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A NATION'S FOUNDATIONS.

The impartial and prompt administration of wise and righteous laws makes largely for the welfare of a nation; but to obtain the best and most lasting results we must go further back. Our King (God save the King!) struck the keynote when he said on a recent occasion—"The foundations of national glory are set in the homes of the people. They will only remain unshaken while the family life of our race and nation is strong, simple and pure." No words of ours could add anything to this expression of profound wisdom and highest statesmanship. Built upon such a foundation stone Britain can stand "four square to all winds that blow."

DIVORCE IN CANADA.

Prior to the Reformation the jurisdiction over marriage and divorce in England was exclusively vested in the ecclesiastical courts, and marriages could in no circumstances be dissolved except by the decree of the court Christian; and up to the time of the Reformation absolute divorces, even on the ground of adultery, were never granted; the only kind of divorce granted being a divorce from bed and board a mensa et thora, as it was called. De facto marriages were dissolved or annulled, where they had been contracted in circumstances which rendered them void ab initio, as, for instance, physical inability existing at the time of the marriage, or where the relationship of the parties disqualified them from marriage with each other, etc. Henry VIII.'s claim to a divorce was on the latter ground, and although styled "a divorce" it was in truth a claim to have his marriage with his deceased brother's wife declared a nullity.

Popes assumed the power to allow marriages within prohibited degrees, and also to dissolve them; but there seems to have been a general opinion that this power of Papal dispensation only extended to prohibitions imposed by ecclesiastical authority and did not extend to the prohibitions of the Levitical law, and although Henry VIII.'s marriage with his deceased brother's wife had been contracted under a Papal dispensation, it was by some theologians considered that the dispensation was invalid and beyond the power of a Pope to grant. Be that as it may, that was a divorce case fraught with most momentous consequences.

Since that celebrated case, opinion on the subject of divorce has undergone a great change in England. By the denial of Papal supremacy and the forbidding of all appeals to Rome, England was left without any recognized judicature for absolutely dissolving marriages. The courts Christian there continued after the Reformation to exercise the same limited jurisdiction they had done before the Reformation, they granted divorces from bed and board, but in no case an absolute divorce; and they continued to grant decrees of nullity of marriage in cases only where they were tainted with some imperfection which rendered them void ab initio.

In this condition of affairs Parliament began to make Acts of Parliament dissolving marriages absolutely and giving power to the divorcees to marry other people. This, however, was an expensive luxury available only by the rich, and had usually to be preceded by an action of crim. con., in which the guilt of one of the parties to the marriage would be established before a jury. As for the poor, their only remedy was to take the law into their own hands and commit bigamy, with the chance of a criminal prosecution. This inequality of the law was graphically described by Maule, J., in his humourous address to some poor bigamist convicted before him.

After existing for about three centuries this anomalous condition of affairs was put an end to, or at all events to some extent alleviated, by the establishment of a purely secular divorce

court in England during the last century. This court, now a branch of the High Court of Justice, is empowered to grant absolute divorces, and divorcees are by statute permitted to marry other persons.

In Canada some of the provinces had prior to Confederation established provincial divorce courts which were continued in existence after Confederation, although by the British North America Act the jurisdiction over marriage and divorce is vested in the Dominion Parliament. Up to the present time that Parliament has established no court with power to grant divorces, but the Parliament of Canada assumes a Parliamentary jurisdiction to grant absolute divorces and to give to the divorcees power to marry other persons, similar to that exercised by the English Parliament prior to the establishment of the English Divorce Court.

It is somewhat to be feared that the divorce habit is growing in Canada. We have to the south of us an example of what may happen, and it is surely an example which for the moral welfare of our country we should avoid rather than follow.

The indissolubility of the marriage tie is to this day the doctrine of the greater part of the Christian Church, and when temporal rulers refuse to give coercive effect to that doctrine a conflict arises between Church and State which is to be regretted. The disposition to do that which the temporal law allows is strong, when it is also the dictate of inclination, even though it be an act which the Christian Church, as the exponent of the divine law, adjudges to be an offence against that law; and people are apt to think that because a temporal legislature permits a violation of the Christian law of marriage, that because such violation is followed by no temporal disability it ceases to have any moral effect; but, of course, temporal legislatures, whatever they may assume to do, have no power to repeal divine laws.

This is a view of the matter which is not properly appreciated, but it is none the less true. A temporal legislature might do away with all temporal penalties for theft or any other im-

moral act, but theft would not cease to be immoral or contrary to the law of God which the Christian Church is bound to teach and maintain, even though temporal rulers may refuse any help of a coercive nature to compel its observance.

Looking through the Dominion statutes for the years 1907, 1908, 1909 and 1910, we gather the following results:—

In 1907 five divorces were granted—four on the application of the husband, and one on the application of a wife. Three applications were from Ontario, one from Quebec, and one from Manitoba.

In 1908 seven divorces were granted—two on the application of husbands, and five on the application of wives. Six applications were from Ontario, and one from Saskatchewan.

In 1909 fourteen divorces were granted—eight on the application of husbands, and six on the application of wives. Seven applications were from Ontario, three from Quebec, two from Saskatchewan, and two from Manitoba.

In 1910 twenty divorces were granted—twelve on the application of husbands, and eight on the application of wives. Fourteen applications were from Ontario, three from Manitoba, two from Quebec and one from Saskatchewan.

In each year the Province of Quebec occupies the honourable position of furnishing the fewest number of divorces in proportion to its population. The steady growth of applications from Ontario is not a very creditable thing to that province.

These statistics do not cover all the divorces granted in Canada, because, as we have said, in some of the provinces provincial divorce courts, deriving their origin from pre-Confederation days still exist, but probably the total number of divorces granted by those courts would not add very materially to the above list. G. S. H.

The views expressed in the above article are those generally held by the ecclesiastical authorities of the Church of England, and still more strongly by those of the Church of Rome. There are no questions connected with our social system more important than those relating to marriage and divorce, and there are

none with which, in the present state of society, it is so difficult to deal.

Those who regard marriage merely as a social contract which may, at any time, be set aside in order to suit the inclination or convenience of the parties, are troubled with no scruples on the subject, and feel no difficulty as to the method of dealing with it. Happily, however, such is not the view taken by the people of this country generally. In practice, at any rate, the religious character of the contract is recognized, and the sanctity of the marriage tie accepted as something which admits of no question.

The extreme view of the indissoluble nature of the marriage contract is, however, not held by all of those who still regard it as of a religious character. Adultery proved against either party would by them be held as good ground for divorce, having also the sanction of Scripture. For instance, when a Divorce Act was sent to the House of Commons from the Senate, the Roman Catholic members voted against it, no matter what the merits of the case might be, while the Protestant members supported it if the action was based upon proved acts of adultery, and there was no evidence of collusion.

The difficult question is, how can any change be made in the present system without causing a gradual loosening of the marriage tie. There can be no doubt, as all enquiry has shewn, that the greater the facilities there are for obtaining divorce, the more numerous will be the demands for it. On the other hand the difficulty of getting a divorce will give time for reflection, it may be for repentance, and thus prevent a separation which would otherwise be inevitable.

But, it will be said, if there are cases when a divorce should be granted the way to obtain it should be open to all—rich and poor alike. In this country, wherever no provincial courts exist, the only proceedings by which a divorce can be obtained are so costly as to be beyond the reach of a poor man—which is a manifest injustice. Considering, however, the frightful results which have elsewhere followed the plan of easy divorces, one might be tempted to say—better submit to the injustice than give

greater facilities for remedying it. It says much indeed, for the moral character of our people, and their respect for the institution of marriage, that there is not, and never has been, such a demand for the relief which a divorce court would give as to compel public attention, and demand legislative action. Till such a demand does arise it may be the part of wisdom to submit to evils of which we know the existence, rather than hasten to apply remedies which we know will not effect a perfect cure.

This may seem a very lame and impotent conclusion, but let us in our defence recapitulate the conditions before us, and the difficulties by which the subject is surrounded: (1) The very strong view of the indissoluble nature of the marriage tie held by all our Roman Catholic fellow subjects, and by many Anglicans and other Protestants, a view entirely opposed to any relaxation of the existing law. (2) The respect for the religious character of the marriage ceremony held by people generally, and their aversion to anything that would lessen the respect in which it is held. (3) The injustice of a system which gives to the rich what it refuses to the poor, for that is the practical result of the present condition of things. (4) The admitted danger to the morals of the community, to the purity of domestic life, to the happiness of the home and welfare of the children; certain to follow from giving undue facilities for divorce. (5) The object lesson in the results, which can only be described as revolting, of the system now prevailing in the country to the south of us.

With all these considerations before us should not our maxim be, Quieta non movere.

