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ACTIONS FOR MALICIOUS PROSECUTION—FUNCTIONS OF JUDGE AND JURY.

It was provided by the Judicature Act, R.S.O. 1897, c. 51, s. 112, that, upon a trial by jury in any case, except an action of libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution or false imprisonment, the judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any question of fact stated to them by the judge for the purpose.

Mr. Justice Anglin, in referring to this enactment in the case of *Still* v. *Hastings*, 13 O.L.R. 322, said: "I read this section as tantamount to an express prohibition against the putting of questions to a jury in actions of the classes enumerated. Notwithstanding its provisions, however, appellate courts have affirmed the propriety of submitting questions to the jury in actions for malicious prosecution, and, in reviewing cases in which questions have been put they have expressed no disapproval of that course."

The learned judge in the same case also said, "It is often practically impossible to direct a jury hypothetically as to the facts upon which reasonable and probable cause depends in such a manner that there can be any certainty that the jury at all appreciate the nature and the scope of its duties in regard to the matters involved in this issue; or any assurance that, in pronouncing a general verdict, the jury will confine itself to the consideration of matters legitimately the subject of its findings. I would, therefore, suggest the advisibility of eliminating from the exceptions in s. 112 of the Judicature Act actions for malicious prosecution."

The practice up to the passing of the Judicature Act of

1913, in actions for malicious prosecution, is clearly stated in the text books to be that "the existence of reasonable and probable cause is a question for the judge, and not for the jury." The rule, however, is subject to the qualifications that all preliminary questions of fact on which this ultimate issue depends are for the jury. That is to say, the jury must find what the facts of the case were, as known to or believed by the defendant, and then the judge decides whether those facts constituted reasonable and probable cause: viz., whether the defendant shewed reasonable care and judgment in believing and acting as he did. Thus, if the defendant alleges that he prosecuted the plaintiff because of certain information received from a third person, it is for the jury to say whether that information was really received by the defendant and whether it was really believed by him, and it is for the judge to decide whether, if it was so received and believed, it constituted a reasonable ground for the prosecution. This division of functions between judge and jury may be effected at the discretion of the judge in two ways. He may either direct the jury to find the facts specially, and then decide for himself on the facts so found whether there was reasonable and probable cause, or he may tell the jury that if they find the facts to be otherwise, there is none, thus leaving the jury to find a general verdict on this hypothetical direction.

This subject was discussed in a recent case in the Province of Ontario (*Ford* v. *Canadian Express Company*, 21 O.L.R. 593), and from the judgment in that case we gather that, notwithstanding the prohibition spoken of by Mr. Justice Anglin, trial judges have usually submitted questions to the jury; and, although the existence of reasonable and probable cause is a question for the trial judge, questions are often left to the jury on the issue as to the want of reasonable and probable cause, such as questions of reasonable care and questions of honest belief, etc., and these questions have been held to be proper questions to be left to the jury under certain conditions.

As has been seen, Mr. Justice Anglin held that the practice of submitting questions to the jury in actions for malicious pro-

secution is illegal, and suggested the advisability of eliminating from the exceptions in s. 112 of the former Judicature Act actions for malicious prosecution.

This apparently led to the passing of s. 62 of the Judicature Act of 1913 (3 & 4 Geo. 5, c. 19), which provides that "in actions for malicious prosecution the judge shall decide all questions both of law and fact necessary for determining whether in not there was reasonable and probable cause for the prosecution."

Sec. 60 of the same Act says that a jury may give a special or general verdict, but shall give a special verdict if the judge so directs and shall not give a general verdict if directed by him not to do so.

By s. 61, the judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact stated by him and the jury shall answer such questions and not give any verdict.

It does not appear to us that the new enactment (s. 62) clears up the difficulty, or at least it introduces a new one, when it says the judge shall decide all questions both of law and fact necessary for determining reasonable and probable cause. But can he (as under the former practice he could) have the assistance of a jury under s. 61?

The trend of the cases seems to shew that the judicial thought was that gradually the jury rather than the judge was being entrusted with the duty of passing upon the existence of reasonable and probable cause. And the legislature may have thought proper to settle the matter by passing s. 62. But has it done so? Or can judges still leave questions of fact relating to this particular issue to the jury? Sections 61 and 62 appear to be inconsistent.

It would be well to call attention to another notable change made by the Judicature Act of 1913 above referred to. By the Act of 1897 (R.S.O. c. 51, s. 112), all actions of slander, criminal conversation, seduction, malicious arrest, malicious prosecution and false imprisonment, were placed in the same class as actions

of libel. But now, not only malicious prosecution, but the other actions are taken out. This is a considerable change, the effect of which should be carefully considered.

ACTIONS ON FOREIGN JUDGMENTS.

The law as to foreign judgments has been much before the courts for many years, but, like many other subjects, cannot be said to be settled. Ever-varying facts open the door from time to time to differences of opinion which require judicial settlement.

In another column (p. 714) is the note of a judgment of a single judge in British Columbia (*Wanderers' Hockey Club* v. *Johnson*) reported in 14 D.L.R. 42. There is also a recent case in England (*Phillips* v. *Batho*, 135 L.T. Jour. 186) on the same subject. These cases give a text for a reference to the law discussed therein.

The plaintiff in the latter case claimed £7,200 against the defendant, being damages awarded to be paid by the defendant to the plaintiff by a judgment of the Bengal High Court in divorce proceedings in which the plaintiff was petitioner and the defendant co-respondent. The defendant replied that before the date when these proceedings commenced he had left India, and the court pronouncing the judgment had, therefore, no jurisdiction over him, and he was not bound by their judgment. The plaintiff was an Armenian Christian, born in Persia, who for thirty-three years had lived in British India, and who was domiciled there. He was married to his wife in British India. The defendant was a British subject domiciled in England, who resided in India for nineteen years before March 22, 1910, when he left India for England. On April 20, 1910, the plaintiff caused to be issued in the Bengal High Court a divorce petition against his wife, alleging her adultery with the defendant in India in 1909. The defendant was joined as co-respondent, and served with process by registered post in England. He did not appear; the wife defended. At the trial adultery was proved

and the defendant was condemned in £7,200 damages. The Indian Divorce Act, 1869, authorizes the Indian courts, where (*a*) the petitioner professes the Christian religion and resides in India at the time of presenting the petition, and (*b*) where the marriage shall have been solemnized in India—both of which conditions were fulfilled in the present case—to act and give relief on principles and rules as nearly as may be conformable to the principles on which the Divorce court in England gives relief. By s. 11 the petitioner is required to make the alleged adulterer a co-respondent: by s. 34 the husband may claim damages from the co-respondent; and by s. 50 the petition is to be served on any party to be affected thereby, either within or without British India, in such manner as the High Court shall direct. Rule 25 of Order V. of the High Court rules provides for the service by post of a summons on a defendant resident out of British India. For the plaintiff it was contended that the English court had jurisdiction to entertain the claim and give judgment for the plaintiff. For the defendant it was contended that the court had no jurisdiction; that the courts in England will give effect to the decree only if the parties were domiciled in the place where it was made; and that the decree in this case was separable into two parts, one a decree for the dissolution of the marriage and the other for the payment of a sum of money, and that in so far as it was a judgment for the payment of a sum of money it was merely in the position of the judgment of a foreign court in personam, which in the circumstances of this case could not be enforced in the courts of this country. The following, amongst other cases, were referred to: *Emanuel* v. *Symon*, 98 L.T.R. 304, [1908] 1 K.B. 302; *Rayment* v. *Rayment*, 103 L.T. Rep. 430, [1910] P. 271. Scrutton, J., gave judgment for the plaintiff, and held, that as the English courts will recognize and enforce the judgments as to status of the Indian courts in matters within their jurisdiction—marriage and the dissolution of marriage being matters of status—so they will also recognize and enforce the ancillary orders as to damages such as they themselves make in similar cases: *Phillips* v. *Batho*, 135 L.T. Jour. 186.

Mr. Justice Blackburn in *Schilsby* v. *Westenholz*, L.R. 6 Q.B. 155, 24 L.T.R. 93, says the true principle on which the judgments of foreign tribunals are enforced in England is that "the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts of this country are bound to enforce; and consequently anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action"; and in that case, where a judgment had been obtained in default of appearance in a foreign court against a defendant who at the time of the commencement of the suit was not a subject of, nor resident in, the country where the judgment was obtained, it was held that the plaintiff could not succeed here as there existed nothing imposing on the defendant any duty to obey the judgment. No territorial legislation can give jurisdiction which any foreign courts ought to recognize against absent foreigners, who owe no allegiance or obedience to the power which so legislates: *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A.C. 670. Lord Selborne in the *Faridkote* case says that the plaintiff "must sue in the court to which the defendant is subject at the time of the suit"; and again, "when the action is personal, the courts of the country in which the defendant resides have power, and they ought to be resorted to, to do justice."

In other words (as explained by Mr. Justice Scrutton in *Phillips* v. *Batho*, 135 L.T. Jour. 286), the English courts will not enforce a German judgment against an Englishman for damages for breach of contract to be performed in Germany, when the Englishman was not in Germany at the issue of the process and had not submitted to German jurisdiction, for the Englishman can be sued on the contract in his own courts, which will do justice.

These are principles upon which English courts will not enforce foreign judgments; is it possible to find positive rules upon which such judgments will be enforced? In *Rousillon* v. *Rousillon*, 42 L.T.R. 679, 14 Ch. D. 351, Mr. Justice Fry enumerates

five cases in which the courts of this country consider a defendant bound by a judgment obtained against him in a foreign court. There are (1) where he is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; (5) where he has voluntarily contracted to submit himself to the forum in which the judgment was obtained.

The English and Canadian authorities on actions on foreign judgments have been reviewed in an annotation in 9 D.L.R. 799, which it would be well to refer to in connection with the above.

THE CASE OF LARKIN.

