of the word 'survivor' in a will. By the will in question the testator gave seven portions of his estate to his seven children for life, and after their respective deaths for their respective children, but there was a proviso that if any child of the testator should die without leaving children, his or her share should go to their then surviving brothers and sisters, if more than one, in equal shares; and if only one, absolutely. The seven children survived the testator. Three died without issue; then one died leaving children; then another died without issue leaving the seventh child surviving. The children of the deceased child claimed to share in the share of the last child who died without issue as surviving in stock, but the House of Lords (Lord Halsbury, L.C., and Lords Ashbourne, Macnaghten, Davey, Robertson, and Lindley) agreed with the courts below that the

words "then surviving" must be read in their ordinary acceptation, and must mean the child of the testator surviving, and could not include the child of a deceased child.

PRACTICE—APPEAL AS TO COSTS.

In *Caledonian Railway Co.* v. *Barrie*, (1903) A.C. 126, the House of Lords refused to entertain an appeal on the question of costs. The same rule would no doubt be followed by the Judicial Committee of the Privy Council.

CLUB—LIABILITY OF TRUSTEES OF CLUB—LIABILITY OF MEMBERS OF CLUB.

In *Wise* v. *Perpetual Trustee Co.* (1903), A.C. 139, the Judicial Committee of the Privy Council (Lords Macnaghten and Lindley, and Sir Ford North, Sir A. Wilson, and Sir John Bonser) laid down the law on a question not hitherto covered by authority, viz., that the trustees of an ordinary club, although entitled to indemnity out of any property of the club to which their lien as trustees extends, for any liability incurred by them on behalf of the club, are not entitled to indemnity from the members of the club individually as cestuis que trustent, unless the rules of the club expressly so provide. As their Lordships point out, a club is a peculiar organization and is not in any sense a partnership, and, in the absence of agreement to the contrary the members are not liable to pay to the funds of the association anything beyond the subscription required by the rules of the club. See ante, p. 518, *Harrington* v. *Sendall* (1903), 1 Ch. 921.

B. N. A. ACT—S. 91, SUB-S. 25; S. 92, SUB-S. 1—NATURALIZATION - ALIENS—PROVINCIAL JURISDICTION.

Cunningham v. *Tomey Homma*, (1903) A.C. 151, was an appeal from the Supreme Court of British Columbia touching the validity of a statute of British Columbia providing that no Japanese, whether naturalized or not, should be qualified to vote at the election of members of the Provincial Legislature. Sec. 91 (25) of the B.N.A. Act confers exclusive jurisdiction on the Dominion Parliament in reference to the subject of the naturalization of aliens, i.e., how it is to be effected; but the Judicial Committee of the Privy Council (Lord Halsbury, L.C., and Lords Macnaghten, Davey, Robertson and Lindley) overruling the Provincial Court held, that s. 92 (1) enables the Provincial Legislature to legislate

as to what privileges, as distinguished from necessary consequences shall result from naturalization. The Act in question was therefore held to be intra vires of the Provincial Legislature. The Court below had considered themselves bound by *Union Colliery Co.* v. *Bryden* (1899) A.C. 587, but the Lord Chancellor points out that by the Act in question in that case it was sought to deprive naturalized Chinese of one of the ordinary rights of the inhabitants of British Columbia, viz., the right to earn their own living, whereas the right of voting at an election is not an inherent right of every subject, but only on those whom the Legislature chooses to confer it.

APPEAL TO PRIVY COUNCIL—PETITION FOR LEAVE TO APPEAL IN FORMA PAUPERIS.

In *Walker* v. *Walker*, (1903) A.C. 170, an application was made to the Judicial Committee of the Privy Council for leave to appeal and to prosecute the appeal in formâ pauperis, and their Lordships laid down as a rule of general, if not universal, application, that the committee will not entertain a petition for leave to appeal in forma pauperis where the court below has power to grant leave to appeal on the usual conditions, unless in the first instance an application for leave to appeal has been made within due time to the court from which it is proposed to appeal.

