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THE REFERENDUM.

That so democratic a measure as the proposal to decide by a popular vote great constitutional questions should be seriously considered by any British politicians is sufficiently remarkable. That it should be put forward as an essential feature in his policy by the leader of the Conservative party shews how recent agitation has affected the very foundations of the British constitution.

The reason for resorting to such means for settling great national questions is no doubt due to the change which has taken place in the High Court of Parliament wherein all such matters are of right and wont to be considered and disposed of. So long as the nation was divided into two parties only, the one naturally averse to change, and the other constantly desiring it, and the leaders of each pursuing a well-defined policy, there was no difficulty in finding out to which side the majority inclined. But when, instead of the two parties, we have three or four of such numerical strength that it is in the power of any one of the number to control the course of events, though not itself having the support of a majority of the electors, the situation becomes very different. There is in such a case no means of knowing what the opinion of the electorate really is on a question so dealt with, and the action of Parliament might be in opposition to the wishes of those whom it represents. It is to find a means of meeting this difficulty, and having also in view the possibility of government by a single chamber, or with a second chamber deprived of the power to control the action of the first, that has caused the question of the referendum to become a practical issue in Imperial politics.

The passage of what is known as the Veto Bill would reduce the functions of the second chamber to those of a merely consul-

tative character, and practically bring about government by a single legislative body upon whose action no check would exist. Such a check could be found by means of the referendum, power being given to a minority upon any great constitutional question to demand an appeal to the electors at large.

Or supposing the result of proposed constitutional changes should be the establishment of a second chamber so constituted as to have, with some exceptions such as that of financial control, equal power with the first, there would always be the danger of a deadlock between the two Houses such as now exists, and the referendum might then be made use of for the settlement of the question. It would appear then that there are three contingencies in which the referendum might usefully be resorted to as the final court of appeal in constitutional difficulties, and it will be noted that each of these has recently arisen. These are new features in the political horizon, and to meet them there is now no provision existing. How far the proposed remedy would, if adopted, be effective remains to be seen.

In considering the application of the referendum to any political question it must be remembered that the members of the Imperial Parliament are not mere delegates sent to represent the views of some particular set of people, and to carry out their behests—they represent the nation at large, they are entrusted with the interests of the whole community, and it is their duty to act according to what they believe to be right regardless of the varying shifts and changes of public opinion. They are responsible for the government of the country; and would not, therefore, the reference of any question to a popular vote relieve them of that responsibility, and throw the whole parliamentary system into confusion? Again what certainty would there be that the popular vote would really represent the sober thought of the electorate?

The same popular clamour which turns the scale at a Parliamentary election might be as easily excited in the case of a referendum, only on a much larger field, and therefore more likely to defeat the object in view. In trying to secure an ob-

ject by a departure from usual and well-recognized methods there is always the danger of finding ourselves in dangers and difficulties greater than those from which we are trying to escape, and such might be result of grafting so democratic a branch upon the old trunk of British Parliamentary Government. In Australia, and in some of the States of the American Union, the referendum has been adopted for the settlement of disputed questions, but so far the trial has given no results that would be of any value, and the conditions are in many respects different from those which we have been considering. The system has been long an essential part of the Swiss constitution, but there again the conditions are altogether different, and the procedure is so complicated that it would never suit a body of British electors, and would make the British system of Parliamentary Government impossible. We therefore look in vain for any precedent to guide us in dealing with this new and interesting proposal, so entirely foreign to our present constitutional principles and practices.

EVIDENCE OF CONVERSATION BY TELEPHONE.