There have been times in English history when such interference with the course of justice as has lately taken place in the City of Dublin would have caused the Minister responsible for it to lose, possibly not his head, but certainly his office.

It is not so now, for a Minister backed by a majority in the House of Commons may apparently do anything he pleases without remonstrance from a public which has become so lethargic through the blows dealt upon the constitution in recent years, that any action may pass without comment.

This man Larkin, an anarchist and a professional agitator, was recently convicted and sentenced to seven months' imprisonment, not for any interference with questions affecting trade unions but of sedition and of inciting to riots which might and actually did result in bloodshed. His conviction took place in an ordinary court of justice under the ordinary forms of law and presented no feature to justify executive clemency; yet, simply in obedience to the clamour of a mob, which for weeks had terrorized the city of Dublin, the executive remitted the very light sentence imposed upon him and liberated him from jail. The result of this action may easily be imagined and is already bringing forth fruit.

Whether this remission of sentence was due to cowardly dread of violence or to the desire to court popularity amongst a certain class, the result is equally disastrous. It is a matter of serious concern that in these days when anarchy is in the air, and riotous proceedings are of daily occurrence, the authority of the courts has been seriously weakened, and the administration of justice is brought into contempt. The disastrous lesson has been taught to those of the populous only too willing to learn it, that agitation carried on with sufficient violence and persistence is in time sure to gain its end.

This is not a question of politics, but appertains to the domain of law, the administration of justice and the enforcement of the court's decree. For a government to interfere with the action of the courts of law must always be an exceptional proceeding and more or less a danger to the state. Such interference under the circumstances connected with this trial and conviction cannot but weaken that which should be kept strong and firm. It will be fortunate if this incident, trifling as it may seem to some, does not lead to results of a most serious character.

A SUPREME APPELLATE COURT.

Whilst there will be divergent opinions as to the wisdom and practicability of the Judicial Committee of the Privy Council going on circuit to the over-seas Dominions, there will be few to differ from the views expressed by the *Law Times* in reference to the suggestion of Lord Haldane regarding the formation of our Supreme Appellate Court for the Empire. The writer believes that such a Court would prove very acceptable to all lawyers throughout the King's dominions. He continues as follows:—

"It is an idea to which we have already adverted in these columns, for, as we have pointed out, although in theory appeals from the United Kingdom go to the King in Parliament and appeals from beyond the seas to the King in Council, the personnel of those tribunals is more or less identical. We have

little doubt that if and when a reorganisation of the House of Lords is brought about, that will prove an opportune time for the establishment of the new court of final appeal, and that its nucleus will be found in the existing Judicial Committee of the Privy Council. A tribunal of this description, enlarged perhaps and sitting in more than one division, upon which all those who have to administer the systems of law that obtain throughout the Empire are represented, would be a truly actual and living Imperial Court of Appeal."

EXAMINATION OF BANK PASS-BOOKS.

Lord Halsbury, L.C., made it fairly clear in delivering his opinion in the historic case of *Bank of England* v. *Vagliano*, 64 L.T. Rep. 353, at p. 356, (1891), A.C. 107, that, so far as his view was concerned, a customer of a bank was "bound to know the contents of his own pass-book." That expression of his Lordship, however, followed almost immediately after a previous statement of his that he did not dispute the proposition that "the carelessness of the customer or neglect of the customer to take precatuions unconnected with the act itself cannot be put forward by the banker as justifying his own default." Is the omission of a customer to examine, and make himself fully acquainted with, the contents of his pass-book carelessness or neglect so "unconnected with the act itself" as not to preclude him from recovering from the bank amounts paid in respect of cheques, the signatures to which were forged, although such cheques were debited to his account in the pass-book? An affirmative answer to that question is of such prime importance to a vast number of persons—for everyone who possess a banking account runs the risk of the forgery of his signature to a cheque—that it may well be anxiously sought for. And it is to be obtained from the judgment of Mr. Justice Channell in the recent case of *Walker* v. *Manchester and Liverpool District Banking Company, Limited*, 108 L.T. Rep. 728. The learned judge gave it as his opinion

that "the authorities were rather against the contention that there is a duty on the part of the customer to examine his pass-book." The observations of Lord Esher in *Chatterton* v. *London and County Bank*, referred to in Paget on the Law of Banking, 2nd ed., pp. 156-160, assist in that conclusion. And later on his Lordship said that if the customer got his pass-book, and examined it so carelessly that he did not discover a fraud, still he would not be bound by payments made by the bank. In his opinion, the case before him was identical to all intents and purposes with *Kepitigalla Rubber Estates, Limited* v. *National Bank of India, Limited*, 100 L.T. Rep. 516, (1909), 2 K.B. 1010. Turning to our report of that case, it is seen that the head-note contains this proposition of law, deduced from the judgment of Mr. Justice Bray: "Where a bank pays money upon forged cheques, it is liable to the customer, unless it can be shewn that the customer's negligence is immediately connected with the transaction itself, and the proximate cause of the loss." That, it will be observed, coincides precisely with what was laid down by Lord Halsbury, L.C., in *Bank of England* v. *Vagliano* (ubi sup.). Mr. Justice Bray referred also to *Swan* v. *North British Australian Company*, 2 H. & C. 175; *Bank of Ireland* v. *Trustees of Evans' Charities*, 5 H. of L. Cas. 389; *Mayor, etc.* v. *Bank of England*, 56 L.T. Rep. 665, 21 Q.B. Div. 160, and *Lewes, etc., Company* v. *Barclay and Co., Limited*, 95 L.T. Rep. 444, 11 Com. Cas. 255, as supporting his statement of the law. The mere fact that a customer of a bank takes his pass-book out of the bank and returns it without objecting to any of the entries contained therein, there being a pencil entry of the balance, did not, in the opinion of his Lordship, amount to a settlement of account as between the customer and the bank in respect of those entries. In America there appears to be a somewhat different view entertained of the rights of customer and bank in this respect, judging from the decision in *Leather Manufacturers' Bank* v. *Morgan*, 117 U.S. Rep. 96, at p. 116. It seems that a customer is bound in the United States to examine the entries in his pass-book when he receives it, and to report any errors

in it. If he fails to do so, and the bank is thereby misled to his prejudice, he cannot afterwards dispute the correctness of the balance shewn by the pass-book. The rigour of that pronouncement of the law is, however, most unlikely to find favour in this country. Customers of banks are not all people blest with punctilious business instincts and habits.—*Law Times.*

DICTA ET PROMISSA IN THE CIVIL LAW AND UNDER MODERN CODES.

A question that very often is put before the courts for decision is: What are the remedies of a purchaser, when his seller delivers a thing not according to contract? We refer in this to sales of individual things and not to things generic.

The question is complicated and involves a number of others. First there is the question: When is the thing defective? In other words, is the seller liable for so-called defects in abstracto (lack of qualities usual with such things) or for defects in concreto only (lack of qualities guaranteed or assumed to exist in the thing sold)? As a general rule, it may be said that the seller of an individual thing will not incur liability in damages for defects in abstracto; the only consequences of such defective delivery will be that the purchaser can cancel the contract; or demand an abatement in the price; this latter is often called damages, but this appears to be a very loose use of the word.

Then, there is the question: Can the purchaser claim from the seller (as the Germans would say) his positive interest in the contract, that is, can he claim the profits he would have made, or can he claim his negative interest only: to be put in the same position, as if the contract had not been entered into?

But the main question is: Is the seller liable for fraud only (dolus) or can he also be held responsible for negligence (culpa)?

We generally follow the Civil Law rule, as it has been uniformly interpreted for centuries: That only fraud will make the seller liable in damages. The Civilians found their rule, that

nothing less than dolus will sustain an action for damages, upon the sharp distinction made between venditor sciens and venditor ignorans.[1] Against venditor ignorans the purchaser has no other actions than those founded upon the Edict of the Aedils (actio redhibitoria and actio quanti minoris) while against venditor sciens he has actio epti, by which he can enforce damages (quanti emptoris interfuit non decipi.)[2]

Of late, however, some of the German civilians have commenced to question this doctrine.[3] They call attention to such statements as the following by Ulpian in fr. 13, sec. 3, D. 19-1, "sed non debuit facile quae ignorabat asseverare," and again, "non debuit facilis esse ad temerariam indicationem."[4]

In addition to fraud, the civil law makes the seller liable in damages for "dicta et promissa," and it does not make any difference whether the dicta et promissa were made fraudulently or negligently. This is probably what Ulpian meant; he warns the seller that, while ordinarily he is liable for fraud only, he will have to be careful, not to make frivolous assertions, as they may be held against him as dicta sive promissa.

We can, then, repeat our former statement that the rule followed by our courts is practically the same as that of the civil law, viz.: The seller becomes liable in damages only, when he has been guilty of fraud, or has guaranteed the thing. This appears so well settled that no citing of authorities is required. But this rule has, never and nowhere, worked quite satisfactorily.

For this there appears to be several reasons, but the principal one seems to spring from the various translations of the Latin words, dolus and culpa. In civil law the meaning of both of

1. Fr. 13, pr.; fr. 1, sec. 15, D. 19-1.

2. Fr. 13, sec. 1, D. 19-1.

3. See f. inst. F. Leonhard: "Die Haftung des Verkaufers fur sein Verschulden beim Vertragsschlusse" (1896) and "Verschulden beim Vertragsschlusse" (1910). Von Bluhme and Krueckman appear to agree, more or less, with Leonhard.