ARBITRATION—REFERENCE OF ACTION TO ARBITRATTION—WITHDRAWAL OF PARTY FROM REFERENCE - MISCONDUCT OF ARBITRATOR—EX PARTE HEARING BY ARBITRATOR—AWARD.

Aitken v. *Fernando*, (1903) A.C. 200 was an appeal from the Supreme Court of Ceylon, but the point involved may be of interest here. An action in Court was by an order referred to arbitration. After the order and before the first sitting of the arbitrator, the respondent wrote to the arbitrator professing to withdraw from the reference, the arbitrator nevertheless proceeded with the reference ex parte and made his award, the respondent then petitioned the Court to set aside the award, and the Colonial Court of Appeal set aside the award, on the ground that the arbitrator's proceeding ex parte was misconduct. The Judicial Committee (Lords Macnaghten, Shand, Robertson and Lindley, and Sir A. Wilson) however reversed this decision, being of the opinion that it was not open to the respondent to withdraw from the reference, and the arbitrator was therefore justified in proceeding as he did, and his award was confirmed.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

From Osler, J.A., Maclennan, J.A.] [March, 6.

RE LENNOX PROVINCIAL ELECTION, PERRY v. CARSCALLEN.

Controverted Elections—Disagreement of trial judges on charges alleging corrupt practices against a candidate and his agent—Right to appeal from such a decision.

The judges at the trial of an election petition having reserved judgment in respect of five charges, subsequently gave judgment, dismissing four of these charges, both judges agreeing as to the result. In respect to the fifth charge—a charge of payment of money by the candidate to a voter to induce such voter to vote for him—the judges disagreed; one judge being in favor of the dismissal of the charge; the other being of opinion that the charge was proved.

It was contended on appeal that the trial judges having disagreed in respect of the one charge, there was no decision as regarded it and that an appeal lay in respect of such charge.

It was also contended that as an appeal lay in respect to that charge, the whole case was open as respects the other charges, in the decision of which the judges concurred.

Held: 1. The existence of a right of appeal in respect of one class of charges does not draw with it the right of appeal in respect of other charges, as to which there would otherwise be no right of appeal.

2. The portions of the Ontario Controverted Elections Act relating to the right of appeal in cases of disagreement between the judges, must be construed in connection with the other provisions of the same Act; and also with the provisions of the Ontario Elections Act which are in pari materia; that the words "or otherwise" in sub-s. (5) of s. 57 of the Controverted Elections Act extend the effect of that sub-section to a difference or disagreement in every matter on which a candidate might be disqualified for a corrupt practice, and that sub-s. (6) extends it to candidates and others. That if an appeal lies in case of a disagreement between the trial judges, a judgment in appeal, finding a candidate or other person guilty of a corrupt practice, would necessarily subject him to disqualification or other disability or penalty notwithstanding the absence of a concurrent judgment to that effect of the two trial judges, and that this would be contrary to the Statutes.

3. (Maclaren, J., dissenting) that in this case an appeal did not lie in respect of any of the charges and the appeal was dismissed.

Watson, K.C., and *Grayson Smith* for appeal.

W. G. P. Cassels, K.C., and *Bristol* contra.

HIGH COURT OF JUSTICE.

Moss, C.J.O.] MACDONELL *v.* BEST. [May 26.

Registry laws—Certificate of allowance of petition under Partition Act—Lien of execution creditor—Expiry of writ—Preservation of lien—Notice Bona fide purchaser for value—Priorities.

At the date of the filing by plaintiff of a petition for partition the defendant company had in the hands of the sheriff a writ of execution against the lands of the defendant L., who was entitled to an undivided interest in the lands sought to be partitioned, and their lien by virtue thereof was still in existence at the date of the allowance of the petition (to which they were made parties) and the registration of the certificate thereof, but their writ, not having been renewed, expired before the date of a conveyance by the defendant L. to the defendant G., a bona fide purchaser for value.

Held, that the company's lien was not preserved by the proceedings taken before the conveyance to G., who was not, therefore, affected with notice of the lien. The company were bound to keep alive the lien which they had at law, at least until there was some act or declaration of the court recognizing their claim as an existing one against the lands.