Whether the evidence of a bystander is admissible as to what was said at the telephone instrument, it being proved by the person speaking that he was holding a conversation with a party to the suit, was raised for the first time, we believe, in a Canadian Court in the case of *Warren* v. *Forst*, 22 O.L.R. 441, and the case affords an illustration of how the English law is moulded to suit new conditions of life as they arise. Of course no one can suppose that the common law could have expressly provided for evidence of conversations held at telephones, because until very recent years communications by telephone were unknown. But as modern inventions develop new methods of communication, the common law has to be developed to meet the new conditions. Our courts may soon have to consider how far the old maxim cujus solum ejus est usque ad cœlum will have to be

modified in view of the modern practice of using flying machines, and the courts may have to say some day whether an aviator has any right to interfere with the free use of a man's column of air usque ad cœlum. We may, however, dismiss that inquiry for the present, as we are now more particularly concerned with that modern convenient nuisance which we call the telephone. In the case in question the defendants tendered the evidence of a witness as to what had been said by one of the defendants at a telephone instrument in a conversation which the defendant proved was held by him with one of the plaintiffs. Sutherland, J., who tried the action rejected the evidence but the Divisional Court (Boyd, C., and Latchford and Middleton, JJ.) held that it should have been received quantum valeat and granted a new trial; the Divisional Court adopting the view taken by the American Courts which have held that such evidence is admissible; e.g., *Miles* v. *Andrews* (1894), 153 Ill. 262; *McCarthy* v. *Peach* (1904), 186 Mass. 67; *Planters Cotton Oil Co.* v. *Western Union Telegraph Co.* (1906), 6 L.R.A.N.S. 1180. As the learned Chancellor points out such evidence may be intrinsically entitled to but little weight, because the witness cannot testify who was the person with whom the conversation was actually held, nor that such person, whomsoever he was, actually heard what was said.

But these considerations go, in the opinion of the Divisional Court, merely to the question of the weight to be attributed to such evidence, and not to its admissibility. But it may not be improper to remark that this decision seems somewhat to invade the hitherto accepted principles regarding the admissibility of evidence. The evidence in question is clearly admissible only on the ground of its alleged corroborative character, and is only admissible so far as it actually is corroborative. Evidence that such and such statements were made by a defendant, can only derive any right to be admitted as evidence by reason of the fact that they were made to some particular person, and it is just at this point that the evidence of a bystander at a telephone as to what is said there wholly fails. The evidence therefore may appear to

corroborate though it does not actually do so. It may be asked how corroboration of an immaterial fact can properly be said to be admissible as evidence. The mere fact that a defendant spoke certain words is itself immaterial, and the fact only becomes material by their being proved to have been spoken to a particular individual, the corroboration in the case in question is not of the material fact that they were spoken to a particular individual, but simply of the immaterial fact that they were spoken.

The evidence in question is really not properly corroborative, but is calculated to give an illusive weight to the evidence of some other person; and it seems open to question whether the ends of justice might not have been better served if the decision had been the other way, especially when the opportunity it affords for manufacturing evidence is considered.

COUNTY COURT JURISDICTION—ONTARIO.

A point of some practical importance may arise and perhaps has arisen in connection with the County Courts Act of last session. It will be noticed that s. 22 [para. (*e*) and (*f*)] of that Act (10 Edw. VII. c. 30) provides that actions for recovery of property, real or personal, are limited in County Courts to cases where the value of the property does not exceed $500; and that in the case of actions for foreclosure or sale, or for the redemption of mortgages, such actions are limited to cases where the claim does not exceed $500. The apparent difficulty lies in this, that in the case of an action for foreclosure or sale where the sum claimed does not exceed $500, the plaintiff may proceed in the County Court, but if the value of the land happens to exceed that amount, the plaintiff would be precluded from joining in his action the customary claim for an order for immediate possession as it would transgress the provision relating to actions for recovery of land. The result would be that he would have to resort to the High Court for foreclosure or sale. This would be much more expensive, and would defeat the object of the enact-

ment. A remedy might possibly be the introduction of a special provision allowing the plaintiff in a foreclosure or sale action to include a claim for possession of the mortgaged property, notwithstanding the fact that the value thereof might exceed $500. As a matter of fact it will be found that in the great majority of cases of mortgages under $500 the value of the land which forms the security very much exceeds that figure.

