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REPUGNANT CONDITIONS AND KINDRED TOPICS.

THE ENGLISH AUTHORITIES.

It often happens, especially when a grant is made, that it is desired to impose some obligation on the tenant or to restrict his user of the property in some respect. The law gives the person interested power to do so; but it is obvious that unless this power were restricted, it might easily be abused and used to promote illegal purposes or to bind up the estate indefinitely. Hence it is that the law prohibits limitations which tend to create perpetuities, to promote illegal acts, such as are repugnant to the estate which is granted, etc. The object of this sketch is to collect judicial dicta concerning and to illustrate that part of the law, which determines what conditions are and what are not repugnant to a freehold interest.

When a restriction is imposed it may be enforced by attaching the condition to the property concerned itself, *e.g.*, a grant of Whiteacre to A. and his heirs on condition that he does not encumber it; or else some benefit of penalty may be fixed dependent on the way the property is used, *e.g.*, a grant of Blackacre to A. and his heirs on condition that he does not encumber Whiteacre.*

Each of these methods fall into three classes. The fulfilment of the condition may be made a condition precedent, which must be satisfied before the benefit arises; or the breach of the condition may give rise to an actual defeasance; or, in the third place, the breach of the condition may mark the end of the benefit granted by the use of a conditional limitation. Take, for example, the following limitations: A gift of Blackacre to A. and his heirs on his selling Whiteacre; a gift of Blackacre to A. and

*The question of the validity of these limitations will be discussed later.

his heirs but if he does not sell Whiteacre within a year to B.; a gift of Blackacre to A. for his life, but if A. becomes bankrupt to B. and his heirs; a gift of Blackacre to A. until he dies or becomes bankrupt.† The first is an example of a condition precedent, the second and third are examples of a defeasance, the third is a conditional limitation.

We will first deal with the classes in which the restriction is attached to the property concerned itself, taking the subdivisions in turn.

In the first class, a gift is made on condition that the donee ties it up in some respect prior to the property vesting. *Turner* v. *Turner*, 4 O.L.R. 578, seems to be a case in point. An absolute interest was given to the testator's widow on condition that she should "make a will of her said estate providing for" certain children. If she did not do so, "instead" of the estate being so given, it was disposed of differently. It was held that the will could not be revoked. Such a limitation, however, seldom occurs.

The next class of cases, however, i.e., those in which there is an actual defeasance, is very important and often occurs. We will, therefore, deal with it rather fully.

So long as there is a defeasance it is immaterial whether it arises from a common law condition or executory devise or shifting use. "The general law is that a defeasance, either by condition or by conditional limitation or executory devise, cannot be well limited to take effect in derogation, not merely of the right of alienation, but of any of the natural incidents of the estate which it is intended to divest" (Kay, J., in *Dugdale* v. *Dugdale*, 38 Ch. D. 176, 181), and "an incident of the estate given, which cannot be directly taken away or prevented by the donor cannot be taken away indirectly by a condition which would cause the estate to revert to the donor, or by a conditional limitation or executory devise which would cause it to shift to another person" (ibid. 182). He quotes *Bradley* v. *Peixoto*, 3 Ves. 324; *Ross* v. *Ross*, Jac. & W. 154, and *Holmes* v. *Gordon*, 8 D. M. & G. 152.

†The validity of these limitations will be discussed later.

Thus a condition forbidding alienation cannot be attached to an estate in fee simple (Cru. Dig. Tit. 13, c. 1, s. 22). In Litt (page 222a) we read: "If a feoffment be made upon this condition, that the feoffee shall not alien the land to any, the condition is void, because when a man is enfeoffed of lands or tenements he hath power to lien them to any person by the law." In *In re Rocher*, 26 Ch. D. 801, land was limited to A., his heirs, executors, administrators and assigns, and it was provided that prior to selling the property he was to give B. the first refusal for £3,000, the actual value of the property being £15,000. This was held by Pearson, J., to be equivalent to "during the life of the widow you shall not sell." The condition was held not to be binding. *In re Dugdale*, 38 Ch. D. 176, may be quoted as an attempt to hinder alienation by means of a gift over. An estate was devised in trust for A., his heirs and assigns with a gift over if A. should do any act whereby he should be deprived of the "personal beneficial enjoyment" of the property. He was held to take an equitable estate in fee simple.

In practice the strictness of the above rules has been modified. In *Rochford* v. *Hackman*, 9 Hare 475, 89 R.R. 539, 543, the Vice-Chancellor first states the law as above and then shews how it may be avoided in practice, although theoretically adhered to. He says: "Upon examining the cases on the subject, I think it will be found that there are two (such) rules: First, that property cannot be given for life any more than absolutely, without the power of alienation being incident to the gift; and that any mere attempt to restrict the power of alienation, whether applied to an absolute interest or to a life estate, is void, as being inconsistent with the interest given; and secondly, that although a life interest may be expressed to be given, it may be well determined by an apt limitation over." And at page 544 he says: "The true rule I take to be this: 'The court is to collect the intention of the testator, whether his intention was that the life interest should not continue; and it is to collect that intention from the whole will." To see the result of this ruling we may quote Kay, J., again: "There are a series of decisions of which

Brandon v. *Robinson*, 18 Ves. 429; *Webb* v. *Grace*, 2 Ph. 701; *Rochford* v. *Hackman*, 9 Hare 475; *Joel* v. *Mills*, 3 K. & J. 458, are examples, which decide that if real or personal estate be given to A. for life, with remainder to B. absolutely, with a proviso that if A. should attempt to assign, his life estate should cease, such a proviso is read as a limitation to A. during his life or until he should attempt to assign, and upon that event, or after his death over, and such a limitation is held to be valid" (*Dugdale* v. *Dugdale*, 180).

Rochford v. *Hackman*, 9 Hare 475, 89 R.R. 539, will shew how the rule works in practice. That case dealt with a bequest of personalty; "a limitation in form determining a life estate upon alienation, was held to amount to a limitation until alienation and then over—a construction which has been followed in a multitude of cases since that decision," per Kay, J., in *In re Moore*, 39 Ch. D. 116. In *Hurst* v. *Hurst*, 21 Ch. D. 278, real property was devised to H. for life with a remainder over; if, however, H. charged or encumbered his interest it was to be forfeited. H. charged his life estate and, although the beneficiary repudiated the gift before he had taken any advantage, the clause operated.

In dealing with the life estate we have anticipated a little the third class of cases, i.e., those in which there is a conditional limitation. Chitty, J., in *In re Machu*, 21 Ch. D. 838, 842, sums up the law as follows: "Now the law up to a certain point is settled beyond all doubt. If an estate in fee simple is given by a will or other instrument with a proviso which is in law a condition-subsequent defeating the estate on alienation or on bankruptcy the condition is void It is said that there may be a limitation to a man—not of his own property, but of the property of another—until he shall attempt to alienate or become bankrupt. It is settled that such a limitation is good with reference to a life estate, but there is no express authority, as far as the researches of counsel have extended, and so far as my memory serves me, in which the point has been decided that a limitation in fee to a man until he shall alienate or become bankrupt is good."

This question, which was expressly left open by Chitty, J., has since been decided. In *In re Leach* (1912), 2 Ch. 422, there was a devise of real estate upon trust to pay the income to the testator's nephew till he should assign, charge or otherwise dispose of the same or become bankrupt, which of the said events should first happen, and if this trust should determine in the nephew's lifetime, to accumulate for the male heir of his body and should he die without a male heir, to other persons.

In the course of his judgment Joyce, F., said: "Pausing at the words, 'which of the said events shall first happen,' and for the moment neglecting what follows, I consider it to be clear that Robert takes in Martock and the freeholds an equitable fee simple qualified or determinable, similar to the first estate which the intended husband ordinarily takes in a settlement on marriage of his real estate. . . . This limitation to Robert of a determinable fee simple appears to me to be free from objection in every respect, notwithstanding what may have been said in any book as to the effect of the Statute of Quia Emptores upon the creation of estates in fee simple determinable or qualified. Upon this part of the case I may refer to page 144 of Lewin on Trusts, 12 ed., and pp. 61 and 192 of Goodeve's Law of Real Property, 5th ed., and there are other authorities. . . . I think that what Robert takes is an equitable estate in fee simple determinable in the event of his assigning, charging, or becoming bankrupt, etc., which estate if he dies without assigning, charging or becoming bankrupt, etc., becomes an ordinary estate in fee simple, but subject to the executory limitation over to the testator's nephews in the event of Robert dying without leaving any male heir of his body at the time of his decease." (The judgment was without prejudice to the heir or male heir of the body claiming by purchase.)