4. See also fr. 45, sec. 4, D. 18-1; fr. 6, sec. 4, D. 19-1; fr. 19, sec. 1, D. 19-2.

these words had become entirely technical, and they had acquired various technical meanings. Dolus was used in the law of contracts for what we call fraud, and likewise in criminal law for malice. In the popular language, dolus retained the meaning of fraud, and in translating contract-dolus we used the English word for its original and popular meaning, whereby its acquired technical meaning was mainly lost; culpa we treated in the opposite way, disregarded its original meaning of guilt and adopted its acquired technical meaning of negligence. As we also adopted the word fraud as the technical name for certain criminal acts, we have become apt to apply a too strict interpretation to dolus, with a correlative too expansive interpretation of culpa. The Germans have suffered somewhat in the same manner. It is true that in civil matters, they have two words for what we call fraud, Vorätz and Arglist, which try to differentiate degrees of fraud, but still, both words imply intentional misrepresentation. On the other hand, both Unachtsamkeit and Nachlässigkeit, just as negligence, imply principally carelessness.

That fraud must carry with it responsibility in damages, appears self-evident; equally plain it is that mere carelessness cannot lead to any further duty than that of restitution. But there is, without doubt, a wide hiatus between intentional fraud and mere carelessness. In practical life, this must be bridged over, and it is quite natural, and in accordance with the rule (in dubio pro mitius), that negligence has been expanded to have an altogether too wide technical meaning.

In the modern legislation of various countries, attempts have been made to cover cases, not fraudulent, nor arising from simple carelessness, and to some extent place them on the same footing with fraudulent cases.

The German Civil Code[5] says: Fehlt der verkaufte Sache zur Zeit des Kaufes eine zugesicherte Eigenschart, so kann der Kaüfer, statt der Wandlung oder der Minderung, Schadenersatz wegen Nichterfüllung verlangen . . ." (If, at the time of

5. (DBGB) sec. 463.

the purchase, the thing sold lacks a certain quality which has been assured, then the purchaser may, in place of abrogation or abatement in the price, demand damages for non-compliance).

The Uniform Scandinavian Laws[6] have the same rule, except that instead of the words, "eine zugesicherte Eigenschaft," they use the words, "Egenskaber som maa anses tilsikrede" (qualities which must be considered to have been assured).

It is rather difficult to give the exact meaning of these words in English. We call attention to the fact that the words "garantiert" and "garanteret" have not been used, and these words were left out advisedly and replaced by the word "zugesichert" and "tilsikret." Literally, these words mean assured, and that with us practically means the same as guaranteed. Still, by the expressions used, it was, without any doubt whatever, intended to cover such cases, where there was no actual guarantee, nor any actual fraud, but still such action on the part of the seller, that he ought not to be heard with the plea that he had simply been careless.

From the day when the German Civil Code was promulgated, yes, from the time it was under preparation and under debate in the Reichstag, the above cited section has been a battlefield, where one-half of the German law-writers, the Reichsgericht and its various "Senaten," all of the German Superior Courts and a number of non-German writers have waged an endless war. The USLK have not been in operation long enough to bring disputes over their corresponding section to decision before any of the supreme courts, but all of the law-writers of the three countries are constantly trying to find the exact meaning of the section.

No agreement has been reached. Judge Riehl, of Berlin, has even as late as in the Deutsche Juristen Zeitung for March 15, 1913, expressed the opinion that when the thing sold is real estate, not even "Arglist" will justify a judgment for damages. But the tendency seems to be towards the opinion that the

6. "Om Kob" (About Purchases) (USLK) sec. 42-II.

words, "zugesicherte Eigenschaft" and "Egenskaber som maa anses tilsikrede" intend to cover the same ground as the Roman dicta et promissa.

Then it becomes necessary, however, to give to these words a somewhat more liberal construction than has hitherto prevailed. In this connection, it may be worth noting that these words often appear as "dicta sive promissa," in other words, they form not one technical expression, but there is a difference between the two words and their meaning. Promissa will cover what we understand by guarantees. What, then, does dicta cover? Our answer, and what would appear as a reasonable and practical one, and in accordance with Ulpian's sayings, is this: Mere general praise of the thing you wish to sell is not dicta. But if you mention special qualities in the thing, as if you had personal knowledge of them, and the purchaser has reason to believe that you have such personal knowledge, such representations on your part are dicta, even when you do not guarantee the qualities, and even when your representations are made in good faith. When the seller holds himself out as speaking of his own knowledge, he should not afterwards be heard with the dfence "caveat emptor." Especially is this the case since, in most sales of individual things, the seller is more or less of an expert in the line in question, while the purchaser generally is an ordinary man off the street.—*Central Law Journal.*

Correspondence.

PRIVY COUNCIL GOING ON CIRCUIT.

To the Editor, CANADA LAW JOURNAL:

DEAR SIR,—A cable despatch states that a suggestion comes from Lord Chancellor Haldane to the effect that he, as head of the judiciary has in contemplation a radical change in the administration of justice in regard to the final Court of Appeal for the Empire over the sea. It is nothing less than that the Lords of the Judicial Committee of the Privy Council should go on circuit amongst some at least of the outlying countries which form parts of Greater Britain. The Lord Chancellor has just returned from his visit to Canada and has seen things, and perhaps broadened his outlook.

The suggestion (for at present it cannot well be more) is in itself significant of a growing Imperialistic sentiment, but it is larger than it would appear at a first glance. Whether it is practical is a question which must be determined by the Imperial Government and the advisers of His Majesty the King, who accepts their humble but wise advice in dispensing justice to those who crave it from him at the foot of the Throne. If practicable his subjects of the over seas dominions would, we believe, welcome a change which would draw closer the bonds of Empire unity.

At first blush one can see difficulties as well as possible advantages. Presumably the expense of appeals would be lessened. The number of appeals to His Majesty would certainly be increased, and the business in our Supreme Court decrease. Comparisons are odious, but even the judges of that court would all admit that the highest class of judicial minds must almost of necessity be found where the largest field of choice exists, and where the training is of a higher order than is possible in the younger countries. Whilst we are vigorous, we are as yet in our minority, and immature as compared with the mother country and have much to learn in many matters.

Then again there are those who think that some personal knowledge by judges of the country where the events occurred would tend to produce more satisfactory findings. I know, however, that your journal takes no stock in this suggestion.

Those of our Bar who have visited the unpretentious chamber where the Judicial Committee does its work will have there wit-

nessed the careful attention of its members to the arguments adduced, their keen and intelligent interest in all that is brought before them, their quiet patience and their gentle courtesy to those who come before them. The example of such men would be most beneficial to the Bench and Bar in the younger countries of the Empire.

ONLOOKER.

[It is too soon, and our information is too scant to discuss what after all may have been but a passing thought in the mind of Lord Haldane. When the suggestion takes more definite shape if it ever does it can be discussed more intelligently. In the meantime, though it may sound inviting, we doubt both its wisdom or its practicability.—ED. C.L.J.]

THE LATE JAMES S. CARTWRIGHT, K.C., MASTER IN CHAMBERS.

To the Editor OF THE CANADA LAW JOURNAL:

DEAR SIR,—There is not a member of the legal profession who does not deplore the death of the late James S. Cartwright, K.C., Master in Chambers, the student's best friend and the lawyer's admiration. In the course of the many heated arguments which took place before him he had the happy faculty of satisfying counsel engaged therein by judgments of which in the end they approved. He was always urbane, never unkind, sympathetic and possessed of remarkable wisdom. He trusted the profession; they reciprocated. It was great pleasure to argue cases before him; he was so patient and still appreciative. The younger members of the bar could not help but love him, never discourteous, always the gentleman, possessed not only of a legal education, but of a literary one. His judgments were short, to the point, sound and almost always to the satisfaction of the legal profession.

It will be hard to find any member of the profession who can fill his place. He was neither narrow, stubborn or egotistic, but broad appreciative and humble. We shall all feel keenly his absence from us, and a fitting memorial to him should be placed in Osgoode Hall.

A MEMBER OF THE PROFESSION.

[We refer in another place (page 714) to the loss the profession has sustained by Mr. Cartwright's death.—ED. C.L.J.]

REPORTS AND NOTES OF CASES.

England.

JUDICIAL COMMITTEE OF PRIVY COUNCIL.

Lords Atkinson, Shaw, and Moulton.] [13 D.L.R. 900.

JONES *v.* CANADIAN PACIFIC RY. CO.

1. *Master and servant—Employer's liability—Statutory duty—Railway employees passing test.*

Where a railway company in breach of the duty imposed by Order No. 12225 of the Railway Commissioners of Canada, permits an employee to engage in the operation of trains without the specified examination and test, the company is, by virtue of sec. 427 of the Railway Act, R.S.C. 1906, liable in damages to any person injured as a result of such breach of duty. *Jones* v. *Canadian Pacific R. Co.*, 5 D.L.R. 332, 3 O.W.N. 1404, reversed; see also Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160, R.S.O. 1914, c. 146; and Fatal Accidents Act, 1 Geo. V. (Ont.) c. 33, amending R.S.O. 1897, c. 166, R.S.O. 1914, c. 151.

2. *Common employment—Master's breach of duty.*

The defence of common employment is not available to the master in a case in which injury has been caused to a servant by the negligence of a fellow-servant selected by the master in breach of a statutory duty to employ in the particular service only persons who have passed a qualifying test, if the injury be the natural consequence of the lack of capability which the test should have disclosed. *Jones* v. *Canadian Pacific R. Co.*, 5 D.L.R. 332, reversed; *Groves* v. *Wimborne*, [1898] 2 Q.B. 402, applied.

3. *Evidence—Presumptions and burden of proof—As to skill—Railroad employees.*

The flagrant failure of a section foreman improperly entrusted with the charge of a railway snow-plow train in violation of statutory regulations requiring that only employees should be placed in charge who had passed the prescribed examination to observe the signals or to signal to the engine driver

in rear may, in the absence of evidence to the contrary, be presumed to have resulted from his want of skill, knowledge or experience, or to some physical incapacity or defect, which the statutory examination or test would have revealed; and the railway company is properly held liable in damages for the death of his assistant on the snow-plow in a collision resulting from the section foreman's neglect in which he also was killed; the company's action in setting an unqualified man to do such work was either the sole effective cause of the accident or a cause materially contributing to it, and the case therefore could not have been properly withdrawn from the jury. *Jones* v. *Canadian Pacific R. Co.*, 5 D.L.R. 332, 3 O.W.N. 1404, reversed.