W. M. Douglas, K.C., for company. *Grayson Smith*, for defendant Gamble.

Trial—Street, J.] DENISON *v.* TAYLOR. [May 28.

Sale of goods — Warranty — Correspondence — Construction — Breach — Damages.

The plaintiff, a private banker, wrote to the defendants, safe makers: "Can you give me a rough estimate of what a burglar proof door with proper frame complete will cost?" The defendants answered: "We can build you a burglar proof door of any size and description you wish. The cheapest door we now make is $250 . . . our No. 67, the outer door being 1⅛ inches thick, the entire surface protected with hardened drill proof plate. . . . Next better quality of door to this is one 1½ inches thick at $400, and the next $550." They enclosed cuts of three vault doors, Nos. 67, 68 and 69; the two latter were called "fire and burglar proof vault doors;" No. 67 was called "fire proof vault door with chilled steel lining," and the printed note below the cut read: "The above cut repre-

sents our vault doors suitable for post-offices, court houses, insurance offices, etc., and are made with a lining of chilled steel covering the entire surface of the outer door." The plaintiff replied: "Would No. 67 furnish a fair protection against burglars?" The defendants telegraphed: "No. 67 door gives both fire and burglar proof protection." The plaintiff then ordered a No. 67 door, which was supplied to him and put into use. Shortly afterwards it was blown open by burglars, and this action was brought to recover damages for breach of warranty. It appeared from the evidence that the handle to the spindle by which the lock was turned had been knocked off and dynamite introduced between the spindle and the door plates; the explosion of the dynamite then stripped the nuts which held the door plates together, and gave easy entrance to further explosives by which the door was wrecked. The door having been taken to pieces during the trial, it was found that the centre layer of the three layers making up the door, which was represented to be hardened drill proof plate, was neither hardened nor drill proof, and was easily perforated by an ordinary hand drill in a minute and a half.

Held, that the correspondence could not be construed as containing an absolute warranty, on the part of the defendants that the door was proof against the efforts of burglars, without qualification as to time or place. The warranty which was given was that which would have been created by an answer simply in the affirmative to the plaintiff's question whether the door would furnish "a fair protection against burglars;" and the further warranty, in a former part of the correspondence, that the entire surface of the door was protected by hardened drill proof plate composed of chilled steel. The former warranty meant that, so far as the thickness of the plates used would admit, the securities against burglary were as complete as the experience of safe makers could make them. Both warranties had been broken.

Held, as to damages, that the loss of the money contained in the vault was not a natural consequence of the defects in the vault door, because the presence of those defects was not the reason why the burglars were unable to break it open; but the plaintiff having sustained a total loss by reason of the article supplied being valueless was entitled to recover as damages the price, $250.

Hellmuth, K.C., and *Shirley Denison*, for plaintiff. *Walter Cassels*, K.C., and *W. H. Blake*, K.C., for defendants.

Trial—Street, J.] PALMER *v.* MICHIGAN CENTRAL R.W. Co. [May 30.

Railway—Farm crossing—Approaches—Repair.

Where a railway severs a farm and the company have constructed a farm crossing, no duty is cast upon them, in the absence of an express agreement, to keep in repair the approaches thereto, within the farm.

J. A. Robinson, for plaintiff. *Hellmuth*, K.C., and *Cattanach*, for defendants.

Boyd, C., Maclaren, J.A., Ferguson, J.] [June 5.

GILLETT *v.* LUMSDEN.

Trade Mark—"Cream Yeast"—Infringement—Trade Name—Acquisition of right by user.

The plaintiff in 1877 obtained the registration of a trade mark for a certain kind of yeast which he manufactured and sold, and in 1894 obtained another registration of the same. It consisted of a label bearing the representation of the head and bust of a woman with the words "Dry" and "Hop" on either side, and the words "Cream Yeast" below. In 1901 the defendants commenced selling yeast cakes in packages labelled "Jersey Cream Yeast Cake," the words "Jersey Cream" at the top and "Yeast Cake" at the bottom, with the representation of two Jersey cows and a milkmaid between. The plaintiff did not use cream in the preparation of his yeast, but the defendants actually used Jersey cream in theirs.