This decision is in direct contradiction to the dictum of Kekewich, J., in *Metcalfe* v. *Metcalfe*, 43 Ch. D. 633, 639. "You cannot limit an estate to a man and his heirs until he shall convey to a stranger, because it is of the essence of an estate in fee that it confers free power of alienation, and it has long been

settled that the same principle is applicable to gifts of personalty." The point was not necessary to the decision of that case, which dealt with a forfeiture clause, and reference is only made to *Holmes* v. *Godson*, 114 R.R. 73, which does not appear to deal with this specific question. But it is certainly hard to reconcile the decision with such cases as *In re Rocher*. If these cases are to be interpreted according to the intention of the testator, it would seem that the limitations might be read as conferring determinable fees by analogy with *Rochford* v. *Hackman* and similar cases, and according to *In re Leach* they would then be valid. It is quite possible that this decision will virtually overrule the older cases, and probably the result so attained would be more logical than the present rules.

The law goes further than Chitty, J., thought, and allows a man to settle his own property on himself. In *In re Detmold*, 40 Ch. D. 585, 587, North, J., says: "A settlement by a man of his own property upon himself for life, with a clause forfeiting his interest in event of alienation or attempted alienation, has never, so far as I know, been defeated in favour of a particular alienee; it has only been defeated in favour of a settlor's creditors generally on the ground that it would be a fraud on the bankruptcy law." And he, therefore, held that a trust made by A. in his own favour until he became bankrupt, etc., and then in favour of his wife could not be defeated at the instance of a single creditor, who attempted to enforce alienation.

Another point to be noticed is the distinction between a condition, which is repugnant to the gift or devise and an illegal condition. The distinction is rather fine, but is interesting, and it will now be possible to compare the effect of illegal and repugnant conditions. In the case of a defeasance there is no distinction; the illegal condition is void just as the repugnant condition, and the donee takes his interest without being bound. It is only when we come to conditional limitations, that the question is of importance. Take, for example, a devise to A. for life or until he attempts to alien, then to B. for life or until he attempts to alien, then to C. B.'s interest begins and ends with

a condition, which, if attached directly to his interest, would be invalid, but B. is not deprived of his interest. Compare this limitation with that in *In re Moore*, 39 Ch. D. 116.* There there was a devise of an annuity to a woman "during such time as she may live apart from her husband, before my son attains the age of twenty-one years." The commencement and determination of her interest were fixed in a way not permitted by law, and the gift did not take effect. The illegality of the transaction vitiated the gift in this case; in the former the condition had no effect; it was regarded simply as marking a point of time and not as being attached to an estate. The distinction is worth noting.

Until now we have been dealing with cases where the condition was attached to the property concerned itself. But it may also be sought to determine how a man deals with his land by giving a reward, if he uses it in the way desired, or imposing a penalty, if he does not do so. Here again there are three groups of cases; those in which there is a condition precedent, those in which there is a defeasance and those in which there is a conditional limitation. The effects of such limitations are illustrated in the following cases, but this form of gift is rather unusual and the cases are not numerous or satisfactory.

In *Barker* v. *Barker*, 10 Ec. 438, a legacy was given to the testator's daughters on condition that they should convey certain real estate to the testator's sons. The validity of the proviso was not questioned: the actual point in dispute was whether there was a lien on the real estate thus conveyed for the amount of the legacy; it was held that there was not.

In *In re Gosselin* (1906), 1 Ch. 120, the condition for obtaining a certain life interest was that the donee resettled certain other property to which he was entitled: money held to be invested in land, to which he was entitled under another settlement. The dispute was about another matter; the validity of the condition was taken for granted.

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*This case contains a valuable discussion on conditions and limitations, many authorities being fully quoted and discussed.

In *In re Smith* (1899), 1 Ch. 331, the widow of a settlor died in 1899, leaving a will bequeathing personalty to be held on trust for the person entitled to the ownership and enjoyment of the settled estate, with a gift over in the event of a sale of the settled real estate. It was held that the give over was inoperative when a sale was made under the Settled Land Act.

In *Re Fitzgerald* (1902), 1 Ir. R. 162, M.R., in a will a house was left to A.B. and a certain income for life or so long as she resided at the house. It was held that the gift over was void under the Settled Land Act.

What conditions are repugnant to an estate in land? It is, from the nature of the question, impossible to answer it exhaustively, nor does it come within the scope of this sketch to do so. I will merely try to give a few of the more typical and modern decisions on this point, but first some preliminary remarks must be made.

In interpreting a will an apparent condition need not necessarily be held to be such. Thus in *Edgeworth* v. *Edgeworth*, 4 H.L. 35, application was made of the rule that where an estate has been plainly given by a will, it is not from subsequent words to be treated as given upon a condition, if these words are capable of being read as the description of an event, on which the gift is to come into existence. Gifts were made to A., B. and C. for their lives, subject to the preceding donee dying without issue; A.'s children were to take in a certain way and "in case B. should come into possession of the said estate hereinbefore limited to him and should die leaving issue, said issue to take in like manner." The words "should come into possession" was held not to constitute a condition prevented the son taking.

But if once there is a condition, its repugnancy does not depend on the length of time for which it is imposed. Thus in *In re Rocher*, supra, a fee simple was given with a prohibition against alienation during the widow's lifetime and this was held to be bad. The same result was arrived at in *Renaud* v. *Tourangeau*, L.R. 2 P.C. 4, where it was sought to prevent the devisee encumbering the land for twenty years from the donor's death.

That case was an appeal from the Quebec courts, but the rule is stated generally on general principles.

Another Canadian case, *Blackburn* v. *McCallum*, 33 S.C.R. 65, is an authority on the same point. There the donee was not to sell or encumber the land for twenty-five years and it was held that, if generally the restraint would be invalid the limitation as to time did not make it good. Davies, J., said: "I cannot concur in the proposal that we should enlarge the exceptions to the general rule against restrictions upon alienations by the addition of one not at any rate judicially adopted in England and which would give validity to a restriction otherwise bad simply by binding the time during which it should work."

In *Hutt* v. *Hutt*, 24 O.L.R. 574, a restraint or alienation for the lifetime of another was held invalid. With these introductory remarks, we will examine what conditions are repugnant to the different estates.

An absolute prohibition against alienation is invalid. Many of the cases quoted, e.g., *In re Rocher, In re Dugdale*, etc., illustrate this. It seems, however, that it is permitted to limit partially the way in which the land may be disposed of. Littleton (page 223a) says that a condition not to alien "to such a one, naming his name, or to any of his heirs or of the issues of such a one, or the like, which conditions do not take away all power of alienation from the feoffee, then such condition is good." In *In re Macleay*, 20 Eq. 186, a condition limiting alienation to the testator's family was held to be valid, and then there is the still stronger case of *Doe* v. *Pearson*, 6 East 173, where it was held that if the devisees had no lawful issue the grantee could be restricted to alien to "her sister and sisters or their children." *In re Macleay* was criticized in *In re Rocher*, but was approved by Kay, J., in *Dugdale* v. *Dugdale*. The converse proposition also holds good and a donee cannot be forced to sell. In *In re Beetlestone* (1907), L.T.R. 367, there was an absolute gift, but if not disposed of within the lifetime of the donee there was a gift over. This was invalid. In *Shaw* v. *Ford*, 7 Ch. D. 669, A., B. and C. were to be tenants in common in fee with a gift over on their de-

cease if they had not alienated, and restrictions were imposed on the mode of alienation. The gift over was held to be repugnant as altering the devolution and also preventing enjoyment without alienation.

A condition altering the devolution of the property is invalid. Thus a limitation defeating escheat to the Crown has been declared repugnant (*Re Willcocks Settlement*, 1 Ch. D. 229.) In *Gulliver* v. *Vaux*, 114 R.R. 83, quoted in *Holmes* v. *Godson*, 114 R.R. 73, 81, it is said: "So feoffment in fee upon condition that feoffee's daughters shall not inherit, is void because repugnant to the nature of the gift." An executory gift over, in the event of the donee of an absolute interest dying "without a will and childless" is void for repugnancy: *In re Dixon* (1903) 2 Ch. 458.

A condition depriving the donee of any other natural incidents of the estate given or limiting his enjoyment thereof is invalid. In *Dawkins* v. *Lord Penrhyn*, 4 App. Cas. 51, it was said by Lord Penzance that the right of a tenant in tail to enlarge his estate could not be defeated by clauses prohibiting his doing so or defeating the estate if he did so. Thus again land cannot be given to A. and B. with a proviso that the property shall not be severed, but that the survivor shall take the whole: Shep. Touch, 131. A common case is that, in which it is sought to prevent the donee encumbering the property. Such cases were *Renaud* v. *Tourangeau* and *Blackburn* v. *McCallum* quoted above in which it was sought to impose such a restriction for twenty and twenty-five years respectively.

A grant upon condition that the grantor shall not take the profits is invalid: Cru. Dig. Tit. 13, c. 1, s. 22. Where real estate was given in fee on condition that on any sale certain sums were to be paid out of the proceeds the condition is not binding: *In re Elliott* (1896), 2 Ch. 353.