4. *New trial—Instructions—Reading charge as a whole—Misdirection.*

The judge's charge to the jury is to be read as a whole, and if in view of its general meaning and effect, the jury were not left under any erroneous impression as to the real nature of the issues to be determined or as to the law applicable, misdirection cannot be predicted upon an isolated portion of the charge when read apart from the other portions, so as to constitute a ground for ordering a new trial. *Jones* v. *Canadian Pacific R. Co.*, 5 D.L.R. 332, reversed.

Sir Geo. Gibbons, K.C., and *Geo. S. Gibbons*, for appellant. *Sir Robert Finlay*, K.C., *Angus MacMurchy*, K.C., and *Geoffrey Lawrence*, for the Railway Co.

Dominion of Canada.

EXCHEQUER COURT

THE KING *v.* BRADBURN & WEBB.

Cassels, J.] [Aug. 29.

Public harbour—Navigable waters—Water lots — Set-off — Increased value of remaining lands by reason of public work.

Proceedings by the Crown for the expropriation of certain lands bordering on the Kaministiquia River at Fort William

were taken with a view to the widening of the channel of the river. In carrying out the works, a road-allowance which intervened between the lands taken and the water of the river was expropriated, leaving the lands with a frontage on the river subsequently widened.

Held, 1. The advantage to the balance of the lands equalize any damage to the land owners over and above the amounts offered as compensation by the government.

Water lots had been granted after Confederation in the river by the Province of Ontario. The question arose as to the compensation to be paid for these water lots.

Held, 2. The waters of the river are navigable waters within the statute (R.S. 1906, c. 115) from bank to bank, and that these water lots could not be built upon by the owners thereof without the assent of the Dominion authorities.

The contention was raised on the part of the Crown that the waters in question formed part of a public harbour as defined by the Confederation Act.

Held, 3. That upon the facts they did not form part of such public harbour.

Dowler, K.C., and *W. S. Edwards*, for plaintiff. *Pitblado*, K.C., and *F. R. Morris*, for defendants.

Province of Ontario.

SUPREME COURT—APPELLATE DIVISION.

Mulock, C.J.Ex., Clute, Riddell, Sutherland, JJ.] [13 D.L.R. 836.

SPENCER *v.* CANADIAN PACIFIC R. Co.

Carriers—Baggage or property of passenger—Limitation of liability for loss—Condition on back of check—Want of notice.

A passenger who checks his baggage on a ticket previously purchased is not bound by a condition printed on the check but not on the ticket, limiting the liability of the carrier in case of loss, where such condition was not brought to the notice of the passenger, and the circumstances disclosed no assent either actual or constructive to such condition by the passenger.

Lamont v. *Canadian Transfer Co.*, 19 O.L.R. 291, considered. *Shirley Denison*, K.C., and *C. W. Livingston*, for the appellant company. *J. W. Bain*, K.C., for plaintiff.

Meredith, C.J.O., Maclaren, Magee, Hodgins, JJ.A.] [13 D.L.R. 854.

RE KETCHESON AND CANADIAN NORTHERN ONTARIO RY. CO.

1. *Damages—Depreciation—Eminent domain—Railway right-of-way across farm.*

The loss of time and inconvenience of transporting the crop from the part of the farm separated from the buildings by the construction of the railway on a compulsory taking of a strip of land for the right-of-way, is proper to be considered in estimating the damages only in so far as it affects a depreciation of the market value of the land not taken: *Idaho and W.R. Co.* v. *Coey*, 131 Pac. Rep. 810, approved.

2 *Damages—Eminent domain—Cultivating farm crossed by railway.*

In awarding damages against the railway in eminent domain proceedings in respect of a railway right-of-way across a farm, the inconvenience of transferring machinery and farm implements, and the like, from one part of the farm to another and the inconvenience in farming and cultivating the land, occasioned by the construction of the railroad, are not separate items to be capitalised on an ascertainment of a prospective annual loss to the owner whose farm is divided, but are to be considered only as factors in fixing the depreciation of the market value of the remaining parts of the farm.

3. *Interest on awards.*

Interest on the sum awarded as compensation as of the date of the deposit of the plan and profile, should not be given by arbitrators as a part of their award for land expropriated for railway purposes, and will be struck out as beyond their jurisdiction; the right to interest from that date is conferred under the Railway Act (Can.) and not left to be determined by the arbitrators: *Re Clarke and Toronto Grey & Bruce R. Co.*, 18 O.L.R. 628, referred to; *Re Davies and James Bay R. Co.*, 20 O.L.R. 534, considered.

4. *Appeal from award—Review of facts.*

The appellate court, on an appeal from an award in eminent domain proceedings, should come to its own conclusion upon all the evidence, paying due regard to the award and findings and reviewing them as it would those of a subordinate court: *James Bay E. Co.* v. *Armstrong,* [1909] A.C. 624, referred to.

On an appeal from an award, the latter will not be set aside merely because the appellate court disagrees with the reasoning of the arbitrators, but will stand if it can be supported on any ground sufficient in law.

5. *Evidence—Relevancy—Similar facts.*

Evidence of settlements made by the railway with other persons for parts of other farms taken for the right-of-way is not relevant in expropriation proceedings under the Railway Act (Can.).

6. *Evidence—Declarations and acts of party—Payments in other cases of expropriation—Fixing values.*

The fact that one party to the issue presented on an arbitration is allowed to give evidence of a class which is not relevant, does not entitle the opposing party to answer with the same kind of irrelevant testimony; and the opposing party, although successful in the issue is properly refused costs of his irrelevant evidence: *R.* v. *Cargill,* [1913] 2 K.B. 271, applied.

W. C. Nikel, K.C., for company. *I. F. Hellmuth,* K.C., and *E. G. Porter,* K.C., for claimants.

Meredith, C.J.O., Maclaren, Magee, Hodgins, JJ.A.] [13 D.L.R. 884.

EGAN *v.* TOWNSHIP OF SALTFLEET.

Highways—Defects—Injury to traveller—Liability—Notice of injury.

In the absence of a reasonable excuse for the plaintiff's failure to give to a municipality notice of injuries sustained on a defective highway, in the manner required by sec. 606 (3) of the Ontario Consolidated Municipal Act, 1903, R.S.O. 1914, ch. 192, the want of notice, although not prejudicial to the municipality, is a full defence to an action for damages.

W. A. Logie, for plaintiff. *F. F. Treleaven*, for defendant corporation.

ANNOTATION ON THE ABOVE CASE.

There is a constantly increasing class of negligence cases under statutes imposing liability for damage on municipalities and on employers in which a condition precedent to a right of action is the service of notice of accident, or of claim. The statute provides in some of the provinces (such as originally in Ontario) for notice of the accident; in others (as Manitoba) for notice of claim.

Sec. 606 of the Consolidated Municipal Act (Ont.) 1903, provided for notice of "the accident and the cause thereof," but sec. 460 of the Municipal Act (Ont.) 1913, amends by requiring notice of "claim and of the injury complained of" (R.S.O. 1914, ch. 192). Sub-sec. 5 of sec. 606 of the 1903 Act dispenses with the notice (*a*) in cases where death ensues and (*b*) in all other cases (except snow and ice sidewalk claims) where the Court "considers" (1) that there is "reasonable excuse," and (2) that the defendants have not been "prejudiced in their defence"; but sec. 460 of the Act of 1913 substitutes the phrase "is of the opinion" for the word "considers."

Sec. 13 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160 (R.S.O. 1914, ch. 146), into which the notice provision is carried dispenses in sub-sec. 5 of sec. 13 with the notice where "in the opinion" of the Court (trial or appellate) (1) there was "reasonable excuse," and (2) there was "no prejudice to the defendant in his defence."

The Manitoba Municipal Act, R.S.M. 1902, ch. 116, sec. 667, provides for notice of "claim or action."

It will be noted that the Manitoba Act prescribes the period for notice not "30 days" but "one month."

This kind of notice (unknown to common law negligence) is of modern origin dating back only to the year 1892 in Ontario, Boyd, C., in *Longbottom* v. *Toronto* (1895), 27 O.R. 198, at 199, and Meredith, J., in *O'Connor* v. *Hamilton* (1904), 8 O.L.R. 391 at 401, taken jointly, are to the effect that the enactment as to highways was introduced in 1894 by 57 Vict. (Ont.) ch. 50, sec. 13, carried with certain amendments into sec. 606 of the Consolidated Municipal Act, 1903, 3 Edw. VII. (Ont.) ch. 19, the idea being probably taken from the Workmen's Compensation for Injuries Act of 1892, 55 Vict. (Ont.) ch. 30, borrowed from the Imperial enactment respecting employers' liability.

The reason for the notice is to give the defendant a chance at once to examine the scene of the accident and to see witnesses; or, as put by Boyd, C., in the Longbottom case, to give an opportunity of investigating the matter in all its bearings with the view to settling or contesting the claim. An analysis of those reasons is embraced in the dissenting judgment of Meredith, J., in *O'Connor* v. *Hamilton* (1904), 8 O.L.R. 391 at 402, 403, 404.

A notice to municipalities in Ontario was prior to 1894 not necessary, then a 30-day notice was prescribed for all municipalities, followed in 1896 by limiting the urban notices to 7 days.

In 1899 the need of further legislation to cover cases of joint municipal liability is emphasized in *Leicert* v. *Matilda Township*, 26 A.R. (Ont.) 1. The legislation followed in 62 Vict. (Ont.) ch. 26, sec. 39, carried into sec. 606 of Consolidated Municipal Act, 1903, and sec. 460 of the Municipal Act of 1913 [R.S.O. 1914, ch. 192].