Held, the plaintiff's trade mark, if he was entitled to register it, was not infringed by the defendants' label.

Held, also reversing the decision of Street J., 4 O.L.R. 300, that the plaintiff had not acquired the exclusive right to use the name "Cream Yeast," and was not entitled to have the defendants restrained from using it.

Shepley, K.C., and *F. C. Cooke*, for defendants. *Masten* and *J. H. Spence*, for plaintiff.

Boyd, C., Ferguson, J., MacMahon, J.] [June 10.

HARVEY *v.* MCPHERSON.

Division Courts—Jurisdiction—Dividing cause of action—Division Courts Act, s. 79—Promissory note—Including in larger claim—Proof against insolvent estate.

The defendants, becoming insolvent, made an assignment for creditors, and the plaintiffs proved their claim upon a certain promissory note and other notes, and in respect of an open account for goods sold, for a lump sum, upon which they were paid a dividend. The plaintiffs had no security for their claim.

Held, that the remedy upon the promissory note in question was not extinguished, and the plaintiffs could sue in a Division Court for the amount of it as a separate cause of action, giving credit for a proportionate part of the dividend paid, without offending against the provisions of s. 79 of the Division Courts Act, R.S.O. 1897, c. 60, forbidding the dividing of a cause of action.

A. McLean Macdonnell, for plaintiffs. *C. A. Moss*, for defendants.

Boyd, C., Ferguson, J., MacMahon, J.] [June 11.

AHRENS v. TANNERS' ASSOCIATION.

Discovery—Examination of officer of company—Agent of unincorporated association.

The plaintiffs sued The Tanners' Association, a syndicate, not incorporated, made up of a number of trading partnerships and incorporated companies. One of the companies appeared and defended in their own name "sued as The Tanners' Association."

Held, that the agent of the association or syndicate could not be examined by the plaintiffs for discovery as an officer of the association or of the company defending.

C. A. Moss, for plaintiffs. *W. N. Tilley*, for defendants.

Osler, J.A.] CLERGUE v. MCKAY. [July 15.

Vendor and purchaser—Offer to sell—Purchaser pendente lite—Certificate of lis pendens—Specific performance—Delay—Damages.

A letter by the vendor's agent to a probable purchaser giving the description of the vendor's land, mentioning the price at which the vendor is willing to sell, and asking the person written to if he is willing to purchase at that price, is an offer to sell, not simply a request for an offer to purchase, and upon the person so written to stating that he wishes to buy at the price named a contract of sale and purchase is constituted between the parties. After the contract for sale had been entered into the vendor sold and conveyed the land in question, which was of a speculative character, to a third person who purchased in good faith and without notice of the prior contract. Before he registered his deed the original purchaser began this action for specific performance and registered a certificate of lis pendens, but although he knew of the second sale he did not take any step in the action, or make the second purchaser a party, for nearly twelve months;

Held, that the second purchaser's rights were not affected by the registration of the certificate; and that in any event the delay would have been fatal to the claim for specific performance as against him.

The vendor having deliberately broken his contract because of a better offer substantial damages were assessed against him.

Clark, K.C., and *N. Simpson*, for plaintiff. *Watson*, K.C., and *W. H. Hearst*, for defendants.

Province of Manitoba.

KING'S BENCH.

Full Court.] CASS *v.* COUTURE. [July 4.

CASS *v.* MCCUTCHEON.

Injunction—Breach of contract to sell bricks to plaintiff only—Remedy by action for damages.