In *Williams* v. *Williams* (1912), 1 Ch. 399, a condition providing that, if proceedings for administration arose, all costs should be paid from the plaintiff's share, was held not to apply to wilful default, but if it had to be repugnant. In *Sir Antony*

Mildway's Case, 6 Rep. 41a, it is said that "if a man makes a gift in tail on condition that the donee shall not commit waste or that his wife shall not be endowed, or that the husband of a woman tenant in tail after issue shall not be tenant by the courtesy or that tenant in tail shall not suffer a common recovery, these conditions are void and repugnant against law."

These cases will serve to shew the sort of restrictions which testators and grantors seek to impose on the devisee or grantee. Many further examples are given in the text-books and these should be consulted.

It cannot be said that the law on this subject is in an entirely satisfactory condition. Distinctions must be drawn between total and partial restrictions, between limitations and conditions, between conditions which are repugnant and those which are illegal; and here as in other parts of real property we see signs of the way the Statute of Uses broke in upon a logical system of law, not altogether to its advantage. In the future the law may well be modified. The distinction between a limitation and a defeasance has been to some extent obliterated by such cases as *Rochford* v. *Hackman*, but it still exists; and it will probably always be found necessary to permit the imposition of some restrictions; but the trend of legal opinion is in favour of freedom of alienation so that it is possible that the doctrine expounded in *In re Rocher* will be developed at the expense of the principles laid down in *In re Macleay*, especially since the Privy Council in *Renaud* v. *Tourangeau* has given its moral support to such a development.

In the meantime its very difficulties make the question an interesting and not uninstructive subject for examination.

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CANADIAN SIDELIGHTS AND PROSPECTIVE CHANGES IN PENNSYLVANIA PROCEDURE.

This was the title of an address given by D. W. Amram, of the University of Pennsylvania, before the Law Association of Philadelphia last December.

It is sometimes necessary to go from home to learn something about ourselves. On this occasion the practitioners in the Province of Ontario (and incidentally those in the other English-speaking Provinces of the Dominion) are congratulated upon the legislation and rules of practice and procedure in civil actions which obtain here. The writer says that so excellent has been the working of these Acts and Rules that the judges in the State of Pennsylvania in the last revision of their local Rules of Court adopted a number of their provisions.

The writer thus refers to the regulation of matters of procedure in the Province of Ontario:—

"Examination of the Ontario Judicature Act shews that it is largely concerned with laying down broad principles, while leaving methods of procedure entirely to the courts. This is a principle of differentiation of function between legislature and courts for which many of the best men at the Pennsylvania Bar have pleaded for many years, and which has often found expression in the reports and debates of the Pennsylvania Bar Association. The attempt to lay down Rules of Court in acts of legislature has justified the criticism that they hamper rather than promote the efficiency of our procedure. A court which makes its rules may reserve to itself the right to modify them, so that through their too strict interpretation they may not lead to injustice. Where the rule is laid down by the legislature, the sound discretion of the courts cannot be exercised at all and the rule of procedure attains the same dignity and inviolability as a rule of substantive law. The Ontario court in proceeding to formulate and promulgate its rules finds itself unhampered by legislative interference, and is allowed free play for its wisdom to determine how the business of litigation can best be done, so

that, to use the words of Rule 183, 'A proceeding shall not be defeated by any formal objection, but all necessary amendments shall be made upon proper terms as to costs and otherwise, to secure the advancement of justice, the determining of the real matter in dispute, and the giving of judgment according to the very right and justice of the case.' No doubt the interference of legislatures with the normal development of common law and procedure has served a good purpose and is justified by history.

It has continued long enough, however, to have fully impressed its lesson upon the mind of all the ministers of justice on the Bench and at the Bar, and it may now be retired in favour of the older method of allowing the law, at least so far as practice and procedure are concerned, to be developed solely through the instrumentality of its experts. No theory is more crude than that which maintains that our legislatures are more expressive of the public will and more responsive to public ideas of right than our courts. The courts are composed of judges and attorneys-at-law, who like all other men are impressed by the influence of the spirit of the time."

Mr. Amram in speaking of our Judiciary draws a comparison between the condition of things in this country and those in the United States, which must have given food for thought to his hearers. He says:—

"There is hardly any criticism of judges or courts in Ontario. The spectacle furnished by the United States in which the courts of justice are daily, I might say hourly, held up to criticism, ridicule, contempt and even vituperation excites unbounded surprise across our northern border. The people of Canada are satisfied with their judges and their administration of the law, and yet they have absolutely nothing to do with their selection or appointment. What do the people want? They want justice. If the judge is able and upright, they are satisfied. It is not true that citizens of this country will not be satisfied with the judgment of a judge from another country, whom they have not helped elect. The citizen wants the law of Pennsylvania applied honestly and fairly to his case and he cares nothing about the resi-

dence, race, religion or politics of the just judge. We need, therefore, not be too closely wedded to any system of election or appointment, for other methods are just as good. Any method which will end the disgraceful spectacle which newspaper headlines furnish, such as 'Judgeship Won by Advertising,' 'Nonpartisan Judicial Ballot a Farce,' 'Recalling Gang-made Judges,' 'Governor Drags Courts into Politics,' will be an improvement over methods which invite, or at least make possible, such outbursts. What shall we do? Shall we continue the present method, recently adopted in so many states, of electing judges on a nonpartisan ballot? Shall we return to the former method of appointment by irresponsible political leaders under the guise of a popular election? Shall we frankly abandon the elective system and adopt the New England practice of appointment by the Governor or the Legislature, or both? Shall we adopt a system like that of Ontario by appointment through the chief law officer of the State by and with the advice and consent of the Cabinet? Shall we adopt the system in vogue in the Jewish Commonwealth according to which the Supreme Sanhedrin appointed commissioners who selected the local judges from among whom the judges of higher courts of twenty-three and the Supreme Court of Sanhedrin were selected—a system which might be adapted so as to make our Supreme Court responsible for the appointment of the Common Pleas judges from among whom the appellate courts would be recruited? Whatever the plan, there is room for study and discussion instead of the aimless and thoughtless criticism of our present system."

The writer also calls attention to another matter which he thinks might well be added to their legislation. We have no doubt of this, but there is still room for improvement in our legislation on the subject. What we have is good so far as it goes, but it does not go far enough. He says:—

"In Ontario they have a method of nipping in the bud much bad legislation, by a system which has not been expanded to its full possibilities. R.S.O. 1897, ch. 52, provides, that the judges shall be paid one thousand dollars in addition to their salary

for the performance of duties assigned to them by the provincial legislature, outside of their ordinary duties, such as matters connected with provincial election, estate bills, regulations to govern the practice of the Surrogate Courts, etc. The practice is to refer all Estate Acts, i.e., private Acts changing the legal effect of will, settlements, etc., to two judges for an opinion on their justice and expediency. By chapter eighty-four it is provided that the Government, that is, the Lieutenant-Governor in Council, may refer to the court for hearing or consideration "any matter which he thinks proper to refer" for an opinion as in an ordinary action. If the question is the constitutional validity of an act of the legislature or a proposed act, either before or after the question arises in actual case, the Attorney-General of Canada must have notice and a right to be heard, and the court may direct any interest to be notified with the right to be heard, or request some counsel to represent such interest. The opinion of the court is a judgment subject to appeal as in an ordinary action."

WHAT CONSTITUTES AN ACCIDENT UNDER THE WORKMEN'S COMPENSATION LAWS.

Litigation in these days largely consists of actions brought in connection with accidents and workmen's compensation; so that all the light to be had on this subject is of interest there is an article in the *Central Law Journal*, which collects a number of authorities on the subject.

We are informed that in most of the United States where workmen's compensation laws exist the decisions have in general followed the English law, including the requirement that, to entitle an injured workman to compensation, his injury must have been due to an "accident." In the leading cases on the subject in England, *Fenton* v. *Thorley Co.* (1903), 89 L.T. Rep. 314, A.C. 443, 52 W.R. 81, the House of Lords has declared that the word "accident" as used in the Imperial Workmen's Compensation Act, must be understood in its popular and ordinary sense, and means "an unlooked for mishap or an untoward

event which is not expected or designed." The writer in our contemporary proceeds as follows:—

"In the *Fenton* case it appeared that a workman operating a machine ruptured himself while trying to turn a wheel on the machine which had stuck fast. He was of ordinary health and strength, and the injury occurred while he was engaged in his usual imployment. It was held that the injury was caused by an accident. It was contended in this case that there was no accident because the man injured himself, and because he was doing exactly what he intended to do. But it was said (by Lord Robertson) that the word "accident" is not made inappropriate by the fact that the man hurt himself; that the statute plainly sanctions such use of the word. "In the present instance," he continues, "the man by an act of over-exertion broke the wall of his abdomen. Suppose the wheel had yielded and been broken by exactly the same act, surely the breakage would be rightly described as accidental. Yet the argument against the application of the act is in this case exactly the same, that there is nothing accidental in the matter, as the man did what he intended to do. The fallacy of the argument lies in leaving out of account the miscalculation of forces, or inadvertence about them, which is the element of mischance, mishap, or misadventure.