Whilst the proud boast of British justice is that it has the same law for the poor as for the rich, there are some cases where the boast becomes a farce. This was well put by Mr. Justice Maule when passing sentence on a prisoner convicted of bigamy. When asked why judgment should not be passed upon him he excused himself by saying that his wife had run away with a hawker five years before, and he had never heard from her since, and that he had only recently married his so-called second wife.

The keen irony of the celebrated judge above referred to appears in his remarks, which were as follows:—

"I will tell you what you ought to have done; and if you say you did not know, I must tell you that the law conclusively presumes that you did. You ought to have instructed your attorney to bring an action against the hawker for damages. That would have cost you about a hundred pounds. When you had recovered substantial damages against the hawker, you would have instructed your proctor to sue in the ecclesiastical courts for a divorce a mensa et thoro. That would have cost you two or three hundred pounds more. When you had obtained a divorce a mensa et thoro, you would have had to appear by counsel before the House of Lords for a divorce a vinculo matrimonii. The bill might have been opposed in all its stages in both Houses of Parliament; and, altogether, you would have had to spend about a thousand or twelve hundred pounds. You will probably tell me that you never had a thousand farthings of your own in the world; but, prisoner, that makes no difference. Sitting here as a British judge, it is my duty to tell you that *this is not a country in which there is one law for the rich and another for the poor.*"

OATHS BY TELEPHONE.

A recent case in the California Court of Appeals (*Fairbanks-Morse* v. *Getchell,* 110 Pac. 331), discusses telephoning an oath across a county line to a notary public out of the jurisdiction of the affiant, and holds that such an oath is void. The case assumes for the purpose of argument that an oath administered by means of a telephone would be valid if the affiant were in the same county as the notary when he makes it, as decided in a Texas case. We are not aware of any case in this country which decides the question as to whether an oath can be administered by telephone, but we should imagine that such a proceeding would be invalid. An affidavit cannot well be said to be "sworn before me," etc., when the parties are miles apart, though they

may recognize, or think they recognize, each other's voices. In cases of contract the rule may well be different. Whether the language we now quote from the *Central Law Journal* in reference to the above case is the effort of the editor of that excellent journal, or is an extract from the judgment of the Californian court we know not, but it is an oasis in the dry desert of legal literature which might appeal to some of those who agree with the thought expressed by one of our judges in this province who thinks (and to a certain extent we concur) that there is no reason why legal propositions and arguments should not be stated in language seeking some literary excellence, lightened occasionally by appropriate illustrations or gems of thought which others might perhaps think foreign to the dry atmosphere of a la· court. We do not know what his views would be as to the following reference to the question at issue in the above case:—

"This is a curious kind of ubiquity. You talk to it at a distanc· l yet it is at your elbow. It identifies you by your voice, and immediately it puts in motion, at a distance, a physical agency wielding a pen and an official seal, guided there by the mentality it encases. This official essence floats around you in a sort of psychological way, and yet that physical agency is so much a part of itself that if it is destroyed this essence goes out of existence or perhaps is in suspended animation, until the physical agency's successor is found."

CHANGES IN ENGLISH JUDICIARY.

There have been several changes in the English Bench during the past few months. In August last Mr. Horace Edmund Avory, K.C., and Mr. Thomas Gardner Horridge, K.C., were appointed judges of the High Court of Justice, King's Bench Division. These two appointments were made under the Supreme Court of Judicature Act of 1910, and date from October 1st last. In September last Mr. John Eldon Banks, K.C., was appointed a judge of the High Court of Justice, King's Bench Division, in place of the late Mr. Justice Walton. In the same month Mr. Charles Montague Lush was appointed judge of the

High Court, King's Bench Division, in the place of Mr. Justice Jelf, who resigned on account of ill-health. It must be gratifying to the English Bar as well as to the public to note that all these appointments, with possibly one exception, are said to be in every way excellent. Of one only (Mr. Justice Horridge) is it said that his political achievements were so great that they would not be allowed to go unrewarded. We have not always been in this country in the same happy position as they seem to be in England in the appointment of the best men at the Bar. Lord Collins last month resigned his position as one of the Lords of Appeal in Ordinary, the vacancy being filled by Sir William Robson, K.C., Attorney-General. Mr. Rufus Isaacs, K.C., perhaps the most prominent man at the English Bar, becomes Attorney-General, and Mr. J. A. Simon, K.C., Solicitor-General. A contemporary describes the rise of Mr. Simon as meteoric. Called to the Bar in 1899, and taking silk in 1908, he has now attained the position as one of the officers of the Crown at an unprecedented early age, at least in modern times, and, in the opinion of those best able to judge, his rise has been in accordance with his merits.

It is worthy of note that both the law officers of the Crown are, if the evidence of their names is to be taken, of Hebrew descent. This is another illustration of the outstanding position taken by men of this wonderful race. Walter Besant says of them: "Poet, lawyer, painter, actor, statesman, physician, musician—there is not a branch of learning, art or science in which the Jew is not in the front rank."

It is said that the press of Europe is almost entirely under the control of Jews, and a large majority of the journalists there belong to that people. In Germany, although they are only two per cent. of the population, they hold more than one quarter of all the professors' chairs in the Universities and nearly ten per cent. of the judges in that country are Jews. In Breslau, which has about 57 lawyers, 31 of them are Jews. Their capacity for acquiring wealth is proverbial. It was pro-

phesied 2,700 years ago that "the wealth of the Gentiles shall come unto them"; and now it is the fact that men of that race control the world's financial operations. It is said that Rothschild alone is worth some two thousand million dollars, and that nearly one half of the gold coinage of the world is held by Jews.

The law courts were opened on the 12th October after the long vacation, with the usual observances. Special services attended by the judges and the Bar were held at Westminster Abbey, the Roman Catholic members of the Bench and Bar attending a special service at the Roman Catholic Cathedral. Afterwards there was the usual procession of judges to the law courts, and the presence of so many newly appointed judges attracted an unusually large crowd of spectators.

THE INFLUENCE OF BIBLICAL TEXTS ON ENGLISH LAW.

DEODANDS.

There is an interesting article in the Pennsylvania University *Law Review* of last month on "The Influence of Biblical Texts upon the English Law." A perusal of this article shews the remarkable extent to which the contents of the old book have been incorporated into various branches of the law in various systems of jurisprudence. We have, however, no space to refer to this at any length, and the subject is academic rather than practical. One illustration given by the writer is the subject of deodands. The ancient rule was that any animate or inanimate thing that caused the death of a human being should be *deo dandum*, that is given to God, which in practice meant that the deadly thing, or its value, was handed over to the King, so that the price of blood should be at least theoretically, devoted to pious uses or objects of charity; and, it may be noted, that for centuries in every indictment for homicide the value of the weapon which caused the death was also stated.

The article continues as follows:—

"This rule is very ancient and most likely antedated the time when the Bible had any very great influence in shaping the law, but Lord Coke, followed by Blackstone, grounds it expressly upon the law of God as stated in Exodus 21:28: 'If an ox gore a man or a woman that they die, then the ox shall be surely stoned and his flesh shall not be eaten.' It is a strange example of the persistence of ancient law that deodands were not abolished in England by statute until 1846. (9 & 10 Vict. c. 62.) It is, however, worthy of consideration whether modern conditions do not call for a revival of the law. If every automobile or trolley car, for instance, which causes the death of a man, woman or child, were forfeited by the owner, it is very likely that the number of accidents would suddenly decrease.

"A curious parallel with the law of deodands was drawn from the covenant with Noah in Genesis 9:5: 'And surely your blood of your lives will I require; at the hand of every beast will I require it, and at the hand of man'; and from the requirement that a homicidal animal should be put to death. These texts were considered by the mediæval Church as authority for the prosecution and punishment of delinquent animals. In France, Germany and other continental countries many curious indictments were preferred against rats, mice and other destructive vermin, as well as vicious animals who killed or injured men."

GENERALLY.

On the general subject which introduces the foregoing, the articles concludes as follows:—

"The Bible as a law book has not received the careful study to which it is entitled. Its theological importance, and, in later times especially, its literary interest have absorbed the attention of its readers, but there are other aspects from which it should be studied. I have confined myself to a small part of its influence in specific cases upon the development of our own law; but the student of comparative law can find in this most accessible place a rich store of material, comparable only with those systems

upon which Sir Henry Maine has thrown so much light. Thus Judge Sulzberger has written upon the Hebrew Parliament, and Mr. David W. Amram, in a series of articles in the *Green Bag*, and his book 'Leading Cases in the Bible,' has shewn how the Hebrew legal system was developed from the patriarchal type, and founded upon the family as the social unit, which like a corporation survived the death of its head. We find among the ancient Hebrews the blood feud, the liability of the head of the family for the crimes of his children, the correlative power which the family head had over the children even to deprive them of life and liberty; these archaic ideas and the corresponding status of women, the custom of polygamy, the rights and obligations of inheritance which are described in the Old Testament have their counterparts in the ancient laws of the Romans, the ancient Aryans and our own ancestors."