It appearing that, in negligence cases of the classes indicated, the notice of the accident prescribed by statute is, to give the defendant a chance to examine the scene of the accident, and to make an immediate and intelligent inquiry into its cause, and so that dishonest claims, or those entirely without legal basis, may be effectively met, and valid claims settled or properly contested; it will be perceived that "ice and snow" sidewalk claims are a striking illustration of the fairness and common sense of speedy notice of accident to induce an inspection before the evidence varies or disappears.

Speaking generally this kind of notice is a condition precedent to the statutory right of action. In this connection Boyd, C., in *Longbottom* v. *Toronto*, 27 A.R. 198 at 199, reads the original enactment touching sidewalks thus: "The notice required by 57 Vict. (Ont.) ch. 50, sec. 13, in cases of injury from defective sidewalks is to inform the corporation before action of the nature of the accident and the cause of it."

The law-maker having wisely provided for notice of the accident to protect the defendant, has with commenable prudence begun to provide for the numberless cases where the want of notice is to be excused to protect the plaintiff. The law of excuse for want of notice evolves slowly and cautiously. A definition will probably be attempted by express statutory enactment in some future Act. In *Armstrong* v. *Canada Atlantic R. Co.* (1902), 4 O.L.R. 560 at 568, cited in *O'Connor* v. *Hamilton* (1905), 10 O.L.R. 529 at 536, it was said: "What may constitute reasonable excuse for not giving notice is not defined and must depend very much upon the circumstances of the particular case."

In *Armstrong* v. *Canada Atlantic R. Co.* (1902), 4 O.L.R. 560, a case under the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, sec. 9, it was held that what constitutes reasonable excuse must depend upon the circumstances of each particular case and that such may be inferred where there is (1) notoriety of the accident; (2) employer's knowledge of (*a*) the injury, and (*b*) its cause; (3) employer's holding up the claim for a promised settlement.

In the *Armstrong* case, 4 O.L.R. 560 at 568, the governing principle is laid down as follows. "Reasonable excuse for want of notice may be very slight indeed where the occurrence of the accident appears to have been well known to the employer, and a *bonâ fide* claim for compensation therefor has been made, inasmuch as the Judge has power under sec. 14 in the alternative, and simply in his discretion and on such terms as he may think proper, to adjourn the trial of the action to enable notice to be given."

In following the history of notice of accident as a condition precedent to right of action, it is seen that while the original intention of the legislature was to protect the municipality or the employer from stale or unjust claims, it soon became evident that the plaintiff also needed help. This was sought to be afforded by certain amendments empowering the Courts to relieve from want or insufficiency of notice in actions where it appeared (*a*) that there was "reasonable excuse" for the failure to give the prescribed written notice, and (*b*) that the defendant had not been prejudiced by such failure.

Courts experience some difficulty in determining when the sufficiency of want of notice of accident does not "prejudice" the defendant. But this difficulty wanes to a vanishing point compared with the vexed question of "reasonable excuse."

Again, a knotty question for the Courts is whether the plaintiff, having proved reasonable excuse (whatever that is), still bears the onus of proving no prejudice. The vague nature of "reasonable excuse" leaves it doubtful in many cases whether the term necessarily includes "no prejudice," while in many other cases the dividing line is obvious. The unique severity of the provision requiring notice of accident without a liberal interpretation of "reasonable excuse" is emphasized by Anglin, J., in *O'Connor* v. *Hamilton* (1904), 9 O.L.R. 391, at 396 as follows: "The legislation in question is so drastic, the limitation imposed, unless a very liberal interpretation be given to the saving provision, is so little short of prohibitive and must so often prove destructive of most meritorious claims, that (speaking for myself) I do not hesitate to say that where there has been no prejudice to the defendants I shall strive to find in the circumstance something, however slight, which may serve as a reasonable excuse."

Meredith, J., dissenting, at pages 399 and 400 intimates that the function of the Court is not one of discretion but strictly to try and adjudicate (like other questions of law and fact in the case) whether there is (*a*) reasonable excuse, and (*b*) no prejudice; and he adds that the subject is not one of mere practice, to which the exercise of discretion may be appropriate, but is one of a civil right, to be sustained or lost finally by the judgment upon the question.

The difficulty seems to be that the Courts are loath to apply a too liberal construction to "reasonable excuse" while the law-maker hesitates to define it. The Ontario Supreme Court (Appellate Division) in a unanimous judgment, *Egan* v. *Saltfleet*, 13 D.L.R. 884, *supra*, delivered by Meredith, C.J.O., addresses the following suggestion to the law-maker: "I cannot refrain from expressing my regret that the legislature has not seen fit to dispense with the necessity of shewing reasonable excuse for the want of notice, I see no reason why the want of it should bar the right to recover where it is shewn that the corporation has not been prejudiced by the notice not having been given within the prescribed time."

The judgment of the Ontario Court of Appeal in *O'Connor* v. *Hamilton* (1902), 10 O.L.R. 529, went off on another ground, yet that decision, which

was unanimous, lays down sufficient to justify the judicial suggestion for further law making. Osler, J., at page 536 (after citing *Armstrong* v. *Canada Atlantic R. Co.* (1902), 4 O.L.R. 560, for the principle that what constitutes reasonable excuse is not defined and depends on circumstances) adds in effect that it not easy to lay down a general governing principle and that where there are actual knowledge and verbal notice, as elements of excuse, there still remain questions of great nicety.

Some of the cases in different provinces, illustrating the difficulties and perplexities experienced by the various Courts in the different law districts of Canada because "reasonable excuse" has never been defined, are subjoined.

The failure of an employee to give notice of an injury within the time prescribed by sec. 4 of the Alberta Workmen's Compensation Act of 1908, ch. 12, is not fatal, unless the omission is prejudicial to the employer: *Bruno* v. *International Coal & Coke Co.*, 12 D.L.R. 745.

The employee's ignorance of the fact that he was entitled to compensation for injuries is not a mistake that will excuse his failure to give notice thereof in the manner required by sec. 4 of the Alberta Workmen's Compensation Act of 1908, ch. 12: *Bruno* v. *International Coal & Coke Co.*, 12 D.L.R. 745.

A notice of injury given by a workman is sufficient to entitle his dependants after his death to the benefits of the B.C. Workmen's Compensation Act, R.S.B.C. 1911, ch. 244, without any other or further notice: *Moffatt* v. *Crow's Nest Pass Coal Co.*, 12 D.L.R. 643.

The statute in Quebec requiring notice of action against a municipal corporation was not enacted to allow corporations to escape liability on technical grounds, but to enable them by investigation to come into possession of all the facts; so as to either compromise or properly prepare the defence: *West* v. *City of Montreal*, 9 D.L.R. 9.

An action brought against a municipality for personal injuries from negligence in the operations under way for making repairs to its streets, but not due to any defect in the condition of the street itself, is not within the Ontario Municipal Act, 3 Edw. VII. (Ont.) ch. 19, sec. 606, so as to require a preliminary notice of injury: *Waller* v. *Town of Sarnia*, 9 D.L.R. 834.

Where a statutory enactment in Quebec required notice of suit to be given to a city corporation before an action in damages could be instituted, such notice in the absence of any contrary stipulation may be given by the plaintiff's attorney and may be validly served by bailiff: *City of Westmount* v. *Hicks*, 8 D.L.R. 488.

A defective notice, or even no notice at all, in British Columbia is not a bar to action if it is proved (*a*) that the employer is not prejudiced in his defence, or (*b*) that the want or defect was occasioned by a mistake or other reasonable cause: *Mitchelli* v. *Crow's Nest Pass Coal Co.*, 7 D.L.R. 904 at 907.

Where in British Columbia the injured party was laid up with the

accident in a serious illness, his inability to give the notice is construed liberally in his favour on the general principle that such a condition indisposes a man to do any business: *Lever* v. *McArthur*, 9 B.C.R. 417 at 420.

Where in British Columbia there has been a genuine mistake, not of law, that is, as to the legal effect of the doctor's certificates in a mining district, but of fact, that is, as to whether or not the company would accept them as a notice of injury, the custom and usage will be considered on the question as to whether the plaintiff was misled thereby from giving the statutory notice: *Michelli* v. *Crow' Nest Pass Coal & Coke Co.*, 7 D.L.R. 904 at 909.

In Quebec the failure to give notice to the municipality of an injury sustained on a defective sidewalk (without reasonable excuse) will bar the action not only against the municipality but also against the property owner who is answerable to the municipality under art. 5641 of the Cities and Towns Act, R.S.Q. 1909: *Batsford* v. *Laurentian Paper Co.*, 5 D.L.R. 306.

The notice of action required by sec. 667 of the Manitoba Municipal Act, R.S.M. 1902, ch. 116, need not be signed by the claimant personally nor need it shew that he was claiming in his capacity of personal representative of the deceased: *Curle* v. *Brandon*, 15 Man. L.R. 122.

Sec. 722 of the Winnipeg charter which is the same in effect as sec. 667 of the Manitoba Municipal Act. R.S.M. 1902, ch. 116, requiring notice of the "claim or action," is to receive a liberal construction, and requirements not specifically stated and not necessarily implied should not be read into it: *Iveson* v. *Winnipeg*, 16 Man. L.R. 352.

When plaintiff proves that he has given the notice of action required by the Municipal Code (Que.), the failure to allege notice in his declaration is not a cause of prejudice to the defendant and not a ground for exception to the form: *Pageot* v. *St. Ambroise*, 10 Que. P.R. 79.

A notice by letter to the chairman of the Board of Works, instead of to the city clerk, under sec. 722 of the Winnipeg charter, 1 and 2 Edw. VII. (Man.) ch. 77, which contained full particulars of the accident and of the injuries and of a claim for a specific sum and which reached the city clerk within the prescribed time, was held sufficient: *Mitchell* v. *Winnipeg*, 17 Man. L.R. 166.

Notice to be excused must be based on more than mere want of prejudice: *Anderson* v. *Toronto*, 15 O.L.R. 643.