In an English case, decided by the Court of Appeal, it was shewn that a miner, while employed in hewing coal, was injured by a piece of coal working into his knee, which caused blood poisoning, from which he died. It was held that this injury was due to an accident. The Master of the Rolls saying: "If any one were to kneel down in a drawing room and a needle ran into his kneee, that would be an accident. It is said that that case is not like the present because it is a natural thing when a man is working in a small seam of coal such as the deceased worked in, that a piece of coal should run into his knee. But what happened was fortuitous and unexpected": *Thompson* v. *Ashington Coal Co.*, 84 L.T. Rep. 412, 3 W.C. Cas. 21.

In the consideration of this subject it must be borne in

mind that no iron-clad rules can be laid down prescribing exactly what events constitute accidents and what do not. An event that is an accident at one time may not be at another. For instance, being struck by lightning may be an accident. But if a man was to intentionally do that which would likely cause lightning to strike him, and he was struck by it, the occurrence could hardly be called an accident. The same rule applies to nearly every conceivabe set of facts—they may or they may not amount to an accident.

Must be a specific event.—To constitute an accident, a happening must be capable of being described as having occurred on a particular date; it must be an event, as distinguished from a gradual growth the commencement of which is uncertain: *Marshall* v. *East Holywell Coal Co.*, 93 L.T. Rep. 360, 21 T.L. Rep. 494, 7 W.C. Cas. 19. Thus, the contraction of lead poisoning from the continual use of red and white lead, by absorbing it through the pores, or inhaling the poison into the lungs, or by eating food to which small particles have adhered, is not an accident, as the development of the disease is a gradual process, generally taking considerable time: *Steel* v. *Cammell, etc., Co.*, 93 L.T. Rep. 357, (1905) 2 K.B. 232, 21 T.L. Rep. 490, 74 L.J. K.B. 610, 53 Wkly. Rep. 612, 7 W.C. Cas. 19. So, an abscess in the knee gradually developed by kneeling while at work, is not due to an accident: *Gorley* v. *Backworth Collieries*, 93 T.L. Rep. 360, 21 T.L. Rep. 494, 7 W.C. Cas. 19.

In *Martin* v. *Manchester Corporation*, 106 L.T. Rep. 741, 28 T.L. Rep. 344, 76 J.P. 251, it was held that in order for an injured workman to recover compensation on the theory that the injury was due to an accident, he must satisfy the court that there was a particular time, place, and circumstance in which the injury happened. In that case the workman was employed as a porter at a scarlet fever hospital, and among his duties was that of cleaning out the mortuary. He had an attack of influenza and returned to work on March 22, 1912. On April 1, and for several days prior thereto he was out and in the fever ward, and on April 1 he cleaned out the mortuary. There was

no proof that there was at any time in the mortuary the dead body of any person who had died of scarlet fever. On April 4 the workman was found to be suffering from scarlet fever, which incapacitated him for work. It was held that there was no evidence that the fever was contracted at a particular time and place, and, therefore, that it was not shewn that the fever was due to an accident.

The event must be unforeseen by whom?—The event to constitute an accident must be one that is unforeseen by the person injured by its occurrence. The standard taken is not the intelligence or foresight of the average man. Indeed, it has been declared that an occurrence is unexpected if it is not expected by the man who suffers by it, even though every man of common sense who knew the circumstances would think it certain to happen: Per Lord Macnaghten in *Clover, etc., Co.* v. *Hughes*, 102 L.T. Rep. 340, 343, 26 T.L. Rep. 359, (1910) A.C. 242.

The fact that the result of an extraordinary exertion by a man of impaired physique would have been expected or contemplated as certainty by a physician, if he had diagnosed the case, is nothing to the purpose. It was also said in the case last cited, that a thing or event is unexpected when a sensible man, knowing the nature of the work at which he is engaged, would not expect its occurrence.

However, it has been held in a case arising under an accident insurance policy, that a result ordinarily and naturally flowing from the conduct of a person cannot be said to be accidental, even where he may not have foreseen the consequences: *Dovier* v. *Fidelity, etc., Co.*, 46 Fed. 446, 449, 13 L.R.A. 114.

Event may be intentional on the part of another.—An event may constitute an accident although the person causing it did so intentionally. There is a double aspect in such cases. From the view point of the person causing the event, there is no accident; but from the view point of the person injured the happening may be unexpected and one which he could not foresee. In other words, an accident.

Thus, an engineer was injured while driving the engine of an

express train by a stone thrown by a boy from a bridge under which the train was passing at the time. The stone broke the glass in the engine cab, a piece of which struck the engineer on the eye, inflicting injuries which eventually caused his death. It was held by the Court of Appeal in England, that the injury was due to an accident; that the circumstance of the throwing of the stone being a wilful act on the part of the boy was immaterial: *Challis* v. *London, etc., Co.*, 93 L.T. Rep. 330, (1905) 2 K.B. 154, 21 T.L. Rep. 486, 74 L.J.K.B. 569, 53 Wkly. Rep. 613, 7 W.C. Cas. 23.

Likewise, in a case in which it appeared that a cashier, who was employed by a colliery company and whose duties required him to carry large sums of money, was murdered and robbed while on his way from the office of the mine to pay off the employees, it was contended that the man's widow was not entitled to compensation because his death was not due to an accident; that it was an intentional felonious act, and that the word "accident" negatives the idea of intention. The court held that it made no difference whether the shot that killed the man was intentional or not, or whether it was intended for him or for someone else, that as far as the cashier was concerned it was an accident: *Nisbet* v. *Rayne*, 103 L.T. Rep. 178, 26 T.L. Rep. 632, (1910) 2 K.B. 689.

Cause or result that is unforeseen.—Within the meaning of the workmen's compensation statutes, an injury is caused by accident when the result produced is unintended and unforeseen.

When a man lifts a heavy weight, he intends to do exactly what he does do; nevertheless if he strains a muscle, or ruptures a blood vessel, the injury is due to an accident. A workman, having been informed that a fellow workman had been overcome by gas, attempted a rescue, although he knew of the presence of gas in dangerous quantity. In the attempt both men were suffocated. It was held that the workman's death was due to an accident: *London, etc., Shipping Co.* v. *Brown*, 7 Sc. Sess. Cas. (5th series) 488, 42 Sc. L. Rep. 357, 12 Sc. L.T. 694, 760.

A workman, who severely strained his back in replacing a derailed coal truck on the track, was held to have been injured by accident: *Stewart* v. *Wilsons, etc., Coal Co.,* 5 Sc. Sess. Cas. (5th series) 120.

Physical condition of injured person a contributory cause.—The fact that the physical condition of the injured person is a contributing cause of the event, does not prevent its being an accident: *Ismay, Imrie & Co.* v. *Williamson,* 99 L.T. Rep. 595, (1908) A.C. 437, 24 T.L. Rep. 881, 52 Sol. Jo. 713, 42 Ir. L.T. 213.

If this were not true, a standard of strength would have to be adopted, and when a man suffers an injury the first inquiry would be, does he come up to the standard of physical fitness? If it were then shewn that he was not up to the adopted standard in strength and resisting power, the event could not be classed as an accident.

Contraction of disease as an accident.—Whether or not the contraction of a disease constitutes an accident depends upon the nature of the disease. It must be one the contraction of which can be definitely fixed in point of time as an event. This would seem not to include idiopathic diseases. On the other hand, a disease contracted as by infection from the lodgment of bacilli comes well within the definition of an accident, and it has been so held. A workman was employed to open and sort bales of Persian wool. While so engaged his eye became infected with anthrax, which necessitated an operation, from which he died. The disease was caused by a bacillus alighting on his eye. In this instance it could be told definitely the day on which the injury occurred, and with considerable certainty the manner in which it occurred, and it was held to be due to an accident: *Brintons* v. *Turvey,* 92 L.T. Rep. 578, (1905) A.C. 230, 21 T.L. Rep. 444, 74 L.J.K.B. 474, 53 Wkly. Rep. 641, 7 W.C. Cas. 1.

In such cases as this we must not allow ourselves to become confused by medical terms because the injury inflicted by the accident sets up a condition which medical men describe as a disease. For instance, suppose some hard substance—a tack,

nail, or piece of wire—is unintentionally allowed to penetrate the skin and causes tetanus. Tetanus is a disease; nevertheless the injury was brought about by accident.