PROPER PRACTICE IN CHARGING JURIES.

In some of the States the legislature has forbidden the judge, in a trial with a jury, to charge upon the evidence or express any opinion upon the value of the testimony, and he is expressly required to confine his instructions to a barren, and to the jury, often unintelligible, statement of the law of the case. In one of his lectures in Yale University, Judge Dillon remarked that such legislation "implies a distrust of the capacity of the judge to deal with the evidence in summing up so as not to be likely to do more harm than good, and it overlooks the need on the part of the jury for intelligent judicial instruction and guidance. . . . Taking the judges as they run, I very much doubt whether such legislation has the approval of the body of the Bar of the States which have adopted it. It has, doubtless, often originated, not in a public demand, or in any demand on the part of the Bar at large, but with some lawyer in the legislature who likes to control juries by declamatory rhetoric, and who has been disappointed by the conscientious discharge on the part of some independent judge of his whole duty. Under the practice required by these stat-

utes, mistaken verdicts are greatly multiplied." The State statutes above mentioned do not affect the practice in the federal courts, and the federal judges, if they are so inclined, freely advise juries on questions of fact, as authorized by the common-law practice. Sometimes a federal judge merely recapitulates the facts and leaves all the responsibility to the jury; or, having formed an opinion on the various issues in the case, he points out to the jury the considerations tending to that conclusion, giving them at the same time all the considerations which have an opposite tendency; and occasionally he adopts the rhetoric of an advocate and addresses the jury in terms which make his own strong opinion of the merits of the case unmistakable. It has been said that the first plan is that of a weak judge. But we do not think this is necessarily true: for the judge may be perfectly sure in the particular case that the jury will render a correct verdict without any suggestions from him, or the questions of fact may happen to be of such a character that wise and strong judges would freely concede the superior qualifications of an intelligent jury to determine them. Probably a federal judge's instructions are never formed on one model, and he varies his style according to circumstances and supposed necessities. In *Illinois Cent. R. Co.* v. *O'Neil*, (C.C.A.) 177 Fed. Rep. 328, where the plaintiff's intestate was killed at a railroad crossing, Judge Foster gave the following colourless instruction on the facts (he made no further comment on the testimony), and the plaintiff recovered, as is usual in such cases:

"Now, gentlemen, you are the sole judges of the facts in this case. There has been very little conflicting testimony, and while I have a right to comment on the evidence, it is not my intention to do so, further than to be of some assistance to you in arriving at a solution of the problem, and you are not bound in any way by my opinions as to what has been testified to; you are at liberty to disregard anything I say in regard to the evidence, and to draw your own conclusions from what you have heard. In determining the issues of fact, where there is conflict of testimony you must resolve those conflicts of testimony, you

must try to resolve those conflicts so as to have all the witnesses speak the truth, but if you cannot do so then you will, of course, reject the evidence of those you do not believe, and you will give credence to the evidence of those you do believe. In determining who to believe you ought to take into consideration the interest that witnesses may have in the matter and the opportunity for observation that each of them had, and the general circumstances surrounding the giving of their testimony. The burden of proof is on the plaintiff to establish her case by a clear preponderance of the evidence, and the burden is on the defendant to establish its plea of contributory negligence."

We remark, in passing, that in many State courts—in Illinois, for instance—it would be unsafe for a judge to use the word "clear" in laying down the preponderance rule. In striking contrast with the foregoing instruction is the elaborate and irresistible argument of Mr. Justice Grier upholding the genuineness of a contested will in his charge to the jury in *Turner* v. *Hand*, 3 Wall. Jr. (U.S.) 88, 24 Fed. Cas. No. 14,257. A single passage in his masterful speech indicates the tone of the whole:

"These witnesses have either sworn what is true, or they have conspired together to commit the grossest perjury. Any other hypothesis is sheer fancy and imagination, conjured up by the ingenuity of counsel to avoid the direct accusation of a crime which the charge of fraud relied upon in their defense indirectly asserts. In order to establish this charge the testimony of defendant must be sufficient to convince your minds by satisfactory evidence. That these four ladies of unimpeachable characters were morally capable of conspiring together to commit perjury in order to sustain a forgery; and that, too, of an instrument which is of no benefit to them, but to enrich a person who was a total stranger to them—this may almost be said to be a moral miracle. But supposing them morally capable of such a conspiracy, you must be convinced also that these ladies were capable of concocting and arranging a false story so perfectly that the most scrutinizing cross-examination of counsel cannot convict them of their guilt; and of being able to narrate

this story with all its circumstances, with all appearance of artless simplicity and truth, and without a blush or tremor—a task which the most practiced, astute, and abandoned knaves in the community would be incapable of performing."

This was pretty plain notice to the jury that if they should take a different view of the case their verdict would be set aside. They returned a verdict sustaining the will.—*Law Notes.*

PASSENGER ELEVATORS AS COMMON CARRIERS.

It seems to be the tendency of decisions to hold that a building, whether a hotel or office building, using an elevator for passengers is bound to the same degree of care as a railroad, steamboat, or stage coach. The Texas Civil Court of Appeals in *Farmers' & Mechanics' Nat. Bank* v. *Hanks,* 128 S.W. 147, is an illustration of this tendency.

This decision holds that a statute mentioning railroad, steamboat, stage coach "and other vehicle for the conveyance of goods or passengers" embraces "an elevator car in an office building habitually used for the transportation of passengers," and that "the reasons underlying the giving of damages" against what is specifically mentioned "apply with equal force" to the owner of such an elevator car.

It seems to us that the statute rather hinders than aids the conclusion reached, because in one respect at least the general words claimed to support it would seem limited by the maxim id omne genus. What were mentioned were common carriers. We doubt whether elevators in an office building are. We recognize that a common carrier must not necessarily hold himself out to the public in absolutely general way, but he may be such in the way limited, that is for carriage of specific things. But his customers need not have any prior relation with him or have their right to carriage of person or property depend upon some other antecedent or existing relation. This, however, does exist for right of carriage in an elevator. If one is a guest of a hotel,

the elevator is for his convenience. So as to the tenant of an office building. In neither case are others entitled to use the elevator except for the presumptive benefit of the guest or tenant. The guest or tenant may be said to have purchased the elevator privilege. Others are licensees through such right. The invitation to the general public as to those not guests or tenants would appear to be thus limited. But, if so, why should one such have any right against the elevator owner unless at least he go to a hotel or an office building upon the guest's invitation or tenant's business, or in furtherance, even though in a general way, of the guest's pleasure or the tenant's business? The case of *Fraser* v. *Harper House Co.*, 141 Ill. App. 390, was in favour of a guest, and the distinction we discuss was not considered. The case of *Sweden* v. *Atkinson Improvement Co.* (Ark), 125 S.W. 439, was that of an office building, and the rule was generally stated.

But whether the rule as to this strictness be limited to tenants and guests or not, there does not seem to have been any necessity for its announcement in the *Hanks* case, as the plaintiff's son was working in the shaft of an elevator and was killed by a descending elevator. That was not a passenger case at all.

An elevator for hotels and office buildings is just a substitute for stairways. Its use is for convenience if there are also stairways, and we doubt greatly whether it would be held that the keeper of a stairway is bound to the same degree of care in its proper use as a railroad of its roadbed.

The case of *Shattuck* v. *Rand*, 142 Mass. 83, ruled that the owner of an apartment hotel was not liable for injuries sustained by the city shutting off the water, from elevator machinery, if he did not know and could not learn by the exercise of reasonable care that there was danger from its being shut off. Here the rule seems to be reasonable, not extraordinary care. It seems to us that something else is needed than the common law rule for that high degree of care applicable to common carriers.—*Central Law Journal.*

THE REVOLUTION IN PORTUGAL AND INTERNATIONAL LAW.