Appeals from orders restraining defendants until the trials from delivering bricks manufactured by them, except in accordance with the terms of a contract between the plaintiff and the defendants and other brick manufacturers who had severally agreed to sell to the plaintiff the outputs of their respective brickyards for the present season and not to sell any of such bricks to any one else. The contract recited that the plaintiff, in conjunction with others, was forming a Company, to be incorporated, and that the plaintiff was desirous of purchasing the bricks for the benefit of the proposed Company, and set out the intention of the plaintiff to assign all his interest in the contract to the Company upon its incorporation, and stipulated that, upon such assignment, the Company should be substituted for the plaintiff in the contract, and the evidence showed that the defendants did not intend to enter into such an agreement for the benefit of the plaintiff and his associates personally, but that the formation of the Company and its interest in the proposed purchases were material parts of the arrangements. The orders were only formally made, without argument, to facilitate these appeals, upon the understanding between counsel for all parties and the Court that they were not to be taken as made in the exercise of a judicial discretion, but were to be fully open to appeal on all points, as it was admitted that the trials of the actions could not, in the ordinary course, take place till after a great part of the brickmaking season would have elapsed, and the continuance of the injunctions would have been equivalent to granting orders for actual specific performance of the contract during that period. The statement of claim in each case alleged that, relying upon the contract and upon the supply of bricks under it, the plaintiff, together with others, entered into a number of building contracts requiring the use of bricks, that the plaintiff would require for the purposes of his business during the present year all the bricks called for by the said contract, that the plaintiff and the said Company were tendering for and expected to obtain a large number of other building contracts requiring bricks, that the plaintiff expected to sell bricks to other builders at a profit, and that, unless the defendants supplied the bricks called for by the contract, it would be impossible for the plaintiff to get bricks in time to carry out these contracts, or to complete the works in the manner and within the times mentioned in said contracts.

The evidence adduced supported these statements in the main, but did not show that the contracts referred to had been made for the benefit or on behalf of the Company, or that the Company had acquired any interest or incurred any liability in respect of them.

Held, that the plaintiff should, under the circumstances, be left to his claim for damages, if any, arising from the alleged breach of the contract, and that the injunctions should be dissolved. Appeals allowed. Costs reserved.

Ewart, K.C., *Phippen* and *Minty* for plaintiff. *Aikins*, K.C., *Robson* and *Dubuc* for defendants.

Full Court.] ROGERS *v.* SORELL. [July 4.

Landlord and tenant—Damage to tenant of one part of building caused by defective condition of another part.

County Court Appeal. Plaintiff was tenant of a store on the ground floor of a building owned by defendant and sued for damages to her goods caused by rain water which entered by an open fanlight over a door at the end of a hall extending from the head of a stairway leading to the second floor of the building and, flowing over the floor above the plaintiff's store, came through the ceiling and damaged her goods. The fanlight had originally been glazed, but the glass had been broken and had all disappeared before the time of the demise to the plaintiff. The County Judge, on the authority of *Miller* v. *Hancock*, (1893) 2 Q.B. 177, held the defendant liable on the ground that the door, hall and stairway were no portion of the premises demised to the plaintiff, but, being in the actual occupation of the defendant, the defendant owed a duty to the plaintiff and occupants of other portions of the building to observe care to prevent the portions not demised from falling into such a condition as would make them a source of injury to those occupants.

Held, that, although the occupier of a building owes a duty to keep it from getting into such ruinous condition as to be a nuisance or cause injury to other persons, and an owner letting a building in a ruinous and dangerous condition, and causing or permitting it to so remain until for want of repair it falls and injures strangers, is liable for the damages, yet if a person chooses to become tenant of such a building, he, in the absence of fraud, would have no recourse for injury arising from its defective condition: *Colebeck* v. *Girdlers Co.*, 1 Q.B.D. 234; *Carstairs* v. *Taylor*, L.R. 6 Ex. 217; *Robbins* v. *Jones*, 15 C.B.N.S. 221, and *Humphrey* v. *Wait* 22 U. C.C.P. 580.

The distinction between this last case and *Miller* v. *Hancock* is that in the latter the defect was the result of wear and time and arose long after the demise, while in *Humphrey* v. *Wait* as in the present case, the defect existed and was plain and obvious when the demise took place.

Per Curiam: Defendant was not bound to remedy or protect the plaintiff from the effect of an obvious defect in the building existing at the time of the demise. It has been argued that the injury was due to the existence of a depression in the upper floor where the rain collected and that this was a latent defect. But the plaintiff should naturally have expected that water entering over the door would flow along the floor in some direction, even if the floor were and continued perfectly level, and, also, that depressions probably existed or would be caused by wear or settling. We think that a tenant taking part of a building, in other parts of which are defects likely to result in damage to him, should examine the premises and contract for the removal of such as are apparent at least.