Another anthrax case was that of *Higgins* v. *Campbell,* 89 L.T. Rep. 660, (1904) 1 K.B. 328, 20 T.L. Rep. 129, 73 L.J.K.B. 158, 52 Wkly. Rep. 195, 68 J.P. 193, 6 W.C. Cas. 1, in which the disease was contracted through a pimple on the workman's neck. In that case it was said by the Master of the Rolls (Collins): "If a workman dies of or is injured by a disease which he himself has brought with him into his work, how could he be said to die from an 'accident?' But that is very different from a case where a workman accidentally catches an infection in the course of his employment. The disease here was caused by the attack or incursion of some bacillus or germ. Though the attack was infinitesimal in force and invisible to the naked eye, yet it was physically a blow, the incursion of a physical force, which seems to come well within the words used by Lord Macnaghten in describing the sense in which he thinks the word 'accident' is used in this act."

Contraction of a cold or chill.—The contraction of a cold or chill may amount to an accident, depending upon the circumstances of the instant case. While employed in clearing a millrace, a workman caught a sudden chill, caused by immersion in the water. Inflammation of the kidneys supervened, and he died several days later. The evidence shewed that the attack could only have been brought on by exposure to cold water. It was held that the death was due to an accident: *Sheerin* v. *Clayton & Co.* (1910), Ir. Rep. 105, 44 Ir. L.T. 52.

Sunstroke or heatstroke.—Sunstroke or heatstroke may constitute an accident within the meaning of the workmen's compensation laws. Although it has been held in suits on accident insurance policies in this country, and in one such case in England, that sunstroke is not an accident, the better opinion is that it is.

A workman of poor physique was employed in the stoke hold of a vessel. The conditions there were normal, but, as usual,

the place was very warm. The man suffered a heat stroke which resulted in his death. It was held that his death was due to an accident: *Ismay, Imrie & Co.* v. *Williamson*, 99 L.T. Rep. 595, (1908) A.C. 437, 24 T.L. Rep. 881, 52 Sol. Jo. 713.

In an earlier English case arising under an insurance policy, it was held that a sunstroke received by the master of a vessel then sailing in the tropics, to which he did not knowingly and without adequate motive expose himself, was not an accident: *Sinclair* v. *Maritime Passengers' Assur. Co.*, 3 E. & E. 478.

Sunstroke contracted by a supervising architect in the course of his ordinary duties was held, in a case in this country, not to be an injury by accidental means. It was said that it was a result flowing ordinarily and naturally from the conduct of the person, although he may not have foreseen the consequences: *Dozier* v. *Fidelity, etc., Co.*, 46 Fed. 446, 13 L.R.A. 114.

This, however, is no argument, because the same can be said of any accident. If one had a perfect knowledge of all the conditions connected with an event, the event and its results would appear to him to be perfectly ordinary and natural.

Shock or fright.—The fact of an accident occurring to a person is usually associated in mind with some physical injury that can be seen and appreciated by others. However, the meaning of the word is not so restricted, but includes an event that does hurt only to the nervous system.

A railway company maintained a system of insurance, insuring its employees "against all accidents, however caused, occurring to the insured in the fair and ordinary discharge of his duty." An employee, a signalman, saw a train approaching and noticed something wrong with one of the coaches. He became much alarmed, and waived his flag frantically. The engineer saw the signal and stopped the train, thereby adverting an imminent disaster. The signalman was so horrified that the shock to his nerves incapacitated him for work for several months. It was held that he had sustained an accident within the terms of the insurance: *Pugh* v. *London, etc., R. Co.*, 74 L.T. Rep. 724, (1896) 3 Q.B. 248, 12 T.L. Rep. 448, 65 L.J.Q.B. 521, 44 W.R. 627.

Frost-bite.—It has not been definitely decided under any Workmen's Compensation Act whether frost-bite is injury by accident. In *Warner* v. *Couchman*, 103 L.T. Rep. 693, (1911) 1 K.B. 351, 27 T.L. Rep. 121, 80 L.J.K.B. 526, it was admitted for the sake of argument that it did amount to an accident in that case, but Cozens-Hardy, M.R., said that he felt considerable doubt whether there was an accident.

There seems no room for doubt that frost-bite can occur under circumstances amounting to an accident. An unintended over-exposure of some part of the person to cold, whereby it becomes frosted or frozen, can just as well constitute an accident as an unintended over-exposure to heat whereby one receives a heatstroke.

Heart disease.—Death from heart disease may or may not be from accident. The question depends for its solution upon the circumstances of the given case. Death brought on by the gradual progress of the disease is not due to an accident. But death or injury from heart disease caused by a sudden strain may well be considered as being brought on by accident.

A workman was descending the side of a ship by means of a rope ladder, when the ladder twisted suddenly, and, with a cry, he fell into the water. Three minutes later he was picked up dead. The evidence shewed that death was due to heart failure, and probably occurred before he reached the water. It was further shewn that his heart was in a bad state; that descending the ladder would cause a strain; that the sudden twisting in the ladder would be likely to bring on heart failure, and that the mere exertion of walking uphill, or coughing, or sneezing, might have been fatal to him. The County Court judge found that death was due to an accident, and on appeal it was held that there was evidence to support the finding: *Trodden* v. *McLennard & Sons*, 4 Butterworth's W.C. Cas. 190.

On the other hand, where a man who had been suffering for several years from progressive heart disease became faint while hurrying to a railway station with a parcel for his employer and died shortly afterwards, it was held that his death was due to

disease, and that there was no accident: *O'Hara* v. *Hayes*, 44 Ir. L.T. 72.

Inhalation of gas.—The unintentional inhalation of gas, by which death or injury is caused, is an accident: *Harding* v. *Brynddu Colliery Co.*, 105 L.T. Rep. 55, (1911) 2 K.B. 747, 27 T.L. Rep. 499, 80 L.J.K.B. 1052.

A workman went into a driven well to repair a pump, and died in a few minutes from a deadly gas which had accumulated in the dug-out portion of the well. The dug-out portion was only twelve feet deep and the accumulation of gas was unexpected. It was held that the death was caused by accidental means: *Pickett* v. *Pacific Mutual Life Insurance Co.*, 144 Pa. St. 79, 22 Atl. 871, 13 L.R.A. 661, 27 Am. St. Rep. 618.

Lightning.—It has been held that death or injury caused by lightning is accidental: *Andrew* v. *Failsworth Industrial Society*, 90 L.T. Rep. 611, (1904) 2 K.B. 32, 20 T.L. Rep. 429, 73 L.J. K.B. 510, W.R. 451, 68 J.P. 409, 6 W.C. Cas. 11.

Question of accident one of fact and law.—For a time the courts of England seem to have considered the question whether or not a happening constituted an accident as purely one of fact. This is evidenced by the consistency with which the Court of Appeal accepted the finding of the County Court judge in this respect as final; questions of fact not being reviewable by the Court of Appeal. For instance: A woman employed as a box maker was put to work on boxes heavier than those on which she had previously worked. While so engaged she suffered a strain from the unusual exertion. The Court of Appeal held that the County Court judge had properly found that the injury was not due to an accident: *Roper* v. *Greenwood*, 83 L.T. Rep. 471, 3 W.C. Cas. 23. Other English cases shew the same trend of opinion.

This question has been definitely settled by the House of Lords in the case of *Fenton* v. *Thorley*, 89 L.T. Rep. 314, (1903) A.C. 443, 19 T.L. Rep. 684, 72 L.J.K.B. 787, 52 W.R. 81, 5 W.C. Cas. 1. In this case the County Court judge found that the facts did not shew an accident, which finding was affirmed by

the Court of Appeal When the case reached the House of Lords it was unanimously reversed, and it was there held that the admitted facts shewed that the injury was caused by an accident.

The question is, of course, one of mixed fact and law. When the facts are found it is then a question of law whether or not they constitute an accident.

This article will shortly be followed by one on "When an accident arises out of and in the course of the employment." To entitle an injured workman to recover under most of the compensation statutes the accident causing his injury must have arisen out of and in the course of his employment.

HABIT-FORMING DRUGS—LICENSE AND CONTROL.

While the opium habit has not been uncommon since the days of DeQuincy and Coleridge says Dr. George W. Goler, in the March *Case and Comment*, the use of morphine, either by the mouth or through the hypodermic syringe, gradually succeeded opium, because it was easier to take, and, with the aid of the hypodermic syringe, much more rapid in its effect. With the growth of luxury, and the development of excesses consequent upon the movement of population from the country to the cities, and the demand for rapid intoxication or excitation, morphine proved to be a drug too slow in its action, and cocaine rapidly grew in favour with those searching for mental or physical rest or forgetfulness. This drug, either because it is more expensive, and for other reasons, has been replaced by heroin, a derivative of morphine, and we now find not only men and women, but the young, even boys and girls, resorting to the intoxication to be rapidly obtained by the use of this habit-forming drug.