The revolution in Portugal irresistibly directs attention to some leading principles of public international law. It is the privilege of every State to adopt any form of government it deems best suited to its internal wants and conditions, and its identity is never lost so long as its corporate existence is preserved. While that is preserved no internal revolution can diminish any of its rights or discharge it from any of its obligations. Neither a change in the person of its ruler nor a complete transformation in the internal organization of its government can affect the treaties or public debts of a State so long as the corporate identity remains. It can be safely assumed that the corporate identity of Portugal has not been affected by the revolution. How, then, does Portugal stand in her relations with other sovereign States? All States are forced in their actual dealings with each other to accept the doctrine that the government de facto must finally be recognized. D' Hannis Taylor, the eminent United States jurist and former Minister Plenipotentiary to Spain, writes: "Even in monarchical countries, in which ideas of legitimacy and Divine right are at the root of State institutions, while there is a greater prejudice against the acceptance of a new régime founded on revolution, it is practically impossible for their administrators to hold out against accomplished facts. While the European governments refused to recognize the French Republic of 1792 because of its instability and objectionable character, they found it convenient to recognize successively the revolutionary governments of Louis Philippe in 1830, of the Republic in 1848, and of the Empire in 1852": Taylor's International Public Law, p. 196. The recognition of the government de facto of Portugal very clearly falls within the application of the doctrine thus expounded and illustrated.

The effect of the revolutionary change in the person of its ruler in Portugal on the status of diplomatic agents may be thus outlined. If after a Minister, as in the case of the Portuguese

Ambassador to this country, has been accredited to a State and received by it a revolutionary change takes place in the government of the State from which he comes, his functions are rather suspended than terminated, and during such suspension he is entitled to the immunities and respect due to his station. Every prudent government is careful not to decide prematurely by a formal reception of envoys from a de facto power whether or not the real sovereignty has actually passed to such power. In order to relieve the State to which such envoys are sent from making any formal or positive decision on that subject, they sometimes go in the anomalous character of agents clothed with the powers and immunities of Ministers without being invested with the representative character or entitled to diplomatic honours. If, on the other hand, after a Minister has been duly received, the government to which he is accredited is forcibly overthrown and another substituted in its place which his own country recognizes, his status is unaffected. If, however, his own country fails to recognize the new government, it is usual for a Minister to continue to enjoy the immunities originally belonging to him, although it is a grave question whether his State could claim for him such immunities as a right while it refuses to invest him with the representative character, or to recognize the lawfulness of the government upon which such claim would have been made: See Taylor's International Public Law, pp. 324, 325.—*Law Times.*

RELEASE TO TRUSTEES.

A correspondent raises a very useful little point as regards the right of a trustee to a release under seal from beneficiaries upon the distribution of the residue under a will. It is a common demand for a trustee to make on winding up his accounts that he should be given a release. In *Chadwick* v. *Heatley* (Coll. 137) a trustee on transferring certain stock to his *cestui que trust* was held entitled to some acknowledgment of the same being received in full, and clear of all demands, but that the trustee could not call for a release under seal. The Vice-

Chancellor makes these observations of general importance (p. 141) "Though it may not have been right (and possibly it was not the right) of the trustee to require a deed, I think that it was his right to require that his account should be settled—that is to say, that he and his family should be delivered from the anxiety and misery attending unsettled accounts—the possible ruin which they who are acquainted with the affairs daily litigated in the Court of Chancery well known to be a frequent result of neglect in such a matter." Further on, at p. 144, the learned Vice-Chancellor continues: "although in strictness a release by deed could not be demanded, yet there was nothing out of the ordinary course of business, nothing unreasonable in asking it." In *Eaves* v. *Hickson* (30 Beav. 142) it is also laid down that a receipt in full in respect of all claims extends only to those then known. While therefore it is a very reasonable request on behalf of a trustee on parting with the funds, and divesting himself of means of defence, that he should be secured against litigation, it is also reasonable that such a request should extend to a release under seal, for it is not always clear whether a parol release would be an effectual discharge and the more formal procedure is safer. On this point reference may be made to the Encyclopædia of Forms and Precedents, vol. 2, at p. 448. Such a form of acquittance may be subject to re-opening on a *cestui que trust* proving some material concealment, fraud, or error, but nevertheless the trustee will feel assured that a heavy onus has to be sustained by one who seeks to get behind its shelter. *Re Catt's Trusts* (No. 2) (25 Beav. 366) was a case in a slightly different form. There trustees were held not to be bound to execute a release on receiving funds from other trustees. The Master of the Rolls said that he agreed with counsel as to the uselessness generally of releases, which, in most cases, really amount to very little more than a receipt. The result is that trustees commonly ask for and obtain the formal release under seal, and all parties are exceedingly well advised when they demand and accord it, but, strictly speaking, in the absence of special circumstances nothing more can be claimed or need be

conceded than an acknowledgment. The broad utility and reasonableness of a release is illustrated by the fact that the trustees' solicitor usually prepares it and the expenses fall on the trust funds.—*Law Times.*

JUDICIAL TENURE IN ENGLAND.

The recent establishment of two new judgeships has led a writer in the lay press to direct public attention to the fact that there is much misapprehension in reference to the tenure of the judicial office. It is popularly believed that a judge is removable by, and only by, an address of both Houses of Parliament to the Throne, whereas the tenure of judges established under the provisions of the Act of Settlement, which is that of good behaviour (quam diu se bene gesserint) instead of at the royal pleasure (placito rege), places their dismissal still within the power of the Crown in certain contingencies. Independently of the Parliamentary method of procedure for the removal of a judge under the Act of Settlement, the legal effect of their tenure of office during good behaviour furnishes the Crown with a remedy to which recourse may be had in the event of misbehaviour on the part of those who hold office by this tenure. An opinion of the law officers of the Crown in 1862—Sir William Atherton, who was then Attorney-General, and Sir Roundell Palmer (Lord Chancellor Selborne), who was then Solicitor-General—deals with the circumstances under which a patent office may be revoked. They state, in reference to the kind of misbehaviour by a judge that would be a legal breach of the conditions under which the office is held, that when a public office is held during good behaviour, a power of removal for misbehaviour must exist somewhere, and when it is put in force the tenure of the office is not thereby abridged, but is forfeited and declared vacant for non-performance of the condition on which it was originally conferred. To the same effect Mr. (Lord Chief Justice) Denman stated at the Bar of the House of Commons, when appearing as counsel on behalf of Sir Jonah

Barrington, who was eventually removed from the judgeship of the High Court of Admiralty in Ireland by the Crown on an address of both Houses, that, independently of a Parliamentary address or impeachment for the removal of a judge, there were two other courses open for such a purpose. These were (1) a writ of scire facias to repeal the patent by which the office had been conferred; and (2) a criminal information in the Court of King's Bench at the suit of the Attorney-General. By the latter of these especially the case might easily be determined: Mirror of Parliament, 1830, p. 1897. It is evident that the Crown is duly empowered to institute legal proceedings against the grantee of a judicial or other office held, during good behaviour, for the forfeiture of such office on proof of misbehaviour therein: See Todd's Parliamentary Government of England, II., pp. 726-729.—*The Law Times.*

A correspondent sends us the annual report of an insurance company which has its head office in London, Ont. Amongst the directors is the name of a county judge. We had thought there was only one judge in Ontario who appeared to be transgressing the laws of the land, but the County Court Bench has its representative in the class referred to as well as the High Court of Justice. The views of these gentlemen on the subject would be interesting to the profession, and we should be glad to give them full publicity should they favour us with them.

REVIEW OF CURRENT ENGLISH CASES.

ADMIRALTY — COLLISION — BOTH VESSELS IN FAULT — DAMAGE— LIMITATION OF LIABILITY—CARGO OWNER—DIVISION OF LOSS —ADMIRALTY RULE AS TO DAMAGES.

The Drumlanrig (1910) P. 249 is a decision which shews the difference between admiralty law and common law on the question of liability for negligence. By the common law according to *Thoroughgood* v. *Bryan*, 8 C.B. 115, where two vehicles come into collision through the negligence of the respective drivers of them, a passenger is so identified with the vehicle in which he is travelling and affected by the negligence of its driver that he cannot sue the driver or the owner of the other vehicle for damages caused by the collision, but it appears this rule has not been adopted in admiralty law, and under that law where two vessels collide, each being in fault, the cargo owners on one ship can recover against the owners of the other ship half of the damage they sustain. By the English Judicature Act, 1873, c. 25 (9), it is provided, "In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the courts of common law shall prevail." The rule above referred to is by the Court of Appeal (Williams, Moulton and Buckley, L.JJ.) held to be one of those rules in force in the Court of Admiralty, and that which governs the liability of shipowners to cargo owners in the case of a collision where both vessels are in fault. And inasmuch as our local Courts of Admiralty are to exercise their jurisdiction "in like manner" as the High Court in England: see Imp. Stat. 53-54 Vict. c. 27, s. 2(1). It seems to follow that this case would govern the practice in Canadian Admiralty Courts.

COPYRIGHT—INFRINGEMENT—INJUNCTION—STUD BOOK—LIST OF BROOD MARES—DAMAGE.