AERIAL NAVIGATION AND THE LAW WHICH SHOULD GOVERN IT.

The airship, or flying machine—though we get no inkling there of the pattern which the experimenters chose—if the sublime narrative in "Paradise Lost" of the conflict between the celestial hosts and the troops of the fallen angel is to be relied on, must have been of pre-creation origin. And it should be interesting to mark what the sacred poet (his mouthpiece being the Angel Raphael) who tells our first parents in the garden the story of that stupendous warfare, when speaking of the Omnipotent's forces, writes: "For high above the ground their march was, and the passive air upbore their nimble tread." Continuing, he says: "High in the air, exalted as a god, the apostate in his sun-bright chariot sat." His account depicts how the needful engines for maintaining the strife were supported in the air, while, at the same time, dexterously guided through it by those charged with their management. Neither can it be out of place, in dwelling on the grand spectacles which the mind here passes in review, to recall the extravagant fancy Milton has evoked when he ascribes to Lucifer the invention of cannon, more particularly as this grim agent of destruction by its ponderousness would notably detract from the buoyancy required in aerial navigation.

That fellow-bard, Homer, in whom likewise the inner sight was accentuated by reason of the physical sense being lost, frequently, we know, presses into service, to expedite movement by his partizan gods and goddesses at the siege of Troy, vehicles suitably adapted, more or less, for cleaving the empyrean.

Since there has been so much vying between sky-cruisers, to secure and keep the record for a sustained flight, as well as extended occupancy of the air, the writer asks pardon of his readers for suggesting that rivalry having either object in view might appropriately cease, since none may hope to equal, much less excel, the triumph won by Aladdin's Palace—the largest courser of the heavens which imagination has pictured, as the equipage of Queen Mab ("her chariot was an empty hazel nut") is the smallest—the first sailing the arch immense from China to the farthest confines of Arabia and back, in a hardly appreciable moment of time, each way.

Before passing altogether from the realm of the fabulous, and taking up the drier line of reasoning which prompted this contribution, the diverting chronicle which the famed author of Rasselas hands down to us of the implement, his character (whom he calls the "artist"), designs, constructs, and finally commits heavenward, may, the writer conceives, be, with advantage, rescued from the dull recesses in which he fears that lively romance now lies unperused.

The episode is found in the chapter entitled, "A dissertation on the art of flying." Certain of the views propounded by the sanguine contriver are well worth presenting:—

"He that can swim need not despair to fly; to swim is to fly in a grosser fluid, and to fly is to swim in a subtler. We are only to proportion our power of resistance to the different density of matter through which we are to pass. You will necessarily be upborne by the air if you can renew any impulse upon it faster than the air can recede from the pressure. The labour of rising from the ground will be great, as we see it in the heavier domestic fowls, but as we mount higher, the earth's attraction and the body's gravity will be greatly diminished, till we shall arrive at a region where the man will float in the air without any tendency to fall." He theorizes again: "I have considered the structure of all volant animals, and find the folding continuity of the bat's wings to be most easily accommodated to the human form. Upon this model I shall begin my task to-morrow."

The subsequent trial and its outcome are briefly described: "In a year the wings were finished, and on a morning appointed, the maker appeared furnished for flight on a little promontory. He waved his pinions awhile to gather air, then leaped from his stand, and in an instant dropped into the lake. His wings, which were of no use in the air, sustained him in the water, and the prince drew him to land, half dead with terror and vexation." This failure seems, if more abject, less deplorable than was that of the unthinking Icarus, who neglected to allow for the heat of the sun on his waxen appendages.

There being such constantly recurring examples to be found of craft of the nature in question, both owned and controlled by subjects of a different country from that where the misadventure happens, getting into trouble with dwellers on terra firma, that the international aspect of the matter would appear to be of first-rate importance.