No exact data exists relating to the increasing use of these recent habit-forming drugs, which are of great danger, used by increasing numbers of persons can be shewn in the discussion of habit-forming drugs which takes place in current journals and

among physicians. These drugs find their way into innocent use, sometimes through the physician who prescribes them, and neglects to inform himself and his patient that not only is he giving the patient habit-forming drugs which are of great danger, especially when giving heroin, which is quite as dangerous as morphine, because it is cheaper, easy to obtain, and quite as easy to use. Like cocaine, it is often taken by snuffing, and in an habitue who takes the drug in this manner an examination of the mucous membrane of the nose will sometimes shew characteristic changes from the snuffing of the dry drug, that are quite as marked as the hypodermic-needle pricks on the arms described by Conan Doyle in Sherlock Holmes.

No adequate law exists in this state prohibiting the sale of heroin. It may be had for a few cents, and almost for the asking. It is found in cough mixtures and various other so-called simple remedies, and most of all in catarrh cures. In this way its use is often unintentionally begun. Personal comfort, desire for food, the demands of personal and moral decency, are all held in abeyance by the desire for satisfying doses of the drug. When its use is persisted in, as it sometimes is, it leads to the frenzy of desire, the delirium of exhilaration, and the mania of despair.

There is just one thing to do with these habit-forming drugs to prevent their increasing use by the people, especially by minors, and that is to take their manufacture and sale away from both manufacturing wholesale and retail druggists, and put their manufacture and sale into the hands of the Federal government; and, further, to provide that no habit-forming drug shall be sold save on a physician's prescription, and to compel every physician to have a special license for their use, this license to be revokable by Federal authority for cause—*Legal News Items.*

There appears to be some conflict upon the question whether a failure to stop an automobile and look and listen before crossing a railroad track constitutes negligence. The Montana case of *Walters* v. *Chicago, M. & P. S. R. Co.*, 46 L.R.A. (N.S.) 702, holds that failure so to do is not negligence.

DUTY TO FURNISH MEDICAL ATTENDANCE.

The law of New York, says William Archer Purrington, of the New York Bar, in the March *Case and Comment,* has never prohibited the practice of Christian Science or any system, fad, or fancy, although it has forbidden an adult, sane person to be killed in his own way, e.g., by suicide, duel, etc. Attendance by Christian Scientists as religious guides upon persons ill of contagious diseases, but physically under the care of educated medical men, might not increase the danger, except by providing additional distributors of the contagion, or by interference with the medical care of the case. The sole charge of such cases, however, by these people, might very greatly enhance the danger of spreading contagion through mistake of diagnosis, by prevention of proper care, failure to quarantine, disinfect, etc. Even Mrs. Eddy recognized, after cruel demonstrations of it, the danger involved in the treatment of obstetrical cases by the entirely uninstructed, thus virtually knocking the bottom out of a very dangerous, and what St. Peter would call a "damnable heresy." Accordingly the votaries of this sect are told in such cases to employ duly qualified practitioners, and this although parturition is not a disease, but may be due to error of moral mind. Under the New York medical law of 1893, only licensed physicians could practise medicine. The Penal Code made it a misdemeanour wilfully to omit a legal duty to furnish medical attendance to a minor child. One Pierson, professing to rely upon Divine healing through prayer, suffered his baby to die of pneumonia without calling in medical aid. He was convicted of the misdemeanour. The Appellate Division reversed the conviction (*People* v. *Pierson,* 80 App. Div. 415, 81 N.Y. Supp. 214). The Court of Appeals, reversing the Appellate Division, and holding that the medical aid required to be called in was that of a licensed physician, affirmed the conviction (176 N.Y. 201, 63 L.R.A. 187, 98 Am. St. Rep. 666, 68 N.E. 243).

Five years later, in *Re Blandel,* 193 N.Y. 133, 85 N.E. 1067, 21 L.R.A. (N.S.) 49, the Court of Appeals held that an osteo-

path, under then existing laws and Sanitary Code, was entitled to register as a "physician," although, it seems, not entitled to practise without limitation, as the regularly graduated and licensed physician might do.

It is interesting to speculate whether, in enforcing the liability of employers under Workmen's Compensation Acts, the medical aid contemplated by them will be held to include treatment, present or absent by Christian Scientists, faith curers, mental healers et id omne genus.—*Legal News Items.*

The natural jostling or pushing of a crowd seeking entrance to a ball game, which causes a patron to be pushed against a trapdoor left open in a passageway leading to seats on an upper floor, is held in *Bole* v. *Pittsburgh Athletic Co.*, 46 L.R.A. (N.S.) 602, not to be the proximate cause of the accident, for the purpose of relieving the owner of the grounds from liability for negligently leaving the door open in that place.

One driving along a highway is held in the Iowa case of *Streeter* v. *Woodward*, 46 L.R.A. (N.S.) 644, not bound to look or listen for vehicles which may be approaching from behind, before stopping his vehicle, nor is he bound to give warning of his intention to stop; his stopping being negligent only when he is aware of the presence of another vehicle with which his act may cause a collision.

REPORTS AND NOTES OF CASES.

England.

JUDICIAL COMMITTEE.

Haldane, L.C., Lords Atkinson and Moulton.] [15 D.L.R. 283.

COTTON v. THE KING.

Succession Duty Act (Que.)—Statutory limitation to property "in the province"—Taxation—Direct or indirect—Liability of party not a beneficiary.

Held, 1. The Succession Duties Act (Que.) as it stood in 1902, is to be construed as expressly limited to property in the Province of Quebec, and therefore, did not include bonds, debentures, and corporate shares which had their situs elsewhere, although the deceased owner was domiciled in the Province of Quebec.

Cotton v. The King, 1 D.L.R. 398, 45 Can. S.C.R. 469, affirmed on this point.

2. Notwithstanding the change in the Quebec succession duty law, made by the Succession Duty Act of 1906, by adding a statutory definition of the word "property" (art. 1191c), stocks, bonds, and debentures having their situs outside of the province were not subject to succession duty, although the decedent was domiciled in the province, the operative clause being expressly limited to property "in the province," and this limitation not being removed by the statutory definition of the term "property" by which it was to include "moveables wherever situate of persons having their domicile in the Province of Quebec."

Cotton v. The King, 1 D.L.R. 398, 45 Can. S.C.R. 469, reversed on this point.

3. The "direct taxation" which, under s. 92 of the British North America Act, a province may impose for raising a revenue for provincial purposes, is a tax which is demanded from the very persons who it is intended should pay it and upon whom the burden of the tax at the time fixed for payment is placed as the ultimate incidence of the taxing scheme; conversely, if the tax is demanded from one person in the expectation and intention of the taxing scheme that he shall indemnify himself at the expense of another, the taxation is "indirect."

Attorney-General (Que.) v. Reed, 10 A.C. 141, applied.

4. An impost of taxation by way of succession duty on the devolution of an estate is for an "indirect tax" and, therefore, beyond the powers of a provincial legislature if the scheme of the succession duty statute is to make one person pay duties which he is not intended to bear, but to obtain from other persons; and as the Succession Duties Act, 1906 (Que.), is of this character, inasmuch as the notary or administrator making the property declaration for the estate might be held personally liable to the provincial collector of inland revenue for the tax, although not sharing in the benefits of the succession, it is ultra vires of the province where, as in Quebec province, no local service such as the granting of letters probate is rendered by the Government therefor or is required by law.

Dominion of Canada.

SUPREME COURT.

Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin and Brodeur, JJ.] [15 D.L.R. 347.

CURRY v. THE KING (No. 3).

Perjury—Form of oath—Uplifted hand.

A witness who testifies to what he knows to be false is guilty of perjury, although, without being asked if he had any objection to being sworn in the usual manner, but without objecting to the form used, he was directed to take the oath by raising his right hand instead of kissing the Bible.

R. v. *Curry*, 12 D.L.R. 13, 21 Can. Cr. Cas. 273, 47 N.S.R. 176, affirmed.

Maddin, for appellant. *Jenks*, K.C., Deputy Attorney-General, for respondent.

DENMAN v. CLOVER BAR COAL CO.

Principal and agent—Rights of agent—Compensation—Rescission of agency contract.

On declaring a contract for an exclusive sales agency for a company for a fixed period not binding on the company as the

other contracting party had failed in his fiduciary duty as a director of the company to disclose the material facts to the shareholders on arranging with his fellow-directors that the contract should be given him on his resigning his directorship, the court may award him compensation on a quantum meruit basis for services rendered as sales agent for the company in faith of the contract so set aside.

Denman v. *Clover Bar Coal Co.*, 7 D.L.R. 96, affirmed.

Corporations and companies—Director resigning to take contract with company—Fiduciary relation.

Full and complete disclosure to the shareholders of the material circumstances surrounding the bargain is essential to support, as against the company, an arrangement made by one director with the other directors whereby he obtained a contract with the company highly advantageous to himself, on resigning his directorship.

Denman v. *Clover Bar Coal Co.*, 7 D.L.R. 96, affirmed on other grounds.