Weatherby v. *International Horse Agency* (1910) 2 Ch. 297 was an action to restrain the infringement of a copyright. The plaintiffs were the proprietors of a publication known as the "General Stud Book" which was published every four years and gave detailed particulars of thoroughbred stud

horses and mares. The defendants compiled a book called "Bruce Lowe's Figures and Stud Book, vol. 21," in which, without the plaintiffs' permission, they included the whole of the list of brood mares published in vol. 21 of their "General Stud Book." The defendants claimed that they had a right to use the list as they had done, and that their doing so would benefit the plaintiffs by increasing the sale of their "General Stud Book." Parker, J., who tried the action, however, determined that the lists in question were not such bare lists of names as to be incapable of copyright because considerable expense and trouble had to be taken in order to compile it; and that the defendants' use of the list was unfair, even though there was no likelihood of the defendants' book competing with that of the plaintiffs, and though no actual damage was shewn. He, therefore, granted the injunction.

COMPANY—DEBENTURES BINDING FUTURE PROPERTY—FLOATING CHARGE—TRUST DEED—RESTRICTION AGAINST CREATING PRIOR MORTGAGES—PURCHASE BY COMPANY—PURCHASE MONEY REMAINING ON MORTGAGE—VENDOR'S LIEN—LEGAL MORTGAGE—CONSTRUCTIVE NOTICE—NOTICE.

Wilson v. *Kelland* (1910) 2 Ch. 306 is an interesting case on company law. In 1904 a limited company purchased freehold property, and the vendors agreed to let part of the purchase money remain on mortgage. The conveyances to the company were executed, but remained in the custody of the vendors' solicitor, and subsequently on 7th January, 1905, the mortgage deed was executed without investigation or inquiry as to the company's title, and without notice of any trust deed or debentures. In 1901, the company had issued debentures secured by a trust deed, whereby the company charged its undertaking and all its present and future-acquired property; and by the trust deed the company was restricted from creating any charge upon its property ranking in priority to, or pari passu with, the debentures; but the condition indorsed on the debentures provided that nothing "herein" contained should prevent the creation of specific mortgages upon after-acquired leasehold or freehold property. On 7th January, 1906, the plaintiff, with notice of the debentures and trust deed, advanced money on the security of a mortgage of the same premises subject to the mortgage of 7th January, 1905, which was afterwards transferred to him. On these mortgages he now brought foreclosure proceedings, and it was held by Eve, J., that as to the mortgage of

1905, whether the vendors had or had not notice of the debentures and trust deed, any equity that attached to the property in favour of the debenture holders was subject to the paramount equity of the unpaid vendors, and that the mortgage to the vendors was entitled to priority over any person claiming through the company. But as to the mortgage of 7th January, 1906, he held that the security created by the trust deed and debenture was cumulative, and that the deed was not controlled by the proviso indorsed on the debentures, consequently he held that the company had no power to give this mortgage priority to the trust deed.

LANDLORD AND TENANT—COVENANT BY LESSEE—"WELL AND SUFFICIENTLY TO MAINTAIN AND KEEP IN REPAIR"—CONSTRUCTION—MEASURE OF LIABILITY.

In re London. London v. *Great Western and M. Ry.* (1910) 2 Ch. 314. This was an action to enforce a covenant by the lessee "to sufficiently maintain and keep in repair" the demised premises. The demised premises consisted of portions of the substructure and supports of Smithfield Market, for the purposes of a station. The substructure in question had been excavated and the supports of the roof thereof constructed in 1862 upon a standard of efficiency approved by referees appointed by the lessors. There was evidence that some of the girders supporting the roof and superstructure had become corroded and weakened, and in 1907 notice to repair according to the covenant was given to the lessees. In December, 1909, an originating summons was taken out to determine whether on the true construction of the covenant, the lessees were compelled to maintain the substructure thereby demised at a standard of strength and stability corresponding with that originally fixed, or whether it would be a sufficient compliance with the covenant to maintain it at such lower standard as might be actually sufficient to carry the weights and stresses imposed or to be imposed upon it, and Eve, J., answered that question by determining that the lessees were bound to maintain the structure at the standard originally fixed.

WILL—CONDITION AS TO MARRIAGE WITH CONSENT—MARRIAGE IN TESTATOR'S LIFETIME WITH HIS CONSENT—CODICIL CONFIRMING WILL.

In re Park, Bott v. *Chester* (1910) 2 Ch. 322. In this case the construction of a will was in question whereby the testator

gave real and personal property in trust for his son for life and on his death in case he should marry "with the consent in writing of my said wife" in trust for the son's children, and in case he married without such consent, or if he should marry with consent and have no child, in trust as to the realty for one person, and as to the personalty for another. The son actually married in the testator's lifetime and with his consent, and after the marriage the testator added a codicil confirming his will but making no alteration in the gift to the son. The son died without marrying again and without having any child. In these circumstances Parker, J., held that the condition as to marriage with consent had been fulfilled by the marriage with the testator's own consent, and that the gift over upon the son so marrying and having no child took effect.

TRUSTEE—POWER TO GRANT MINING LEASES—UNOPENED MINES.

In re Baskerville, Baskerville v. Baskerville (1910) 2 Ch. 329. In this case a testatrix by her will devised to trustees her undivided share in certain lands upon trust for sale and conversion, and declared that whilst any part should remain unsold the trustees might let, manage and join with any other persons in letting and managing the unsold portion, and also gave them power to grant building or other leases for such rent, etc., as they should think fit. On part of the estate were opened, and on other parts unopened, mines, and the question, for decision was as to the power of the trustees to grant mining leases of the property and Joyce, J., held that they might join with the other co-owners, in mining leases of the opened mines, but that this power did not extend to granting mining leases of unopened mines.

CONFLICT OF LAWS—MORTMAIN—TESTATOR DOMICILED IN ENGLAND—DEVISE OF LANDS IN ONTARIO FOR CHARITY—APPLICABILITY OF COLONIAL LAW TO CONSTRUCTION OF WILL—9 GEO. II. C. 36—MOVABLES—IMMOVABLES.

In re Hoyles, Row v. *Jagg* (1910) 2 Ch. 333. In this case a testator, a domiciled Englishman, by his will devised and bequeathed certain freehold mortgages of lands in Ontario, to be applied to purposes of charity. The will was dated in 1878, and the testator died in 1888. The Imperial statute, 9 Geo. II. c. 36, had been incorporated into the provincial law by the Constitutional Act of 1792, and was not repealed till 1902 (see now

R.S.O. c. 333), and under that Act the devise and bequest would be void as being a gift in mortmain of impure personalty; and Eady, J., held that the provincial law controlled the case and that the gift therefore failed, the mortgages, though personalty, being held to be immovables and governed by the law of the situs of the land.

DEED—ASSIGNMENT FOR VALUE—DEFECTIVE TITLE—SUBSEQUENT ACQUISITION OF GOOD TITLE—ESTOPPEL.

In re Bridgwater, Partridge v. *Ward* (1910) 2 Ch. 342. In this case a man having, as he supposed, an absolute reversionary interest in a settled fund, mortgaged it to secure a debt and by the same instrument it was recited that he had agreed to assign all his interest, absolute and reversionary, in the fund to secure the debt. As a matter of fact part of the fund had been appointed at the time of the making of the mortgage, and the mortgagor was then only entitled to a moiety of the residue of the fund, subject to an outstanding life interest. The mortgage contained covenants for title, and further assurance. By the subsequent death of the owner of the other moiety of the residue of the fund the mortgagor as her next of kin became entitled to that moiety, and the question was whether that moiety of the residue was bound by the mortgage, it having been acquired by the mortgagor after the date of the mortgage. Eady, J., came to the conclusion that the intention of the mortgagor was to assign the whole fund and not merely a moiety, and that he was liable to make good the mortgage to the extent of any interest he actually acquired.

ELECTRIC LIGHTING — MUNICIPAL CORPORATION — STATUTORY POWERS—"SUPPLY OF ELECTRICITY"—"THINGS NECESSARY AND INCIDENTAL TO SUCH SUPPLY"—SALE OF LAMPS AND FITTINGS—ULTRA VIRES.

Attorney-General v. *Leicester* (1910) 2 Ch. 359. This was an action to restrain a municipal corporation from acting in excess of its statutory powers. The defendants were by statute empowered to supply the inhabitants of the municipality with electricity and to "enter into such contracts and generally do all such things as may be necessary and incidental to such supply." In addition to entering into contracts for the supply of electricity the defendant corporation engaged in the sale of electrical fittings and apparatus to consumers of electricity. This

was held by Neville, J., to be an act in excess of the statutory powers of the corporation, which ceased with the delivery of electricity at the terminals, *i.e.*, the meters on the consumers' premises, the learned judge being of the opinion that the general powers above referred to were limited to the generation and delivery of electricity.