In Quebec the right of action for damages against a city being based primarily on the sufficiency of the notice as to the place where the accident occurred according to art. 536(*a*) of the Montreal charter, a notice stating that the accident occurred on a sidewalk on the corner of two streets, while it appears by the evidence that the plaintiff fell on the crossing between these two streets, is insufficient: *Seybold* v. *City of Montreal*, 10 Que. P.R. 377.

In an action in Ontario against a township corporation for damages for personal injuries from a highway out of repair, where the plaintiff gave

notice in writing of the "accident and the cause thereof" under the Consolidated Municipal Act, 1903, sec. 606, within the proper time, but did not state therein the precise part of the highway which was out of repair, the notice was held sufficient as affording reasonable information to enable the defendant to investigate, it appearing that the municipality knew the place of the accident and had in fact investigated, on the principle that the Court should not add anything to that which is expressly prescribed by the statute: *Young* v. *Township of Bruce*, 24 O.L.R. 546.

In an action against a rural municipality in Ontario where (*a*) the municipality was notified verbally by the plaintiff's employer of the happening of the accident, (*b*) the plaintiff for part of the period was not in a condition to give the notice, (*c*) the plaintiff was ignorant of the law requiring the notice; such reasons do not constitute a reasonable excuse for want of notice: *Egan* v. *Township of Saltfleet*, 13 D.L.R. 884, *supra*.

Where want of notice was pleaded by the defendant the following excuses were held sufficient: (1) notoriety of the accident, (2) defendant's knowledge of it, (3) defendant's knowledge that plaintiff's representative was making the claim, (4) defendant taking the claim into consideration but never giving plaintiff a final answer as to settlement: *Armstrong* v. *Canada Atlantic R. Co.*, 4 O.L.R. 560.

Ice and snow sidewalk cases call strictly for notice; but it may be dispensed with where reasonable excuse and absence of prejudice are both established: *Drennan* v. *City of Kingston*, 27 Can. S.C.R. 46.

The legislation and decisions as to the requirement of notice would appear to be more elastic under Workmen's Compensation Laws in the different provinces than under the municipal laws. It will be noted in this connection that the trial Court may adjourn or postpone the trial to enable notice, or amended notice, to be given, under certain of the statutes.

Ignorance of the law is not sufficient excuse, whether or not it may be an element in arriving at a conclusion as to whether the circumstances of the case shew reasonable excuse: *Biggart* v. *Town of Clinton*, 2 O.W.R. 1092.

The degree of physical and mental disability necessary to constitute reasonable excuse is specially considered in *Drennan* v. *City of Kingston*, 27 Can. S.C.R. 46, and *O'Connor* v. *Hamilton* (1905), 10 O.L.R. 529.

For convenience the following summary may be found useful:—

1. The statutory-negligence action requiring notice of accident is in Ontario a modern innovation dating back only to 1892.

2. The notice may be excused for other good causes where the want of notice has not prejudiced the defendant.

3. The other good causes which will suffice to excuse the notice have never been defined, but the Courts are left to reach their own conclusions in the circumstances of each particular case.

4. Proof that the want of notice has not prejudiced the defendant is not of itself sufficient to excuse notice, although it may be an element in considering reasonable excuse.

5. Ignorance of the law is not sufficient excuse, although it also may be an element in considering reasonable excuse.

6. Notice is not excuse by (*a*) verbal notice, (*b*) physical and mental inability to give it for part of the statutory period, and (*c*) ignorance of the law requiring it: *Egan* v. *Township of Saltfleet*, 13 D.L.R. 884, *supra*.

7. Notice is excused by (*a*) notoriety of the accident, (*b*) defendant's knowledge of the accident, (*c*) defendant's knowledge of a claim based thereon, and (*d*) defendant's taking the claim into consideration and holding it in abeyance and thereby lulling and misleading the plaintiff: *Armstrong* v. *Canada Atlantic R. Co.* (1902), 4 O.L.R. 560.

IN THE COUNTY COURT OF THE COUNTY OF PERTH.

BANK OF HAMILTON AND A. McEACHERN *v.* GRAND TRUNK RY. CO.

Sale of goods—Carrier—Bill of lading—Forged endorsement—Railway company—Responsibility of, for genuineness of signature.

The plaintiff McEachern, a farmer, sold to one W. a carload of hay. A sight draft was drawn through the Bank of Hamilton on W. then of Toronto for the price. To the draft was attached a bill of lading on the "Form of Order Bill of Lading approved by the Board of Railway Commissioners for Canada by order No. 7562, of 15th July, 1909." The draft and bill of lading (both to the order of the Bank of Ottawa) were by McEachern's authority sent to a branch of the Bank of Ottawa in Toronto with instructions to collect the draft before endorsing and handing the bill of lading to W. W. refused both the hay and the draft whereupon the Bank of Ottawa was instructed to surrender the bill of lading to D. and return the draft—D. being unknown to the manager of the Bank of Ottawa, the latter endorsed the bill of lading: "Deliver to the order of D., on payment of all charges, without recourse for the Bank of Ottawa," signed the endorsement and enclosed the bill in a sealed envelope addressed to D. which he intrusted to W. to deliver to D. W., unknown to D., obtained a delivery of the hay to an Ice Company.

The bill of lading had on its face, printed in prominent characters, "The surrender of the Original ORDER Bill of Lading pro-

perly endorsed shall be required before delivery of the goods." Defendants produced the way-bill of the hay and a receipt of the Ice Company for same. They could not produce the bill of lading nor account for its disappearance. Their "carload clerk" testified that an advice note was sent to W., as consignee; that W. brought in the bill of lading already endorsed and surrendered it to him and the charges were paid; that W. endorsed a direction to deliver to the Ice Company, but that the bill of lading purported to be endorsed by D. It was not customary, he said, to require the signature of the endorser to be verified.

The following cases were cited or referred to by the judge: *Henderson* v. *The Comptoir D'Escompte de Paris*, L.R. 5 P.C. App. 253; *R.C. Bank* v. *Carruthers*, 28 U.C.R. 278, and 29 U.C. R. 283; *Heugh* v. *London and N.W. Ry. Co.*, 5 L.R. Ex. 50; *McKean* v. *McIvor*, L.R. 6 Ex. 35; *Couley* v. *C.P. Ry. Co.*, 32 O.R. 258. After differentiating these cases and mentioning the old case of *Lubbock* v *Inglis* (2 Starkie 104), E.C.L.R. vol. 2, p. 48.

ERMATINGER, acting Co.J.: "The case before me is that of a carrier, who is in some respects more strictly accountable in law than a wharfinger or warehouseman. I see no difference in principle, however, between the case just cited (*Lubbock* v. *Inglis*) and this case. Moreover in the present case, the special contract entered into by the defendants (according to form approved by the Railway Commission) must not be lost sight of. The action is founded upon it and defendants in their statement of defence specially refer to it. It is termed an "order bill of lading" to distinguish it from an ordinary bill of lading for direct consignments I suppose. The clause already quoted provides not only for surrender of "this original order bill of lading," but "*properly endorsed*" also. Can it be said to be properly endorsed when the endorsement is forged?

It is a matter of surprise to me that no case of a forged order bill of lading has been cited, and it is said that none is reported. Possibly the point involved is considered so plain as to be beyond argument, namely, whether a railway company must be held responsible for the genuineness of the signatures of endorsement in all cases where the plaintiff is not estopped from questioning it. Is it sufficient for them to say, "We took ordinary and reasonable precautions and have been the victims of a fraud?" The banks have to face the same responsibility every day, and why not the railways, when their contract so explicitly requires it?

I have already referred to the indiscretion of the bank manager in conveying the bill to D. by the hand of W. in a sealed envelope as insufficient to exonerate defendants. I have similarly resolved my doubts raised by the unexplained absence of the bill of lading from the company's possession, in defendant's favour, and have placed my decision on the broad ground of the responsibility of the railway to see that the order bills of lading are "properly endorsed," according to their explicit terms. The importance of the question to both railway company and shipper must be my excuse for discussing the case at such length as I have.

I have not considered the Ice Company's responsibility in the matter as they are not parties and no one has asked that they be added as parties. I do not think the plaintiff bound to look to the Ice Company, if the railway is responsible, as I hold it to be. There will be judgment for plaintiff Archibald McEachern for $121 against defendants. As to costs, I follow the precedents afforded in *Moshier* v. *Keenan*, 31 O.R. 658, and other cases in withholding costs against defendants. The delivery of the bill of lading by the Bank of Ottawa to W., though under cover, facilitated the wrongful delivery of the goods by defendants. The Bank of Ottawa was specially named to the Bank of Hamilton by plaintiff McEachern or his son as agents in the matter."

Coughlin, for plaintiffs. *Foster*, for defendants.

Province of Nova Scotia.

SUPREME COURT.

Sir Charles Townstend, C.J., Meagher, Longley, Ritchie, JJ.] [13 D.L.R. 844.

MILLER v. HALIFAX POWER CO., LTD.

THOMPSON v. HALIFAX POWER CO. LTD.

Courts—Jurisdiction—Relation to other departments of government—Eminent domain—Power to determine necessity for —Injunction—Governor-in-Council.

1. The question whether a necessity exists for the expropriation of land by a company is not one to be decided by a court in the first instance, but for the Governor-in-Council, where the

charter of the company, secs. 17 and 19 of ch. 113 of N.S. Acts, 1911, provide that whenever it is necessary that the company should be vested with land, lakes or streams or land covered with water for the purposes of its business and no agreement can be made for the purchase thereof, the Governor-in-Council may order its expropriation if satisfied that the property is actually required for the business of the company, and that it is not more than is reasonably necessary therefor, and that the expropriation is otherwise just and reasonable. (*Per* Townshend, Ritchie, and Longley, JJ.)