Evidence—Burden of proof—Representations by person in fiduciary capacity.

A director of a company who resigns his position as director to accept a contract of employment with the company obtained upon his representations as to material facts, has cast upon him the burden of proof of the truth of such representations, where his employment contract was in fact a bargain extravagantly advantageous to him and which would affect shareholders not concurring therein, and where the consideration for same consisted partly of an arrangement made between the resigning director and his fellow-directors by which the latter would obtain personal benefits from him.

Appeal—Supreme Court of Canada—Final judgment.

Where the highest provincial appellate court had dismissed the plaintiff's claim for breach of contract with a company to employ him for a fixed term with an exclusive territory as sales agent because of non-disclosure of material facts to the shareholders by the plaintiff in his fiduciary position as a director up to the time of making the contract, on his failure to shew that the contract was a fair and reasonable one for the company, such judgment is a final disposal of a distinct and separate ground of action entitling the plaintiff to appeal to the Supreme Court of Canada, although the court appealed from had, at the same time, allowed to the plaintiff remuneration by way of quantum meruit

for services rendered by the plaintiff in faith of such contract, and had directed a reference to fix the amount, which had not been fixed prior to the last appeal.

Hesseltine v. *Nelles*, 10 D.L.R. 832, 47 Can. S.C.R. 230, referred to; *McDonald* v. *Belcher*, [1904] A.C. 429, and *St. Jean* v. *Molleur*, 40 Can. S.C.R. 139, applied.

S. B. Wood, K.C., and *O. M. Biggar*, K.C., for appellant. *J. H. Leech*, K.C., and *W. L. Scott*, for respondents.

Ont.] [Feb. 3.

WADSWORTH v. CANADIAN RY. ACCIDENT INS. CO.

Accident insurance—Construction of policy—Special conditions—Increased and diminished indemnity—Injuries from fits causing death.

In an accident policy an insurance company agreed to pay the insured the principal sum in case of death or specified injuries, double that sum if such death or injuries occurred under certain conditions and one-tenth for "injuries happening from fits causing death." W., holder of the policy, went at night with a lantern to an outbuilding of the fishing club which he was visiting. Shortly after the outbuilding was seen to be on fire. The fire was extinguished and W. brought out badly burned from the effects of which he died the next day. In an action on the policy the trial judge found as a fact that W. had been seized with a fit and in that condition caused the fire. This finding was concurred in by the two provincial appellate courts. The trial judge held that the company was liable for one-tenth only of the insurance. The Divisional Court reversed this ruling (26 O.L.R. 537).

Held, affirming the judgment of the Appellate Division, Duff and Anglin, JJ., dissenting, that the injuries causing the death of W. happened from a fit within the meaning of the clause in the policy diminishing the indemnity to be paid. *Winspear* v. *Accident Ins. Co.*, 6 Q.B.D. 42, and *Lawrence* v. *Accident Ins. Co.*, 7 Q.B.D. 216, distinguished.

Per Fitzpatrick, C.J.:—The clause diminishing the indemnity payable is not an exempting clause, but one of the three separate contracts between the insurers and insured as to amount of liability.

Per Anglin, J.—It does not create a new liability, but is a clause of limitation in favour of the company and to be strictly construed.

Appeal dismissed with costs.

Aylen, K.C., and *R. V. Sinclair*, K.C., for appellant. *Hellmuth*, K.C., and *McConnell*, for respondents.

Province of Ontario

FIRST DIVISION COURT, DISTRICT OF KENORA.

KATZ v. NOLAND.

Innkeeper—Liability for loss of property by guest or boarder—Meaning of "guest" and "boarder" distinguished—When guest may become a boarder at a hotel.

The defendant, a resident of Midland, made a special agreement with the plaintiff, a hotelkeeper, to board at his hotel for a certain sum per day. He remained there about ten months, paying at the agreed rate. A few days before leaving, his overcoat was stolen from his room by a person who was not in the employ of the plaintiff. The plaintiff brought action to recover $40, the balance due by defendant for board and lodging, and the defendant counterclaimed for damages for loss of his coat to the same amount.

Held, 1. That the defendant was a boarder and not a guest, and, therefore, the plaintiff was not liable for the loss of the coat. 2. The distinction between a "boarder" and a "guest" discussed.

[KENORA, Feb. 4, 1914.—Chapple, Co. J.

The plaintiff was a hotelkeeper at Kenora and claimed from the defendant $40 for his board and lodging. The defendant admitted that liability, but counterclaimed against the plaintiff for the value of an overcoat which was stolen from his room whilst boarding in the hotel, basing his claim upon R.S.O. 1897 c. 187.

The facts, which were admitted, were that the defendant commenced to board with the plaintiff about January 2, 1913, and was there continually as a regular boarder (with the exception of two weeks) until November 15. He did not pay the regular hotel rate of $1.50, but the board rate of $1 per day. There was no part of the hotel set apart for regular boarders,

and there were regular boarders as well as transient guests. The overcoat was hung in his room, where he left it there on the morning of Nov. 10th, and closed the door, but did not lock it, as he had no key. When he returned in the afternoon the coat was missing. He reported the loss to the plaintiff. It was said that the chambermaid had seen a man in the corridor with an overcoat which seemed to answer the description.

H. A. C. Machin, for plaintiff. *J. F. MacGillivray*, K.C., for defendant.

CHAPPLE, Co. J.:—As far as determination of this action is concerned I do not think the locking of the door is material in order to shew negligence on the part of the defendant, as urged by counsel for the plaintiff. The authorities differ in that respect.

The learned judge here referred to *Filipowski* v. *Merryweather*, 2 F. & F. 285; *Oppenheim* v. *White Lion Hotel Co.*, 40 L.J.C.P. 231; *Herbert* v. *Markwell*, 45 L.T. 649.

I am of the opinion that the gist of this action is more a question of the liability of the plaintiff than that of the defendant. The question to be decided is, was their relationship that of innkeeper and guest or that of boarding house keeper and boarder or lodger? "A guest is defined as a transient person who resorts to and is received at an inn for the purpose of obtaining the accommodations which it purports to afford." American Ency., vol. 16, page 516. The general rule of law with respect to the liability of an innkeeper as to the safety of the effects of his guests appear to be "that it is his duty to keep the goods of his guests safely night and day so that no loss shall happen through his default or that of his servants or others for whose presence in the inn (or hotel) the innkeeper is responsible, and if he is guilty of any breach of this duty he is liable to the party injured fo rthe loss sustained."

In *Cashill* v. *Wright*, 6 E. C. & B. C. 891, it was held: "Where goods of a guest at an inn are lost the innkeeper is liable as for a breach of duty unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances, and where there is negligence on the part of the guest the innkeeper is not responsible."

The late Judge Gorham, of the County Court of Halton, considered the matter of the relationship of innkeeper and guest

very carefully in a case of *Frazer* v. *McGibbon,* which is reported in 41 C.L.J. 411, and he there fully discusses tse legal status, rights, duties and liabilities of innkeepers and decided in that case under the existing facts, that, "where the plaintiff went as a "guest to the hotel of the defendant, took off his overcoat and hung it in the usual place, but called no person's attention to it; owing to a Fair being held that day in Georgetown the hotel was crowded. A special cloak-room had been provided and a notice to that effect had been put in the public sitting room. The plaintiff did not see this notice, nor a notice in the hotel register book, that the proprietor will not be responsible for coats, etc., unless checked. The coat was not to be found when the plaintiff was ready to leave the hotel in the evening. Held, that the defendant was liable for the missing coat under the existing circumstances." In his very carefully considered judgment he cites several English and American cases, some of which I have above referred to and clearly points out that each must depend on its own circumstances, as was similarly stated in *Herbert* v. *Markwell.* The defendant in this case admits that there was a notice on the back of his door which contained a request that guests would lock their door on leaving their rooms, but neither this nor the fact of asking the plaintiff to take care of his coat on the 2nd of April, I think would be sufficient negligence on the part of the defendant to relieve the plaintiff of his liability, if the relationship which existed between them was that of innkeeper and guest as held in such cases as *Filipowski* v. *Merryweather, Whiting* v. *Mills,* 7 U.C.Q.B. 450; *Lynar* v. *Mossop,* 36 Q.B. 230; *Palin* v. *Reid,* 10 A.R. 63.

In the American Ency., 2nd ed., vol. 16, p. 522: "A boarder is defined as one who makes a special contract with another person for food with or without lodging," and then proceeds to state "The essential difference between a mere boarder and a guest at an inn lies in the character in which the party comes, that is, whether he is a transient person or not, and accordingly one who stops at an inn or a hotel as a transient, is a guest, with all the rights, privileges and liabilities incident to that relation. On the other hand, one who seeks accommodation with a view to permanency as to make the place his home for the time being, is not a guest but a boarder." At page 511: "There is nothing inconsistent or unusual, however, in a house of public entertainment having a double character, being simultaneously a boarding house and an inn With respect to those who occupy rooms

and are entertained on special contract, it may be a boarding house; and in respect of transient persons who without a stipulated contract made from day to day, it is an inn."