While "the heavens above, the earth beneath, and the waters under the earth" have been for all time assigned to man's use, and left to his superintendency, the jus gentium so far only deals with, and operates upon, the last two spheres of movement. And where the high seas is concerned, there are, of course, long-sanctioned definite rights and privileges of sovereignty enjoyed by one nation over others, with countervailing duties and obligations imposed by edict of the international college. But recognizing the doctrine of private ownership of everything on, below and above the surface (cujus est solum, ejus est usque ad coelum et ad inferos), to what extent, if any, does it become weakened in the case of the overhead empire? A proprietor of land may, so long as it has been securely enclosed, and there has been no invitation by him to come upon the premises, bring appliances there liable to cause injury to those who negligently expose themselves to danger therefrom, without being responsible for any damage referable to contact with any such. So with the keeping of ferocious animals, if one recklessly disturb them, so attracting injury to himself. Suppose, however, the owner of some mechanical device for air-transportation, while operating

it, should pass immediately over his own property, and a collision with an emulous flyer through space occur, with ill consequences to both, or the former only, could he, in the latter event, claim redress from the other? Might not his brother-pilot be able to shew the juster title to compensation? Would the individual poised in a balloon or aeroplane over the messuage of a neighbour, be a trespasser, pure and simple, accepting the risk of being answerable in damages to any and every one whom he should harm? And would he be disentitled as well to recover from all and sundry who might do him injury? The matter of a descent by a supernal Jehu on another's land, from which damage follows, offer apparently no great difficulty. One of these was the subject, as far back as 1822, of judicial inquiry and determination in the forums of New York State—*Guille* v. *Swan*—which is reported in 10 Johns. 381. There plaintiff was awarded damages resulting from the act of a manipulator of a balloon, who, finding that his descent was going to be precarious, invited help from a crowd of people. These, rushing hurriedly to his assistance, trampled down, in their well-meant efforts, a crop of vegetables in plaintiff's garden. It may be observed, by the way, that the court lays down the proposition that ascending in a balloon is not per se unlawful.

Perhaps one's right to use the superambient air is in the nature of an incorporeal hereditament, though, on the other hand, the public may demand to exercise it as a franchise not unlike that of common warren. Is the maxim now being discussed, however, true, absolutely and unequivocally?

Lord Ellenborough appeared to think not, when, in *Pickering* v. *Rudd*, 4 Camp. 219, he controverts the proposition that a landowner would have the right exclusively to the air above his enclosure. The principal has been commented on recently by Kay, L.J., in *Lemmon* v. *Webb*, 3 Chy., who says, at page 20, "but Lord Ellenborough doubts whether the passage of a balloon over land would be a trespass; while Blackburn, J., questions the authority of that decision in *Kenyon* v. *Hart*, 6 B. & S. 249. Maude, J., intimates a like doubt in *Fay* v. *Prentice*,

1 C.B., at p. 840, where he says, "the maxim" (quoting it) "is not a presumption of law applicable in all cases, and under all circumstances; for example, it does not apply to chambers in the inns of court." Coltman, J., observes that for a cornice which overhangs another's property to constitute a trespass is opposed to the opinion of Lord Ellenborough. "Clearly it would be a trespass to sail over another man's land in a balloon at a level within the height of ordinary buildings, and it might be a nuisance to keep a balloon hovering over the land at a greater height:" Pollock on Contracts.

Were the standards fixed by international law in the provinces, which, at present, they regulate to affect, in the future, this department of activity, may we not hear of a dirigible, of foreign make and ownership, intending a flight in some alien state, being, as was the British vessel lying at its moorings in Rotterdam, regarded as part of the country where it lingered? Or, in that contingency, importing the rule that the authority of municipal courts does not embrace points in the sea, there may be a recrudescence of the problem which, in the famous *Coombes* case, a century and a half ago, taxed to the full the acumen of the whole body of justices of the King's Bench to solve, whether the killing of a man on a ship a hundred yards away, by one who fired upon him from the shore, occurred within the Admiralty, or the ordinary land, jurisdiction.