Appeal allowed and judgment entered for defendant with the costs of the appeal but not the costs of the action.

Heap for plaintiff. *Mathers* for defendant.

Full Court.] IN RE BONNAR. [July 6.

Mandamus—Revision of voters' lists under the Manitoba election Act—Power of Revising Officer to keep his Court open after expiration of time limited by Board of Registration.

Applications for mandamus to compel a revising officer, appointed to revise and close the list of electors for the Electoral Division of Winnipeg Centre, to re-open his Court and hear applications to be placed on the list in accordance with the provisions of the Manitoba Election Act, R.S.M., 1902, c. 52, under the following circumstances. Mr. Bonnar, having been appointed revising officer under s. 70 of the Act, was notified by the Chairman of the Board of Registration, under s. 72 of the Act, of his appointment, and that he should hold his court on June 15th between the hours of 10 a.m. and 1 p.m. and between 2 and 5 p.m. Believing that he had no power under such notice to continue the sitting of his court after 5 p.m. on that day, he refused to do so or to appoint any other day or time for the hearing of applications to be placed on the list, although a number of persons had been in attendance for some hours and up to the closing of the Court for the purpose of making such applications, and were unable to get their applications heard. On the next day verbal notice of the application for a mandamus, to be heard on the following day, was given to Mr. Bonnar and he agreed to accept such notice and to attend and meet the application, but afterwards, and before the motion could be heard, he transmitted the list of electors and all books and papers to the Chairman of the Board of Registration as required by s. 92 of the Act. There were several adjournments of the motion and, before it was finally heard, the Chairman of the Board of Registration had, pursuant to s. 97 of the Act, sent the revised lists to the King's Printer and the books, documents and other papers to the clerk of the Executive Council.

Held, 1. The revising officer had power to continue the sessions of his court beyond the day and hours specified in the notice received by him, as long as he was satisfied that it was reasonably necessary for the purpose of considering applications to be entered on the lists, as sections 71, 72, 76 and 91 of the Act all contain expressions to show that the revision might occupy more than one day, and s. 88 gives the revising officer, with reference to the revision, all the powers which belong to or might be exercised by a Judge of a County Court in any action pending in a County Court.

2. But after the lists, books and papers have been returned by him to the Chairman, and after the Chairman had transmitted them as above mentioned, both the Board and the revising officer were functi officio, and it would be futile and useless to grant a mandamus.

Application refused without costs.

Ewart, K.C., and *Wilson* for applicant. *Aikins*, K.C. and *Elliott* for revising officer.

Full Court.] IN RE BONNAR. [July 11.

Contempt of court—Publication of articles reflecting on revising officer under Election Act.

This was an application to the court to take into consideration certain newspaper articles reflecting on the decision of a revising officer appointed to revise lists of electors under R.S.M., 1902, c. 52, who had refused to continue the sittings of his court beyond the hours named by the Board of Registration, and accusing him of partisanship and misconduct in his office, with a view to determine whether the court should deem it proper to take summary proceedings for contempt against the publishers. A motion had been made for a mandamus to compel the revising officer to re-open his court, which motion, after two days' adjournment, was refused by a single judge and afterwards by the full court on appeal, and the newspaper articles complained of had appeared pending the application for a mandamus and after its original dismissal and pending the appeal.

As to the conduct of the revising officer which had been so criticised, the full court, while agreeing that his view of the law was erroneous, admitted that, upon the face of the statute, the point was not so clear that another might not take the opposite view in good faith. The subject matter of the articles was one of immediate public importance; and the court considered that they would not be warranted in inferring that their publication was intended to influence the decision of the case then pending, or could tend to prejudice the interests of the revising officer in the litigation.

Held, that, so far as the articles complained of were defamatory, the revising officer's proper remedy was that which was open to other members of the community, but that there was no reason why the court should take summary proceedings to punish the publishers as for a contempt of court.