Now I find as a fact that the defendant on the very day of his arrival made a special contract or agreement with the plaintiff to board and lodge at his hotel at the special rate of $1 per day; he expected to stay during the sawing season of 1913 and did stay over ten months. True, the agreement was conditional on his staying at least two months to obtain the special rate of $1 per day, but as soon as the two months expired, the special contract went into effect, and even if he had been a guest up to that time, the relation of guest then terminated by him becoming a permanent boarder.

Mr. MacGillivray refers to an American case of *Hannock* v. *Rand*, 94 N.Y.I., 46 Am. Rep.: "Where an army officer made a special bargain with the innkeeper" and it was held, that the defendant received him as a guest and not as a permanent boarder, but in my opinion that decision does not apply, as it was held in that case that "persons belonging to the army or navy who have no permanent residence they can call home, are to be regarded as travellers when stopping at public inns."

The defendant does not appear to have any doubt but what he was a regular boarder and not a guest.

Then as to the liability of the plaintiff to the defendant as a boarder. "The rule appears to be that he is required to take as much care of the goods of his boarder or lodger as a reasonably prudent man would take care of his own, and is liable only for any loss thereof occurring through the negligence of himself or his servants."

The leading English authorities on this point which is clearly established by them, are *Holder* v. *Saulby*, 29 L.J.C.P. 246, and *Dansey* v. *Richardson*, 23 L.J.Q.B. 217.

In *Warner* v. *Cameron*, 19 W.L.R. 461, an Alberta action recently decided by Judge Taylor, of Edmonton: "Where the plaintiff, a weekly boarder at the defendant's hotel, had made arrangements with the defendant's clerk by which whenever he was absent for a night his room might be occupied by some other person, if required, be held that the defendant was not liable for the loss of the plaintiff's luggage, which he left in his room during one of his absences, the evidence not shewing gross negligence on the part of the defendant. He was also of the opinion that the plaintiff did not use the ordinary care required of him by leaving his goods exposed in his room.

There being no evidence of negligence on the part of the plaintiff or his servants, I give judgment for the plaintiff for $40 and costs, and dismiss the defendant's counterclaim with costs including the costs of the commission to take his evidence. at Midland.

Province of Manitoba.

COURT OF APPEAL.

Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A.] [15 D.L.R. 229.

KENNY v. RURAL MUNICIPALITY OF ST. CLEMENTS (No. 2).

Municipal corporations—Liability for damages—Failure to provide sufficient outlet for ditch—Backing up of water.

Held, 1. A rural municipality is answerable in damage for a failure to provide a sufficient outlet for a ditch opened by it adjacent to the plaintiff's land, by reason of which water backed up and inundated the land so as to destroy the fertility thereof, and render it useless for cultivation.

Kenny v. Rural Municipality of St. Clements, 4 D.L.R. 304, affirmed on this point; see also *McGuire v. Township of Brighton*, 7 D.L.R. 314.

2. Damages should be awarded for the flooding of agricultural lands by the construction of a municipal drainage ditch of too small capacity, on the basis of the diminished value of the property affected, and should be assessed in one lump sum for all time; the judgment should not be limited to damages for the deprivation of the use of the soil for a limited period with a reservation to the landowner of his remedy for further damages in the event of the municipality not remedying the defect in the meantime.

R. M. Dennistoun, K.C., and *G. T. Baker*, for defendants. *F. Heap* and *R. B. Stratton*, for plaintiff.

Howell, C.J.M., Richards, Perdue and Cameron, JJ.A.] [15 D.L.R. 261.

WILLIAMS v. BOX.

Interest—When recoverable—Mortgages—Fund in court representing mortgaged property.

On taking mortgage accounts consequent upon the opening of a foreclosure decree to permit a mortgagor to redeem, the mortgagee should not be compelled to accept a smaller rate of interest which the fund representing the land in question was actually earning by reason of the land having been taken for railway purposes and the price thereof having been paid into court; the mortgagee should in such case receive the full contract rate for which his mortgage provided.

Williams v. *Box*, 12 D.L.R. 90, reversed.

Mortgage—Mortgagee in possession after foreclosure—Loss of rents from non-repair.

While acting as owner following a final order of foreclosure in his favour regularly obtained, and up to the time when the court, exercising its equitable powers and not for any irregularity in the final order, opened the foreclosure and gave the mortgagor liberty to redeem, the mortgagee was under no obligation to repair or to keep up the buildings on the mortgaged lands, or to try to obtain tenants, and, therefore, his mortgage account is not subject to surcharge as for rents which might have been, but were not, obtained by him.

Williams v. *Box*, 12 D.L.R. . . reversed.

J. B. Coyne and *J. Galloway*, for plaintiff. *J. W. Baker*, for defendant.

KING'S BENCH.

Galt, J.] RE BUCHANAN. [15 D.L.R. 232.

Prohibition—Appeal by informant from dismissal of accused on summary trial—Adjournment—Appeal—Summary trial—Jurisdiction—Remedies.

Held, 1. Prohibition lies to prevent a County Court entertaining an appeal launched by an informant from the decision of a police magistrate dismissing on summary trial a charge of an indictable offence, on the ground that no appeal lies; and the prohibition motion is properly brought as soon as the notice

of the proposed appeal has been filed in the inferior court to which the appeal is taken.

2. That objections to the jurisdiction of a court to entertain an appeal may be raised on the hearing will not prevent the granting of a writ of prohibition against such tribunal by a superior court

Mayor of London v. *Cox,* L.R. 2 H.L. 239, followed.

3. The court hearing a prohibition motion has a discretion to refuse an adjournment for the purpose of cross-examination upon an affidavit, where the adjournment would be against justice.

4. Where a prosecution before a police magistrate for an offence under the Secret Commissions Act, 8-9 Edw. VII. (Can.) c. 33, is brought as for an indictable offence and is tried on the defendant's election under the summary trials clauses of the Cr. Code, 1906 (Part 16), and the charge, while triable in either method, is not brought under the summary convictions clauses of the Code (Part 15), there is no right of appeal by the prosecutor from the dismissal of the charge.

H. W. Whitla, K.C., and *M. Hyman,* for Buchanan. *W. Hollands,* for the informant.

Province of Saskatchewan.

SUPREME COURT.

Johnstone. J.] [15 D.L.R. 216.

PEACOCK *v.* WILKINSON.

Brokers—Real estate agents—Default in making title—Broker's warranty of ownership.

Real estate agents who, on making a contract of sale, misrepresent to the purchaser that the party whose name is then disclosed by them as being the vendor and with whom the contract purports to be made, has been ascertained by them to be the registered owner of the property, will be held liable not only for the return of the payments made to them on the faith of the contract, but for damages in not carrying out the contract where no effort had been made by them to get in the outstanding title which was in a third party so as, if possible, to carry out the sale.

O'Neil v. *Drinkle,* 1 S.L.R. 402, applied; see also *Reeve* v. *Mullen* (Alta.), 14 D.L.R. 345.

J. F. Frame, for plaintiff. *J. F. L. Embury,* for defendant.

Book Reviews.

Chapters of the law relating to the Colonies. By SIR CHARLES JAMES TARRING, Knt., late Chief Justice of Granada; author of British Consular Jurisdiction in the East. Fourth edition. London: Stevens & Haynes, Law Publishers, Bell Yard. 1913.

Nothing would give to the legal reader a better idea of the vast extent of the Empire to which we belong than this book, an Empire continually expanding. Since the last edition the union of South Africa has been achieved and its constitution embodied in an act of the Imperial Parliament. As regards appeals to the Judicial Committee of the Privy Council we are informed that owing to the erection of the High Court of Australia appeals to England have naturally diminished; whilst the resort of Canadians to the foot of the throne is not slackened.

Topical indexes are appended of cases decided in the Privy Council on appeal from the colonies, and of cases relating to the colonies decided in the English courts otherwise than on appeal therefrom. There is also an appendix giving the topics of English law dealt with in the above cases. Another appendix gives the Judicial Committee Rules of 1908.

A Collection of Latin Maxims and Phrases, literally translated. By JOHN M. COTTERELL. Third edition. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar. 1913.

This is intended for the use of students; but it is also interesting and desirable reading for practitioners, it being remembered that a maxim is a general principle, and a universally approved leading truth in law. For the convenience of the readers this edition is interleaved.

Boycotts and the Labour Struggle. Economic and Legal Aspects. By HARRY W. LAIDLER. New York: John Lane Company. Toronto: Bell and Cockburn. 1914.

An interesting sketch of an important branch of the labour struggle, not of much practical use in this country, but a handy volume to refer to when occasion requires. An appendix gives a summary and digest of decisions in boycott and allied cases in England and the United States.