The pathway of international law, in any event, should it ever lie through such wide-ranging, unproved field—without landmarks to assist, and where anything like precise demarcation of frontiers must be impracticable—will unquestionably be a thorny one.

J. B. MACKENZIE.

HARMLESS ERROR.

Whilst a discussion of this subject is of more importance in the United States than in Canada, there are some points in the article we copy from the *Central Law Journal* which are not without interest in this country. The writer thus deals with it:—

There is no dispute in this country about the doctrine that error in a trial, which works no prejudice to one complaining thereof, cannot be invoked as a basis for re-examination of a result. In perhaps every state and federal court of this country, this doctrine, in one form or another, and with much iteration in each, has been announced. Such error comes under the maxim de mimimis non curat lex.

Possibly, also, there is little, if any, dispute concerning the standpoint from which the existence or non-existence of prejudice is to be viewed, and that standpoint is, that in a trial a party must have conceded to him the right to conduct his action or defence in whatsoever way the law allows, and any error which prevents such conduct is prejudicial, unless independently of its commission, it plainly appears that he either has no right of action or no ground of defence, as the case may be. This rebuttal of prejudice is also shewn in such decisions as declare that a judgment for defendant should not be disturbed, where plaintiff is not entitled to recover in any event, or that the decision is correct on the merits, or that a defence is generally baseless and insufficient, of which see cases passim.

The trouble arises more in the attitudes of courts when they come to consider whether error has affected, sufficiently to demand a retrial, the right of a party to conduct his action or defence, and whether it has been shewn, despite such error, that he had no substantial right of action or defence, as the case may be.

Cases in which proof shews no action or defence.—Taking the matter up in something of an inverse order, as last above stated, we will endeavour to ascertain whether the rebuttal of prejudice need go to the extent of shewing, that it ought to

appear that the trial court should have instructed for defendant as to plaintiff's action or for plaintiff as to defendant's defence, or pro tanto considering the error complained of. Refusal of a new trial, because prejudice from error is overcome, does not take into account, or at least need not take into account, any views about presumption of prejudice from error and whether the burden is on appellant to shew prejudice. It cuts from under all claim of prejudice the possibility of harm by saying there is nothing for prejudice to affect.

The cases, therefore, which hold that the losing party should not have had any contention by way of action or defence decided in his favour need not be adverted to, for, according to Alabama practice there should have been an affirmative charge in favour of the party not complaining, applying such rule to an entire action or defence as to what the error, *e.g.*, a claim of set-off, affects. And so those cases or the particular issues therein as to which a favourable verdict in favour of a complaining party would not be allowed to stand. Much authority could be cited to these propositions, but merely a few illustrative cases are referred to.

Cases in which verdict for either party would be sustained.—It may, in view of what has gone before, be said, that it is only where a losing party could claim that a verdict in his favour would stand, that any error against him in the course of a trial may be complained of at all. Not even, then, may he successfully complain, unless the error interfered with a full and fair consideration of his action or defence and that interference was not nullified or negatived in the course of the trial. It is in these cases only in which error may be properly said to be harmless or prejudicial. In all others there being nothing upon which prejudice can operate, its presence or absence is a mere figment of the mind.

Presumption of prejudice from error.—There are cases which announce as a principle of law, that error is presumed to be prejudicial to the interests of him against whom it is committed. As strong an expression of that principle as we have

seen given is by the federal Supreme Court, which said: "While an appellate court will not disturb a judgment for an immaterial error, yet it should appear beyond a doubt, that the error complained of did not and could not have prejudiced the rights of the party duly objecting." A California court has said in effect, error would not be deemed harmless unless it appears that no harm could have been or was done thereby and it does not suffice to shew that probably no harm was done.