PATENT—INFRINGEMENT—AMENDMENT OF SPECIFICATION—DISCLAIMER—TERMS OF AMENDMENT—INJUNCTION—PATENTS & DESIGNS ACT, 1907 (7 EDW. VII. c. 29), ss. 22, 23, 33—(R.S.C. c. 69, s. 24).

Gillette Safety Razor Co. v. *Luna Safety Razor Co.* (1910) 2 Ch. 373. By the English Patent Act 1907, an application to amend a specification in a patent has to be made to the court, whereas under the Canadian Patent Act (R.S.C. c. 69, s. 24) the application must be made to the Commissioner of Patents. This action was to restrain an infringement of a patent, and in the course of the action an application was made to the court to amend the specification, and the case will furnish a guide as to the manner in which the jurisdiction of the Commissioner of Patents in a like case should be exercised. The patent in question was for a safety razor, and the proposed amendment was in the nature of a disclaimer, and the applicants asked that they might be at liberty to use the patent as amended at the trial of the action. The court (Parker, J.) granted the proposed amendment, but on the following terms, (1) the applicants to pay the costs of application, including the costs of third persons served with notice of the application as required by rules of court; (2) that no relief by way of damages should be sought by the plaintiffs against persons for infringement of the patent prior to the making of a consent order in November, 1909, whereby all actions of the plaintiff for infringement were stayed pending the result of the application to amend; and that the plaintiffs should seek no relief by way of injunction or damages against the defendants in respect of any razors made in, or imported into, England prior to November, 1909, if the judge at the trial should find that the plaintiffs' original claim was not framed in good faith or with reasonable skill and knowledge, and the plaintiffs were also required to undertake not to claim any relief in respect of any razor purchased by, or coming to the hands of, any member of the public, as distinct from the trade, prior to November, 1909.

INFANT—NEXT FRIEND—UNSUCCESSFUL ACTION BY INFANT—INDEMNITY TO NEXT FRIEND FOR COSTS.

Steeden v. *Walden* (1910) 2 Ch. 393. In this action the plaintiff, who had previously brought an unsuccessful action on behalf of the defendant as his next friend sought to be idemnified out of the defendant's estate for the costs and damages so incurred. The action brought on the defendant's behalf (he being an infant) was instituted on the advice of counsel, and in the course of the action an interim injunction had been granted on the usual undertaking of the plaintiff as next friend as to damages. The action was dismissed with costs, and an inquiry was ordered as to damages, which were assessed, with the result that the plaintiff had been compelled to pay for damages and costs including those of his own solicitor, over £700, for which he now claimed to be declared entitled to a charge on the infant's lands. Eve, J., being of the opinion that the action had been instituted by the advice of counsel on reasonable grounds and conducted with diligence and propriety in the interest of the infant, held that the plaintiff was entitled to be indemnified by the infant, and he made a declaratory judgment to that effect, but inasmuch as the infant's estate was not being administered by the court, he declined to make any declaration of charge, but he gave the plaintiff liberty to apply.

HABEAS CORPUS—FOREIGN COUNTRY IN WHICH CROWN HAS JURISDICTION—FOREIGN JURISDICTION ACT, 1890 (53-54 VICT. C. 37)—ORDER IN COUNCIL—PROCLAMATION—ARREST—HABEAS CORPUS ACT, 1862 (25-26 VICT. C. 20).

The King v. *Crewe* (1910) 2 K.B. 576. This case though perhaps not of any practical interest in Canada, is yet noteworthy from a constitutional standpoint. By an order in council, dated in 1891, in exercise of the powers vested in Her late Majesty by the Foreign Jurisdiction Act, 1890, the High Commissioner of South Africa was authorized to exercise in Bechuanaland Protectorate the powers of Her Majesty and "do such things as are lawful," and provide for the administration of justice and generally for the peace, order and good government of all persons within the Protectorate, including the prohibition of all acts intended to disturb the peace. One Skegome, who claimed to be a chief of a native tribe, was detained in custody at a place within the Protectorate, by virtue of a pro-

clamation of the High Commissioner authorizing his detention, on the ground that his detention was necessary for the preservation of the peace. The present proceedings for habeas corpus were instituted by Skegome against Earl Crewe, the Secretary of State for the Colonies. A Divisional Court having discharged the order nisi, the applicant appealed to the Court of Appeal, and the appeal was dismissed, their Lordships holding that the Protectorate was a foreign country in which the Crown had jurisdiction within the Foreign Jurisdiction Act, 1890, and that the proclamation was validly made under the powers conferred by the order in council of 1891, and that the detention of Skegome was lawful. Williams and Kennedy, L.JJ., however, were of the opinion that the Protectorate was not a foreign dominion of the Crown within the Habeas Corpus Act of 1862, which, it may be remembered, was passed in consequence of the celebrated *Anderson Fugitive Slave* case (11 C.P. 9) and prohibited the English Courts from issuing a habeas corpus to a colony or other foreign dominion of the Crown where local Courts had been established with power to grant the writ. In a proper case, therefore, it would seem the writ might properly have issued, but it is doubtful whether the Secretary of State in such a case would be the proper party to make respondent, as the prisoner was in no sense in his custody.

ASSIGNMENT OF CHOSE IN ACTION—PART OF DEBT ASSIGNED—RIGHT OF ASSIGNEE TO SUE—JUDICATURE ACT, 1873 (36-37 VICT. C. 66) S. 25 (6)—(ONT. JUD. ACT, S. 58 (5)).

Shipper v. *Holloway* (1910) 2 K.B. 630. In this case, Darling, J., holds that where a part of a debt is assigned, the assignee is within the Judicature Act, s. 25 (6), (Ont. Jud. Act, s. 58 (5)), and is entitled to sue for the recovery or the part assigned in his own name, but the authority of this case seems to be somewhat doubtful when the following case is taken into consideration. It may also be noted that it may render a debtor liable to a multiplicity of suits in respect of the same debt which can hardly have been the intention of the Judicature Act. It is also to be noted that the case was appealed, and the appeal allowed, but on the ground that the supposed debt had no existence, and it therefore became unnecessary for the Court of Appeal to pass on the question whether an assignment of a part of it would be within the Judicature Act.

JUDGMENT DEBT—CHOSE IN ACTION—ASSIGNMENT OF CHOSE IN ACTION—ASSIGNMENT OF PART OF JUDGMENT DEBT—ASSIGNEE—LEAVE TO ISSUE EXECUTION—JUDICATURE ACT, 1873 (36-37, VICT. C. 66) S. 25 (6)—(ONT. JUD. ACT, S. 58 (5)).

Forster v. *Baker* (1910) 2 K.B. 636. In this case also, the effect of an assignment of a part of a chose in action was in question. In the present case a part of a judgment debt was assigned and the assignee applied to the Court for leave under Rule 601 (Ont. Rule 864) to issue execution for the part assigned. Bray, J., refused the application on the ground that there cannot be an absolute assignment within the Judicature Act, s. 25 (6) (Ont. Jud. Act. s. 58 (5)) of a part of a chose in action, and the Court of Appeal (Williams, Moulton, and Farwell, L.JJ.) affirmed his decision on the ground that as the original judgment creditor could only issue a single execution upon his judgment and could not split up the judgment debt and issue separate executions for different parts of it, he could not give an assignee a right which he did not himself possess.

SET OFF—MUTUAL DEBTS—ASSIGNMENT TO DEFENDANT OF DEBT OWED BY PLAINTIFF—SET OFF BY DEFENDANT OF DEBT ASSIGNED—JUDICATURE ACT, 1873 (36-37 VICT. C. 66) S. 25 (6)—(ONT. JUD. ACT, S. 58 (5)).

In *Bennett* v. *White* (1910) 2 K.B. 643, the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) have reversed the decision of the Divisional Court (1910) 2 K.B. 1 (noted ante, p. 491). The Court of Appeal holding that a defendant may set off *pro tanto* against a debt owing by him to the plaintiff, a debt owing by the plaintiff to a third party whereof the defendant is assignee.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Middleton, J.] DAVIS v. WINN. [Sept. 26.

Costs—Summary disposition—Master in Chambers—Jurisdiction—Consent of parties—Appeal.

Appeal by the defendant from an order of the Master in Chambers requiring her to pay the costs of the action. The motion before the Master was for summary judgment under Con. Rule 616, but it was dealt with as a motion to determine the incidence of the costs of the action—it being said that the further prosecution of the action for any other purpose was rendered unnecessary by reason of the execution of certain conveyances.