2. The court will not enjoin a proposed application by a company to the Governor-in-Council for permission to expropriate land or an easement for the purposes of its business, as permitted by its charter, ch. 113 of N.S. Acts, 1911, on the ground that the property sought was not such as could be acquired by expropriation, because affected with public rights, or rights already acquired by others under statutory grants; since the court cannot assume in advance that the Governor-in-Council will exceed his jurisdiction or act illegally and grant permission to take land not subject to expropriation. (*Per* Townshend, C.J., and Longley, J.)

3. Statutory powers of expropriation in the incorporating statute of a power company are to be strictly construed so as not, by mere general words authorizing expropriation for the damming of a river, to deprive the public of rights theretofore existing unless a clear legislative intention to abrogate public rights is disclosed in the statute. (*Per* Ritchie, J.)

T. S. Rogers, K.C., for appellants. *H. Mellish*, K.C., and *F. H. Bell*, K.C., for respondents

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Province of British Columbia

COURT OF APPEAL.

Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A.] [13 D.L.R. 822.

McKissock *v.* McKissock.

Husband and wife—Property rights—Transactions between—Purchase of land by wife with money furnished by husband for investment for joint benefit.

A married woman who purchases land in her own name with

money furnished her from time to time by her husband from his wages and other sources, will be required to convey a half interest therein to her husband, where the money was given her for the express purpose of being invested in land for their joint benefit, share and share alike.

J. H. Senkler, K.C., for plaintiff, respondent. *R. M. Macdonald,* for defendant, appellant.

ANNOTATION ON THE ABOVE CASE.

1. *Wife having custody or control of husband's money.*

Under sec. 10 of the Imperial Married Woman's Property Act of 1882 (45 & 46 Vict. ch. 75), where any investment is made by a wife in her own name with money belonging to her husband without his consent, any Judge of the High or County Court may order the investment and dividends, or any part thereof, transferred or paid to the husband: 16 Halsbury's Laws 404. And any savings of a married woman made while living with her husband, from the proceeds of his business, or from an allowance by him for housekeeping expenses, dress or the like, belongs to the husband, although invested in the name of the wife, unless it appears that he intended that such savings should belong to the wife as a gift from him: 16 Halsbury's Laws 358; *Bruneau* v. *Lefairre*, 34 Que. S.C. 173; *Barrack* v. *McCulloch*, 3 Kay & J. 110. So savings made by a wife, from money remitted unconditionally to her by her absent husband, above the maintenance of the family, and deposited by her in bank in her own name, belong to her husband on a separation between them taking place: *Birkett* v. *Birkett*, 98 L.T. 540. And where a married woman sold chattels belonging to her husband, who was of unsound mind, although not so found, and applied the proceeds to her own use, on the death of her husband his representative is entitled to recover the proceeds of such sale from the wife's executor: *Re Williams, Williams* v. *Stratton*, 50 L.J.Ch. 495. The general rule in the United States, as shewn in the annotation to the case of *Ford Lumber & Mfg. Co.* v. *Curd*, 43 Lawyers' Reports Annotated 685, is that money saved by the wife in managing the home of husband and wife belongs to the husband; and that, in general, property purchased by the wife therewith, belong to the husband, and may be reached by his creditors.

But a married woman will be entitled to savings made by her from a household allowance, etc., if it appears that her husband intended that she should take it as a gift: 16 Halsbury's Laws 358. Thus, where a married man permits his wife to have for her separate use the profits from butter, eggs, etc., beyond what was used in the family, and the husband borrows a portion of the wife's savings, she may prove the claim against his estate, especially where there is no deficiency of assets: *Slanning* v. *Style*, 3 P.W. 337. And where a married woman is permitted by her husband to retain two guineas from every tenant who renewed a lease with

her husband, savings therefrom belong to the wife: *Slanning* v. *Style*, 3 P.W. 337. And savings from money a woman swears her husband gave her in his lifetime, belong to her: *McEdwards* v. *Ross*, 6 Gr. 373.

Money saved by a married woman from an allowance paid for her separate support by her husband, from whom she was living apart, belongs to her and cannot be recovered by him: *Brooke* v. *Brooke*, 25 Beav. 342. And a wife's savings from an annual allowance for her separate maintenance paid under an order in lunacy, will be her separate property, although the order did not expressly so provide: *Re goods of Tharp*, 3 P.D. 76, 38 L.T. 867. So a wife living separate from her husband may make a gift of her savings from an allowance for her separate maintenance, as if she were a *feme sole*: *Gage* v. *Lister*, 2 Bro. P.C. 4; or she may dispose of it by will: *Bletson* v. *Pridgeon*, 1 Ch. Cas. 118; *Humphrey* v. *Richards*, 25 L.J. Ch. 442.

Where a married man receives a legacy belonging to his wife, but not for her separate use, and to which, therefore, he is entitled, and gives it to her to care for, and she, without his consent, deposits it in bank in the name of her infant son by a former marriage, the husband may recover the deposit from the banker: *Calland* v. *Lloyd*, 6 M. & W. 26. So money of a married man which he deposits in a bank account of his wife as executrix will pass, on his death, to his representative: *Lloyd* v. *Pughe*, L.R. 14 Eq 241. And where a man borrows from trustees money held for the benefit of his wife, without ever paying any interest on the debt, it will be presumed, in order to prevent the debt becoming barred by the Statute of Limitations, that the latter gave the arrears of interest to her husband: *Re Dixon*, *Heynes* v. *Dixon*, [1900] 2 Ch. 561. And where a married woman, during her husband's absence, carries on his business, and deposits the profits in a bank in her own name, according to an arrangement between them, in order to protect it from his creditors, the money is not attachable by garnishment by the latter as a debt due her husband: *St. Charles* v. *Andrea*, 41 N.S.R. 190. Where a woman with money received from her husband purchased a homestead in her own name, and subsequently sold it to a third person, who, before the completion of the agreement for sale, became aware that she was not a widow, the husband is entitled to a declaration that the wife held the property as trustee, and to recover from the purchaser the money which, after notice of the husband's claim, the latter had paid to secure an immediate conveyance: *Dudgeon* v. *Dudgeon*, 13 B.C.R. 179.

2. *Husband having custody or control of wife's money.*

No presumption of a gift from a married woman to her husband arises from a purchase of property with or an investment of her money by her husband in his own name or their joint names; and under such circumstances the husband is to be presumed a trustee for the benefit of his wife, in the absence of evidence of a contrary intention: 16 Halsbury's Laws 396. This rule will be applied where a married man receives and retains

the proceeds of a sale of his wife's separate property without ever accounting for it: *Briggs* v. *Willson*, 24 A.R. (Ont.) 521. And a resulting trust arises in favour of a married woman from the purchase by her husband in his own name of a house with her money, which had been deposited in bank in their joint names: *Mercier* v. *Mercier*, [1903] 2 Ch. 98 (C.A.).

Where a married man induces his wife to sell shares held in their joint names, on his promise to reinvest the proceeds in the same manner, but which he used without the knowledge of his wife, in part payment for land purchased in his own name, on his death his widow is entitled to a lien on the land for the proceeds of such sale: *Scales* v. *Baker*, 28 Beav. 91.

Where money bequeathed to a married woman's separate use, was lent during coverture on a mortgage payable to the husband and wife or the survivor of them, which was prepared by her husband's solicitor, and which untruly recited that the money lent belonged to the wife before marriage and was not comprised in any settlement, the wife executing the conveyance without it being read to her, or having independent advice, she may, on being deserted by her husband, have the deed declared void, and the mortgagor required to execute a new mortgage in favour of her alone: *Knight* v. *Knight*, 5 Giff. 26.

Under R.S.M. 1891, ch. 95, sec. 5, relative to the separate property of married women, there is no presumption from the receipt by a man of the corpus of his wife's separate estate that it was a gift; and she may recover it without evidence either of a bargain or agreement for a loan: *Thompson* v. *Didion*, 10 Man. L.R. 246. And a man who receives money belonging to his wife will be a trustee for her in respect thereto unless he can shew clearly and conclusively that there was a gift of it to him: *Ellis* v. *Ellis*, (Ont.) 12 D.L.R. 219.

A woman, whose claim that her husband permitted her to carry on a farming business on a farm owned by him, and to treat the proceeds as her separate property, is uncorroborated, is not entitled to the proceeds of the business which her husband invested in his own name: *Whittaker* v. *Whittaker*, [1882] 21 Ch.D. 657.

Where the trustee of a fund, the income from which was payable to a married woman for life, permits her husband to use a portion of the fund for a number of years, the wife, on separating from her husband, cannot recover interest on such sum, where she admitted that she allowed her husband to receive her income as long as he behaved as a husband should, and she did not claim interest until after his desertion: *Rowley* v. *Unwin*, 2 Kay & J. 138.

A wife's assent to the mere receipt by her husband of a legacy bequeathed to her separate use will not raise a presumption of a gift to him: *Alexander* v. *Barnhill* (1888), 21 L.J. Ir. 511; *Rowe* v. *Rowe*, 2 DeG. & Sm. 294. And a bequest to a wife by husband of a large sum will not be considered as a satisfaction of her claim against his estate in respect to the legacy so received by him: *Rowe* v. *Rowe*, 2 DeG. & Sm. 294. So the delivery by a woman to her husband of a cheque for a legacy

belonging to her and its deposit in bank in his own name a few days before his death, cannot be regarded as a gift of the money to him: *Green* v. *Carlett*, 46 L.J.Ch. 477, 4 Ch.D. 882.

But a woman who permits a legacy bequeathed to her to come into her husband's hands and to be employed by him in his business and in paying family expenses, will be regarded as having assented to such use of the money, so as to prevent her from recovering the amount of the legacy from his estate: *Gardiner* v. *Gardiner*, 1 Giff. 126.