It has also been stated, that the admission of illegal evidence requires a reversal, if it cannot be said what effect it may have had on the minds of the jury. So as to the exclusion of competent evidence there is presumption of prejudice unless it clearly appears it was not of importance to the party offering it, where the exclusion was erroneous.

On the other hand expression of the rule has been stated with much more mildness. Where the error referred to procedure, such as giving the wrong party the right to open and close, prejudice will not be presumed, but must be shewn, but as against this the Supreme Court of Missouri appears opposed, in holding that the wrongful over-ruling of a challenge for cause will be deemed prejudicial, whether or not the challenger has exhausted his challenges. And it has been said as to immaterial and irrelevant evidence, that on its face it must appear to be calculated to have an improper influence.

In regard to instructions erroneously given or refused, we find similar opposition in expression about presumption of prejudice. In Arkansas it is stated, with regard to refusing a proper requested instruction and the giving of an erroneous instruction, that prejudice is presumed. Also, the federal courts say it must be said that there is prejudicial error, though there be two theories, upon either of which the verdict could stand, if there was an erroneous instruction regarding one of them, if there was no way of telling which theory the jury adopted. The same result ensues from conflicting instructions, as it cannot be said which the jury followed. And even misleading instruction presumes prejudice, it only being necessary to see that it could, not did, mislead.

Some courts adopt a less stringent application of the rule or confine it more according to the nature of the case in which prejudice is claimed from error. Thus it has been held that where there was an "unusually fair trial" free from passion or prejudice and substantial justice appears to have been done, the errors must be very grave and material for the findings to be set aside. In Wisconsin it was held that improper evidence should not cause reversal, unless it clearly appears that but for its admission the finding would have been different.

Error harmless pro tanto and prejudicial specially.—The particular evil in American administration of law, generally speaking, is that, while our facilities in the way of presenting, verbatim et literatim, a complete record of a trial in a court appealed from, yet errors wherein they are certainly harmless are taken to be generally prejudicial and overturning everything that has been done in the trial court. This is exemplified in ruling generally that a new trial should be awarded where there is error and injury—thus not confining the injury to its scope. Thus take the case where the cross-examination of a particular witness is denied or unduly restricted. This case argues on broad lines about the right to free and full cross-examination, which being denied is presumed to work injury, and though in the case the cross-examination may have been concerning that which went to the root of the whole case, a wide statement of this kind is misleading in tendency. In a Nebraska case the evidence held incompetent and prejudicial related merely to the question of damages and yet the case was remanded generally for a new trial. In a Missouri case we find the scope of the prejudice caused by certain incompetent evidence stated, *i.e.*, its effect on the amount of recovery, and yet the cause was reversed and remanded for a new trial generally.

But it is unnecessary to go into extensive citation of cases on this question, for every case, in which a reversal and remand is directed, unless a plaintiff will consent to an affirmance with a reduction of damages, goes upon this theory. In North Carolina, we find the partial new trial theory the rule, and occasionally resorted to in other states.

What is meant by prejudice is presumed and the converse.—Prejudice must be shewn.—There is nothing more firmly seated, than that a juror is not allowed to impeach his own verdict. Affidavits may be submitted for the purpose of bringing to the attention of the court matters of which it would otherwise have no knowledge and from which inference of prejudice may be drawn. These are that a juror was disqualified propter affectum; or that he had expressed an opinion; or that some irregularity had occurred in the impanelling, or custody of or consideration by the jury. But what took place in facie curiae or constituted a part of the record is not to be thus shewn. But all of these things are to be judged of as to their tendency and not as any trior of the facts may say what was their effect.

Therefore, it may be thought that there is really no presumption one way or the other. The great majority of American courts say, if an error might or could have worked material harm, it should cause reversal. If it is clear that it did not, it is harmless. And these conclusions are to be drawn from a reading—a scrutiny—of the record. And so with these merely viewing prejudice more leniently.