Held, 1. That there was much room for doubt whether the Master in Chambers has jurisdiction to deal with a motion under Con. Rule 616, which amounts to the hearing and determining of the cause. Admissions may be made in pleadings and on examinations which raise matters of the greatest importance and difficulty, and the parties are entitled to have the case disposed of before a forum from which there is an unfettered right of appeal. The Master was, therefore, right in dealing with the motion as one to determine costs only, and the parties so treated it, and, if the defendant's consent was necessary, his solicitor's letter of the 25th August was a sufficient consent.

2. The plaintiff should not receive costs, and perhaps should pay costs; but, on the whole, it would be better to leave the parties each to pay his or her own costs. The appeal is allowed.

W. E. Raney, K.C., for the defendant. *John MacGregor*, for the plaintiff.

Middleton, J.] RE BOLSTER. [Oct. 1.

Will—Construction—Precatory words—Restraint—Trust.

Motion by a devisee under the will of Lancelot Bolster, for an order determining the question whether the land devised to

him was vested in him in fee simple free from any trust or restraint.

By his will the testator devised the property known as Eastview to the applicant, "with the wish that he may keep the same free from mortgage as a summer residence for himself and children." The applicant, in view of changed circumstances, finds the property unsuitable as a summer residence, and seeks to have it declared that he is the owner in fee simple so that he can sell it. Save the words quoted there was nothing in the will to cut down the absolute gift.

MIDDLETON, J.:—In *Bank of Montreal* v. *Bower*, 18 O.R. 226, the cases are reviewed, and the rule is thus laid down: "If the entire interest in the subject of the gift is given with superadded words expressing the nature of the gift, or the confident expectation that the subject will be applied for the benefit of particular persons, but without in terms cutting down the interest before given, it will not now be held without more, that a trust has been thereby created."

Since then the whole question was very fully discussed in *In re Williams*, [1897] 2 Ch. 12. Lord Justice Lindley says: "There can be no doubt that equitable obligations, whether trusts or conditions, can be imposed by any language which is clear enough to shew an intention to impose an obligation and is definite enough to enable the court to ascertain what the precise obligation is and in whose favour it is to be performed. . . . If property is left to a person in confidence that he will dispose of it in a particular way, as to which there is no ambiguity, such words are amply sufficient to impose an obligation." Rigby, L.J., who dissents in the application of the law to the will then under discussion, adopts as the guiding principle the words of Lord St. Leonards: 'Clear words of gift to a devisee, for his own benefit free from control, shall not be cut down by subsequent words, which may operate as an expression of a desire without disturbing the previous devise.'"

Two cases came before the Court of Appeal in 1904 in which the matter was discussed, *In re Oldfield*, [1904] 1 Ch. 549, and *In re Hanbury*, [1904] 1 Ch. 415. In each case the court accept *In re Williams* as practically adopting what Lord St. Leonards had called "the not unwholesome rule, that, if a testator really means his recommendation to be imperative, he should express his intention in a mandatory form."

Although *In re Hanbury* was reversed in the Lords, [1905] A.C. 84, nothing was then said at all qualifying the law laid

down in the Court of Appeal upon the matter now under discussion; in fact, the decision upon this question is affirmed, the view being taken that, though the gift was absolute, it was, in the events that had happened, subject to an executory devise. This agrees with the view expressed by Joyce, J., in *In re Bailey*, [1910] 1 Ch. 215.

This will creates no obligation or trust, and the applicant is the owner in fee.

G. Waldron, for the applicant. *F. W. Harcourt*, K.C., for the infants.

Boyd, C.] MOFFATT v. LINK. [Oct. 1.

Costs—Scale of—Slander—Malicious prosecution—Damages—Amount claimed more than $500—Assessment by jury at less—County Court jurisdiction—Set-off.

Action for malicious prosecution and slander brought in the High Court, and tried with a jury begun August 30, 1909, and tried Sept. 27, 28, 1910. The plaintiff claimed $5,000 damages. The jury, in answer to questions, made findings in favour of the plaintiff, and assessed the damages at $110—$10 for the malicious prosecution and $100 for the slander. The Chancellor refused a motion for a nonsuit, and gave judgment for the plaintiff on the findings of the jury, reserving the question of costs. By 9 Edw. VII. ch. 28, sec. 21(1), the County and District Courts have jurisdiction in . . . (*b*) personal actions, except actions for criminal conversation and actions for libel, where the sum claimed does not exceed $500. By s. 43, the Act was not to come into force until a day to be named by the Lieutenant-Governor by his proclamation. This part of the Act was brought into force on, from, and after the 10th June, 1909, by proclamation in the Ontario *Gazette* of the 22nd May, 1909.

BOYD, C.:—The plaintiff in an action for slander or for malicious prosecution cannot, by claiming more than $500, now since 9 Edw. VII. c. 28, get rid of the effect of Con. Rule 1132, which provides for the taxation of costs in cases where actions of County Court competence are brought in the High Court. The test as to the quantum of costs is measured by the amount recovered, and not by what is claimed. If such an action of comparatively trifling importance is brought in the High Court, the plaintiff has to run the risk of being amerced in costs, unless

he can get the Judge to certify that the provisions of the general order should not apply. This is clearly not a case for giving such a direction, and therefore the plaintiff has to tax only County Court costs, with a set-off to the defendant of his costs on the High Court scale. This set-off will apply, if necessary, to reduce the $110 recovered by the plaintiff.

A. B. Morine, K.C., for plaintiff. *Alexander MacGregor,* for defendant.

Middleton, J.] [Oct. 3.

PETTIGREW *v.* GRAND TRUNK R.W. CO.

Third parties—Relief over—Indemnity—Relation to plaintiff's claim—Negligence—Breach of contract—Issues for trial.

Appeal by the Knechtel Lumber Company, third parties, from an order of the Master in Chambers giving directions for the trial of the issues between the defendants and the third parties. The plaintiff sued the defendants for damages for the death of her husband, who was killed upon a siding running from the defendants' main line of railway to the yards of the third parties. A train was backing into the siding to connect with a car standing there. The deceased, as the plaintiff alleged, for the purpose of making the coupling, descended from the train, and, because lumber had been piled close to the track, was compelled to walk along the track itself, and was knocked down and killed. It was said, also, that snow and ice had accumulated, and this sloped down to the track, making it impossible to use such small space as there was between the lumber and the rails. It was also alleged that the frog at this point was packed, and that the deceased in walking along the track caught his foot in it. It was also alleged that the train was not in charge of a skilled person, and was run recklessly and at too high a rate of speed. The foundation for the claim over against the third parties was an agreement of the 16th March, 1903, under which the defendants constructed the siding, and the third parties paid interest on the cost, and also paid the cost of maintenance and repair. The third parties agreed to keep the siding free from snow, ice, and obstruction, and also agreed to keep a space six feet wide on each side of the siding free from all obstructions.

MIDDLETON, J.:—Upon the plaintiff's case it may be found that the accident was caused by the failure of the lumber com-

pany to observe their contract. . . . On the other hand, the plaintiff may be entitled to recover against the railway company in respect of matters quite apart from those indicated. In my view, the defendants do not lose their right to have their claim against the third parties determined in this action because the plaintiff, in addition to basing her claim to recover upon grounds as to which there is or may be a right of indemnity, also alleges that she can recover upon other grounds with which the third parties have no concern. The rights of the parties are not to be finally determined on the interlocutory motion for directions, except in the plainest cases; and it is enough that the plaintiff has made a claim against the defendants in respect of which there is a prima facie right to relief over. . . . Unless the third party proceeding can be made use of in a case like this, it has very largely failed in its object. The third parties are manifestly interested in the questions to be determined between the plaintiff and the defendants, and ought to be heard at the trial so as to see that this question is duly tried, and that the ground of liability is definitely ascertained. There ought only to be one trial of the question of the defendants' liability, and at that the facts ought to be so ascertained that the question between the defendants and the third parties will be in train for adjustment. This can be accomplished by questions being submitted to the jury.

Appeal is dismissed with costs to be paid by the third parties to the plaintiff and defendants in any event.

G. H. Kilmer, K.C., for third parties. *D. L. McCarthy*, K.C., for defendants. *S. G. Crowell*, for plaintiff.

Divisional Court, K.B.] [Oct. 6.

RE SOLICITOR.

Solicitor—Retention of client's money—Order for delivery of bill of costs—Retainer.

Appeal by the solicitor from the order of MIDDLETON, J., 21 O.L.R. 255.

RIDDELL, J.:—Whatever the form, the substance of this application is to have a declaration that a solicitor obtaining money for his client is entitled to retain thereout an amount promised him—agreed in writing to be paid to him—by his client as a "retainer." Its meaning is, a preliminary fee given to secure

the services of the solicitor and induce him to act for the client. A client may give his solicitor or counsel a preliminary fee in this sense—if so, it is a present; it does not at all diminish the fees properly chargeable and taxable against the client, and does not appear in the bill. . . . A promise to pay a "retainer" is not enforceable—and if the professional man is content to take a promise to pay a "retainer," instead of insisting upon payment in cash, he must rely upon the honour and generosity of his client. A promise to pay a retainer is void.