It is only when anything is done which has a tendency to obstruct the ordinary course of justice or to prejudice a pending trial that the court has such summary jurisdiction. *Shipworth's case*, L.R. 9 Q.B., per Blackburn, J., at p. 233; *Hunt* v. *Clashe*, 58 L.J.Q.B., 490, and *Queen* v. *Payne*, (1896) 1 Q.B. 577, followed.

Province of British Columbia.

SUPREME COURT.

Hunter, C. J.] [Jan. 21.

English Law-Stamp Act, 1853, s. 19 (Imp) not applicable to British Columbia—Bills of Exchange Act—Intention of was to modify and alter as well as codify the law.

A local manager of an incorporated company who was authorized only to endorse cheques for deposit with the Bank of British Columbia, indorsed and cashed at the Bank of Montreal cheques payable to the company drawn on that Bank:—

Held, that the Bank of Montreal was liable to the Company for the amount of the cheques so cashed.

Sec. 19 of the Stamp Act, 1853 (Imp.), which exonerates bankers from liability if they pay on what purports to be an authorized indorsement is inapplicable to British Columbia and hence did not come into force by virtue of the English Law Act. Even if it were brought into force it was annulled by the repugnant legislation of the Bills of Exchange Act although not mentioned in the repealing schedule to the Act.

The Canadian Bills of Exchange Act was intended to modify and alter as well as to codify the law relating to bills of exchange, cheques and promissory notes.

Sir C. H. Tupper, K.C., and *Griffin*, for plaintiffs. *Wilson*, K.C., and *Bloomfield* for defendant.

Full Court]. [Jan. 27.

CENTRE STAR MINING CO. *v.* ROSSLAND MINERS' UNION.

Practice—Pleading—Appeal partially successful—Costs.

Appeal from an order of MARTIN, J. In an action against a labour union for damages in respect of the Rossland strike in 1901 the union pleaded that "they were not a company, corporation, co-partnership or person, and not capable of being sued in this or any action."

Held, a bad plea.

The defendants in their pleadings also claimed the benefit of the provisions of the Trade Unions Amendment Act of 1902, and plaintiffs applied

to have the plea struck out on the ground that it was embarrassing as the Act was not retroactive.

Held, that questions of law going to the merits of a case will not be decided on an application to strike out pleadings as embarrassing.

It is open to either party to an action up to the time of the trial to attack the other's pleadings.

An appellant who is substantially successful is entitled to the costs of appeal.

The fact that a respondent is successful in some parts is not sufficient to deprive an appellant who is substantially successful of his costs.

A. C. Galt, for plaintiffs. *Taylor*, K.C., for defendants.

Full Court.] HASTINGS *v.* LE ROI NO. 2. [June 16.

Master and servant—Negligence—Common employment—Mine owner and contractor.

Appeal from judgment of IRVING, J. H. & M. contracted to sink a winze in defendants' mine at a certain price per foot, and by the terms of the contract the direction and dip of the winze were to be as given by the defendants' engineers; the defendants were to provide all necessary appliances, etc,; H. & M.'s workmen should be subject to the approval and direction of the defendants' superintendent and any men employed without the consent and approval of or unsatisfactory to such superintendent should be dismissed on request. A hoisting bucket hung on a clevis was supplied to H. & M. by defendants and through the negligence of the defendants' superintendent, master mechanic or shift boss, a hook substituted for the clevis by defendants at the request of H. & M. got out of repair in consequence of which the bucket slipped off and in falling injured the plaintiff who was one of H. & M.'s workmen engaged in sinking the winze:

Held, that the plaintiff being subject to the orders and control of the defendants was acting as their servant and the doctrine of fellow-servant applied and the action was not maintainable. Appeal allowed.

Davis, K.C., and *J. S. Clute*, for appellants. *MacNeill*, K.C., for respondent.

Full Court.] HOPPER *v.* DUNSMUIR. [July 20.

Practice—Discovery—Examination for—Nature of Rule 703.