Where, after the passage of the Imperial Married Woman's Property Act of 1870, a wife became entitled in possession to a sum of money to which, before marriage, she was entitled to in expectancy, and joined with her husband in petitioning the Court of Chancery to pay it to him in his own right, he became vested with the money by virtue of such petition: *Lane* v. *Oakes*, 30 L.J. 726. And where a married woman, who was entitled to a separate property, joined with her husband in appointing an agent to receive the rents, and the latter deposited them in a bank, from which the husband drew them and appropriated the money for purposes of his own, the balance on deposit at his death will belong to his estate, by reason of his wife's acquiescence in his conduct: *Bersford* v. *Armaugh*, 13 Sim. 643. And a gift will be presumed where a married woman, under a power, permitted shares of stock to be transferred to herself and husband, and then consented to the latter selling them, and he appropriated the proceeds of the sale to his own use: *Hale* v. *Sheldrake*, 60 L.T. 202. So the written assent of a woman to the payment by trustees to her husband of a fund from which he was entitled to the interest for life, with remainder to her, will relieve the trustees from liability to the wife for making such payment: *Cresuel* v. *Dewell*, 4 Giff. 460.

Where stock, to which a woman was entitled to the separate use, was improperly transferred by a trustee into the joint names of himself and her husband, and the latter received the dividends until the death of the trustee, when the stock was sold by the husband, and, without the knowledge of his wife, the proceeds were applied by him to his own use, on his subsequent desertion of his wife she is entitled to recover from her husband and the estate of the deceased trustees the arrears of dividends accruing since the sale; and to have the trust fund replaced; notwithstanding it might be presumed that she assented to her husband's actual receipt of the dividends while the stock was intact yet no such assent could be presumed after its sale: *Dixon* v. *Dixon*, 48 L.J.Ch. 592, 9 Ch.D. 587. And where a married man, who was a trustee for his wife, applied the capital belonging to her estate to his own use, and, although she wished to give him the money, he refused to accept it, and always spoke of it as belonging to her, he is to be regarded as a trustee for his wife, and after his death she may prove a claim against this estate for the capital together with interest thereon from his death: *Re Blake, Blake* v. *Power*, 60 L.T.N.S. 663.

A married man who receives his wife's separate income and applies it for their common benefit, is not answerable to the wife therefor: *Ellis* v. *Ellis* (Ont.), 12 D.L.R. 219; *Payne* v. *Little*, 26 Beav. 1; *Squire* v. *Dean*, 4 Bro. C.C. 326; *Bartlett* v. *Gillard*, 3 Russ. 149. And a married man will not be required to account to his wife for arrears of her separate income paid to him without a demand therefor having been made by the wife: *Leach* v. *Way*, 5 L.J. Ch. 100; *Smith* v. *Camelford*, 2 Ves. Jr. 698; *Squire* v. *Dean*, 4 Bro. C.C. 326. So a married woman who permits her husband to receive her separate income or pin-money cannot require him to account for it, if at all, back of the year: *Parker* v. *White*, 11 Ves. 205; *Townshend* v. *Windham*, 2 Ves. 1; *Thompson* v. *Harman*, 3 Myl. & K. 513. Where a married man is permitted by his wife to receive the income from a sum settled on her for her separate use, a gift of such income to the husband will be inferred: *Edward* v. *Cheyne*, 13 App. C.H.L. 385; *Young* v. *Young*, 29 T.L.R. 391. But where paid the husband for the purpose of investment for the wife it will remain her property: *Young* v. *Young*, *supra*.

In *Ellis* v. *Ellis*, (Ont.) 12 O.L.R. 219, it was said that a woman who seeks to recover income paid to her husband and expended for their joint benefit, must shew clearly and conclusively that he received it by way of loan.

A gift of the dividends from stock owned by a married woman will be inferred where, for a number of years, she permitted her husband to deposit them in bank in his own name, and to use the proceeds for purposes of his own: *Caton* v. *Rideout*, 1 Macn. & G. 599.

A married woman may recover from her deceased husband's estate, but without interest, money belonging to her which the former appropriated for her own use during his lifetime: *Re Flamank*, *Wood* v. *Cock*, 40 Ch.D. 461. And money earned by a woman during the time she was deserted by her husband, and which he afterwards forcibly took from her, may be recovered by her: *Cecil* v. *Juxon*, 1 Atk. 278. So money belonging to a woman's separate estate, which her husband took forcibly from her, the return of which she frequently demanded, may, on her husband's death, be recovered by her from his executors; since her husband is to be regarded as a trustee for his wife; and, as the money was retained without accounting for it, his executor cannot, under the Trustee Act, 1888, sec. 8, claim the benefit of the Statute of Limitations: *Wassell* v. *Leggitt*, [1896] 1 Ch. 554.

Under the Imperial Married Women's Property Act (45 & 46 Vict. ch. 75), sec. 3, any money intrusted by a wife to her husband for the purpose of any trade or business carried on by him constitutes a part of his assets in bankruptcy; the wife being entitled, however, to rank as a creditor in respect thereto against his estate after the payment of creditors for a valuable consideration: 2 Halsbury's Laws 159, 16 *ib.* 434.

SUPREME COURT.

Murphy, J.] [14 D.L.R. 42.

WANDERERS' HOCKEY CLUB *v.* JOHNSON.

1. *Foreign judgment—Of sister province—Jurisdictional matters —Want of service on defendant—Effect.*

A judgment rendered in the Province of Quebec without personal service of process on the defendant who was out of that province while the proceedings were going on, is not binding on the courts of British Columbia in an action based on the Quebec judgment.

2. *Contracts—Validity and effect—Contract of employment by one under existing contract — Knowledge of contractee — Action for breach.*

Under the axiom ex turpi causâ non oritur actio an action cannot be maintained for the breach of a contract of employment where the plaintiff, at the time the agreement was made, was aware that it could not be performed without the defendant breaking an existing contract of employment with a third person. *Harrington* v. *Victoria Graving Dock*, 47 L.J.Q.B. 594, followed; and see, as to injunctions generally in restraint of personal service, *Chapman* v. *Westerby*, W.N. (1913), 277.

Deacon, for plaintiff. *S. S. Taylor*, K.C., for defendant.

Bench and Bar

THE LATE MASTER IN CHAMBERS, OSGOODE HALL, ONT.

On November 12th, Mr. James Strachan Cartwright, K.C., who, since April, 1903, has held the office of Master in Chambers, died at his residence in Toronto, after some months' illness.

Mr. Cartwright was the son of John Soloman Cartwright, Q.C., a former member of the Canadian Parliament, and was born in 1840 in Kingston where his father resided for many years. He received his education at the celebrated Public School of Rugby. He was a well educated man and came to the study of the law with a mind well equipped. In 1868 he was called

to the Bar and commenced practice in Napanee. In May, 1883, he received the appointment of Registrar of the former Queen's Bench Division of the High Court. In 1902, he was appointed K.C., and in the following year, on the appointment of his predecessor to the County Court Bench, he was made Master in Chambers, an office which he filled in a way entirely acceptable to the profession.

Mr. Cartwright was of a modest and retiring nature but was always genial and approachable. He had a sound mastery of legal principles and dealt with the matters that came before him in a way that was marked by good sense. That he will be remembered affectionately and respectfully by all who were thrown in contact with him in business, or socially, is beyond doubt. Beneath a somewhat grave and solemn exterior he cherished a keen sense of humour. Of him it may truly be said that he made the words of the prophet of old the rule of his life, and that doing justly, loving mercy, and walking humbly before his God, was his constant delight.

Appointments to Office.

William James Leahy, of the City of Regina, Province of Saskatchewan, Barrister-at-law, to be Judge of the District Court of the District of Kerrobert. (Nov. 8.)

Algernon Edwain Doak, of the City of Prince Albert, Province of Saskatchewan, Barrister-at-law, to be Judge of the District Court of the Judicial District of Prince Albert. (Nov. 8.)

Flotsam and Jetsam.

A Merciless Verbatim Reporter.

Very few speakers are precise and accurate enough to stand well in an absolutely verbatim report. There are speakers who scarcely ever complete a sentence grammatically. There are others who use unwittingly the most hopeless words and phrases, and there are a few who are fond of involved sentences for which they can never find a subject, a predicate, and a close. I have come across a verbatim report of a wonderful question addressed by Lord Chief Justice Hyde to an accused person. If any reader can make head or tail of it I should like to hear

from him. Here is the question: "You took a man in the dark by the throat, that man that was guilty of such a thing, as when that you did let him go to call his companions to bring the money, bring fellows to you single; I would be glad to know whether in this case they would not have knocked you on the head and killed you?"

Here is another amazing utterance by the great Lord Eldon himself at the trial of a certain O'Coigly for high treason: "Therefore any means which can be adopted consistently with the rules of justice, to know who these three persons are, I shall certainly think it my duty, again protesting against its being considered as any censure upon them, so far to concur with my learned friends in what they have been stating, as to relieve the prisoner from the necessity of challenging those persons by challenging them myself." I do see a glimmer of light in the second utterance, but none in the first.—*Ex.*

A carrier is held in *Lilly* v. *St. Louis & S. F. R. Co.* (Okla.) 39 L.R.A. (N.S.) 663, to be liable to a passenger who holds a through ticket over its road but who must make a change of trains to reach her destination, for the failure and refusal of its employees to inform such passenger, upon her repeated requests for information, of the place where such change is to be made, by reason of which failure the passenger is carried past her destination, and is required to take passage upon another railroad and to expend an additional sum for fare, and is caused to suffer a loss of time and certain inconveniences.

THE LIVING AGE. Boston, Mass., U.S.A.—The leading article of this interesting serial for November 1, on "Blundering Social Reform," reprinted from *The Nineteenth Century and After* has a lesson for American as well as British philanthropists, who are too apt to be carried away by various social fads without giving enough consideration to their practical aspects.

Sir Bampfylde Fuller is the author of "A Psychological View of the Irish Question," reprinted in *The Living Age* for November 8 from *The Nineteenth Century and After,* which views the Irish question from a new standpoint and more sympathetically than usual.