The appeal should be dismissed with costs.

E. Meek, K.C., for appellant. *R. McKay*, for client.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] ALDOUS *v.* SWANSON. [Sept. 27.

Principal and agent—Revocation of agency—Work done before revocation—Commission on sale of land—Quantum meruit—Distinction between power to revoke authority and right to do so.

Appeal from judgment of METCALFE, J., noted ante, p. 388, dismissed with costs.

Full Court.] [Sept. 27.

HAINES *v.* CANADA RAILWAY ACCIDENT CO.

Accident insurance—Proviso against liability if insured come to his death while under the influence of intoxicating liquor—Onus of proof—Condition that notice of death must be given within ten days thereafter—Tender before action, whether an admission of liability—Waiver—Impossibility of performance.

Appeal from judgment of MATHERS, C.J., noted ante, p. 270, allowed with costs, the court

Held, 1. (CAMERON, J.A., dissenting). A notice within ten days after discovery of the body of the insured was sufficient.

Bailey v. *De Crespigny*, L.R. 4 Q.B., at p. 185, and *Trippe* v.

Provident Fund Society, 140 N.Y. App. 23, followed. *Cassel* v. *Lancashire, etc., Ins. Co.*, 1 T.L.R. 495, distinguished.

2. Per PERDUE and CAMERON, J.J.A.—The tender by the defendants before action of one-tenth of the amount of the policy, followed by a plea of tender and payment of the one-tenth into court, was an admission of liability on the policy and a waiver of the condition as to notice.

The decision of Mathers, C.J., on the question of the intoxication of deceased should not be disturbed.

Trueman, for plaintiff. *Fullerton*, for defendants.

Full Court.] [Sept. 27.

WOOD v. CANADIAN PACIFIC RY. CO.

Negligence—Railway company—Workmen's Compensation for Injuries Act, R.S.M. 1902, *c.* 178—*Contributory negligence—Volenti non fit injuria—Evidence to go to the jury—Nonsuit—New trial.*

At the trial before a jury of an action by a switchman to recover damages against a railway company for injuries alleged to have been caused to him while engaged in the execution of his duty under the orders of his foreman through negligence in the operation of a train by other servants of the company and because there was not sufficient room between the different tracks in the railway yard to enable the plaintiff to carry on his work safely, the defences of contributory negligence and volenti non fit injuria are properly for the jury and, when there was some evidence that the bell had not been rung or the whistle sounded on the train which struck the plaintiff, and to shew that the "lay-out" of the yard was defective, a verdict entered for the defendants by direction of the trial judge should be set aside and a new trial granted.

Toronto Railway Co. v. *King* (1908) A.C. 260, and *Ingley* v. *City of Winnipeg*, 20 M.R. 22, followed.

Macneill, for plaintiff. *Aikins*, K.C., and *Curle*, for defendants.

Full Court.] KERFOOT v. YEO. [Oct. 4.

Vendor and purchaser—Rescission of contract—Cancellation—Right to recover money paid under cancelled agreement.

Appeal from judgment of MACDONALD, J., noted vol. 45, p. 573, dismissed with costs.

KING'S BENCH.

Mathers, C.J.] [August 11.

IN RE BLACKWOOD AND C. N. R. CO.

Railway — Arbitration — Costs — Taxation—Fees of arbitrator who resigned pending the arbitration.

Application by the railway company under s. 199 of the Railway Act, R.S.C. 1906, c. 37, to have its costs of an arbitration to determine the amount of compensation to be paid for land taken taxed by the judge, the board of arbitrators having awarded only the sum previously offered by the company. Mr. Johnson, one of the arbitrators first appointed, resigned before the award was made and a new arbitrator was appointed in his stead. The owner took up the award, paying the fees of all the arbitrators but Mr. Johnson, who came in on this application and asked that his fees be paid.

Held, that he could have no relief on this application, but must be left to his remedy, if any, against the owner by action.

In taxing the costs of the arbitration under the statute, the judge acts ministerially and cannot decide anything as to the right to costs.

Ontario & Quebec Ry. v. *Philbrick*, 5 O.R. 674, 12 S.C.R. 288, followed.

Clark, K.C., for the Railway Co. *G. A. Elliott*, for Blackwood. *Hough*, K.C., for Johnson.

Prendergast, J.] THORDARSON *v.* AKIN. [August 15.

Survey of land—New survey—Errors in survey.

When, upon a new survey of a block of lots giving only the the family for the crimes of his children, the correlative power which the family head had over the children even to deprive them outlines, it is determined that there is a small excess in the length of the block over the dimensions shewn in the original subdivision survey, there is no principle of law requiring that such excess should in all cases be distributed over the whole length of the block so as to increase the width and change the true boundaries of every lot; but, if the case requires that such excess should be distributed or located at all, it may, according to circum-

stances, be located or allotted at one or the other end of the block. In the present case the southern boundary of the block was a known and definite street line from which all but a few of the lots, each 25 feet in width and rectangular in shape, were numbered off in the original survey until near the southerly boundary of another street which ran obliquely along the north end of the block, leaving an area whose east and west boundaries were 88 and 132 feet in length respectively and which was subdivided into four lots of different sizes.

Held, that, in this case, the excess in question should be attributed or located to or amongst this last mentioned area, thus leaving all the rectangular lots as in the original survey.

Barry v. *Desrosiers*, 9 W.L.R. 633, followed.

Anderson, K.C., and *Garland*, for plaintiff. *Rothwell* and *Bergman*, for defendant.

Province of British Columbia.

COURT OF APPEAL.

Full Court.] [Oct. 17.

McDONALD v. VANCOUVER, VICTORIA AND EASTERN RY. CO.

Railways—Right of way—Land acquired for or actually taken—Obligation of company to take lands—Railway Act (Dominion), secs. 158, 159, 160.

A railway company, in its acquirement of right of way, included inter alia land in which the plaintiff had a leasehold interest, but the right of way was at no time wholly upon the plaintiff's property, the greater portion being upon adjoining lands. The company, without proceeding to arbitration acquired the interest of the plaintiff's lessor, and built its road clear of but adjoining that portion of the indicated right of way over the land in which the plaintiff was interested. In an action to compel the company to acquire and pay for the right of way as indicated, the company contended that it could be compelled to pay for only that portion of the right of way which it actually took possession of, and Irving, J., at the trial dismissed that contention and held that the plaintiff was injuriously affected by the construction and operation of the railway.

Held, on appeal (MARTIN, J.A., dissenting), that the trial judge was right.

A. H. MacNeill, K.C., for appellant company. *G. E. Martin,* for plaintiff, respondent.

Bench and Bar.

APPOINTMENTS TO OFFICE.

Hon. Horace Harvey, a Puisne Judge of the Supreme Court of Alberta, to be Chief Justice of the Supreme Court of Alberta with the title of Chief Justice of Alberta, in the room and stead of Hon. Arthur Lewis Sifton, resigned. (Oct. 12.)

William Charles Simmons, of Lethbridge, in the Province of Alberta, Barrister-at-law, to be a Puisne Judge of the Supreme Court of Alberta, in the room and stead of Hon. Mr. Justice Harvey, promoted to be Chief Justice of said court. (Oct. 12.)

Blaise Letellier, of Beauceville, Province of Quebec, K.C., to be Puisne Judge of the Supreme Court of the Province of Quebec, in the room of Jean Alfred Gagne, deceased. (Oct. 12.)

Hon. James Drummond McGregor, of New Glasgow, in the county of Pictou, Nova Scotia, to be the Lieutenant-Governor of the Province of Nova Scotia, in the room and stead of Duncan Cameron Fraser, deceased. (Oct. 18.)

Flotsam and Jetsam.

THE MAN WITH THE MUCK-RAKE:—Not one whit too severe is the apt and striking cartoon that appeared in *Punch.* Under the fearless title of "A Dirty Trade," it represents the "Gutter Press" standing in the foul stream of Sensationalism," and offering, for "a few more coppers, gents," to "*roll in it!*" With splendid sarcasm *Truth* also utters its voice of protest, and concludes a couple of merciless verses thus—

> Good taste? What's that to do with gains?
> The one material fact remains—
> It ANSWERS.

One of the worst blights that for generations has settled upon our land is that of individuals or syndicates which purvey their daily and weekly feasts of sensationalism to demoralize the public mind. The "liberty" of the Press is fast becoming a national curse.—*Exchange.*