Appeal from an order of Drake, J., refusing to strike out the defendant's defence on the ground of his refusal to answer certain questions on his examination for discovery. The action was to set aside the will of Alexander Dunsmuir on the grounds of insanity and undue influence exercised by the defendant who was the beneficiary under the will. On the examination for discovery of the defendant he refused to answer ques-

tions in reference to the nature and extent of the subject-matter of the will, the business and personal relations that existed between him and his deceased brother, the history of their dealings with the property, the mode in which the deceased brother managed his affairs and the circumstances leading up to and surrounding the execution of the will.

Held, that the questions must be answered or the defence will be struck out. The examination for discovery under Rule 703 is a cross-examination both in form and in substance, and a party being examined must answer any question the answer to which may be revelant to the issues. Appeal allowed.

Duff, K.C. (*Helmcken*, K.C., with him) for appellant. *Davis*, K.C., (*Luxton*, with him) for respondent.

Book Reviews.

The Elements of Mercantile Law, by T. M. STEVENS, D.C.L., Barrister-at-Law. Fourth edition, by Herbert Jacobs, B.A., Barrister-at-Law. London, Butterworth & Co., 12 Bell Yard, Temple Bar.

Our young friends know this book well, and being a fourth edition, it need not be referred to at length. It is known also as one of Butterworth's Commercial Law series of elementary legal text books for commercial classes. We trust, however, that the commercial classes have more sense than to hunt up their own law, even in so good a book as this.

The Law of Employers' Liability and Workmen's Compensation. Third edition. By THOMAS BEVEN, of the Inner Temple, Barrister-at-Law. London, Waterlow Bros. & Layton, Limited, 34 Birchin Lane, 1902.

Part I treats of the Employers' Liability at Common Law. Parts II and III are respectively commentaries on the Employers' Liability Act, 1880, and the Workmen's Compensation Act, 1897 and 1900.

Mr. Beven is a past master on the subject of negligence, and his book is, in the opinion of one of the best authorities in England, "the most learned commentary on the Acts yet produced, and the most compact and orderly presentment of the whole subject."

The author calls special attention to Part I, which, he quaintly complains, has failed to get the recognition he hoped for as a summary of an employer's liability at Common Law. We fancy it is much more highly appreciated than he supposes. He gives the result of his research in the shape of propositions stated in his own concise and luminous style, with appropriate notes and references. It is an admirable note-book on the law applicable in cases of personal injuries.

Some of his comments on book-making are very refreshing. In introducing Parts II and III, he remarks that the "Annotated statute is a repulsive kind of literary hack-work—the meanest form of book-making, inartistic and chaotic. A doctrine of verbal inspiration or something akin thereto, seems at the bottom of the method and probably its first practitioners were theological pedants peering at syllables and so obscuring all wider vision." We notice that the author cites many Canadian cases, and what is unusual, decisions of the English County Court Bench.

An Introduction to the Study of the Law of the Constitution, by A. D. DICEY, K.C., of the Inner Temple. Sixth edition. London, MacMillan & Co., Limited; New York, The MacMillan Company, 1902.

In looking at this, the sixth edition of this standard work, one is struck with the author's modesty in view of his world-wide reputation as a writer on Constitutional Law. He calls attention to the works of Sir William Anson, Mr. Bryce and Mr. Lowell as throwing a flood of new light on the legal aspects of the English Constitution, and says that the study of their works has taught him much, as well as strengthened his conviction that the essential characteristics of the Constitution of England are the sovereignity of Parliament and the Rule of Law. This edition contains a valuable note on Australian Federation which will be of special interest in this country in connection with the great attention which is being paid in these days to the subject of Imperial Federation. This book is so well known and so highly thought of that no words of ours would be of any interest. The work of the publishers is, as usual, excellent.

C. E. D. Wood, of Macleod, Alberta, is removing to Regina where he will enter into partnership with Hon. F. W. G. Haultain, K.C., Premier of the North-West Territories.

UNITED STATES DECISIONS.

INJUNCTION:—An employee of a glucose manufacturer, knowing the secret processes of the business, is held, in *Harrison* v. *Glucose Sugar Refining Co.* (C. C. App. 7th C.) 58 L. R. A. 915, to be properly enjoined from violating his contract not to enter the employ of a rival manufacturer during his term of employment.