It may be true, that here is a wide open door and that no very definite prediction may always be indulged as to the outcome of a case, when reversal is claimed and resisted for error alleged to be prejudicial. The way in which a case has been tried may eliminate the error. As for example, where there is a trial on the merits under a plea of general issue, and a general judgment for defendant on that plea, that demurrers to special pleas were erroneously overruled will be deemed harmless. If the final result arising out of special findings of fact may shew that the tendency of prejudice in a particular direction is negatived, it will not be considered.

The growth of decisions on the line of harmless and prejudicial error.—The absolute fullness of records, their complete reproduction in appellate tribunals as to everything except visual observation of witnesses and the hearing of their voices places appellate tribunals in a vastly different situation now from where

they were fifty years ago. A transcript of the evidence is greatly different than depending on the "notes" of the trial judge, or a narrative statement of what was testified to, however diligently it was attempted to keep track of everything that was said and done. The minutiae now produced in a record enable opinions to quote the very words of witnesses, when the older cases had to content themselves with the substance of what they were understood to say. If one, however, will indulge himself with a fairly critical glance at "harmless error" in the Century Digest covering more than a hundred years of American decision in comparison with what he will find on the same subject in the Decennial Edition of the American Digest, he will discover that the ten year grist of cases on this line exceeds all that has gone before. In passing, we might also say, that, in general bulk, the number of cases under the title, "Appeal and Error" for the ten years falls little below that of the entire period of hundred years that went before.

If our legislation has produced this wonderful accumulation it is sadly at fault. If our facilities in the production of perfect records have done so, it would seem that we might have been better off without them.

These perfect records seem especially to have put judicial investigation on the line of search for error and to have coined phrases which are like stereotypes in decision. "We find no reversible error and the case is affirmed;" "the verdict is for the right party;" "the case was fairly tried and the verdict is supported by the evidence," all these and others seem to invite other litigants to try their fortunes before appellate tribunals should ill luck attend them in lower courts, for they are impression, and not principle, decisions.

And yet as often as these courts seem averse to allow conclusiveness to rest where the least error occurs, still in almost the same breath, with dogmatic positiveness, they will say, where there was no error in a trial that a recovery is too large. In other words they are ready to state the precise effect of competent evidence, but refuse to declare the precise influence of that which is incompetent.

Possibly they are right under the latter position, because of the constitutional jealousy in respect to jury trials, but why this jealousy should not operate as forcefully in behalf of a respondent in an appeal as an appellant is something of a refinement my mind has not been able fully to grasp. But even, if there be substantial basis for the distinction, I would still be at a loss to understand why, if the jury's judgment is only at fault as to damages, it should be nullified in its entirety, and what would seem like a vested right accruing to plaintiff practically confiscated for no fault of himself or his attorney.

The reach of statutes in decreasing remands for error.—I have just suggested that constitutional jealousy in regard to the inviolability of jury trial governs American courts in their consideration of the question whether error is harmless or prejudicial. This is the theory, but I do not believe it can be claimed, that the history of any appellate court in this country shews entire consistency in its application. But there is another principle quite universally recognized even in jurisdictions where there is constitutional guarantee of jury trial—and this means a fair jury trial. This principle is that only in such cases from the decision of which a constitution specifically provides for an appeal is an appeal other than of statutory creation. This implies, as has often been held, that the statute may impose whatsoever conditions to its taking a legislature sees fit to impose.

Therefore, it seems to me that the statute may authorize an appellate court to adjudicate as against appellant as fully as the nisi prius court could, but it cannot impair an iota, in jury trial cases, the rights of appellee except for prejudicial error. But prejudicial error may be severely limited in his favour.

Let me illustrate by the bill proposed by the American Bar Association to Congress: "To regulate the judicial procedure of the courts of the United States." It proposes to eliminate from consideration in an appellate court all error except that which "has resulted in a miscarriage of justice." I do not much relish the quoted language, but take it to intend to say, that but

for the error a verdict might or even probably would have been for the other party, yet it should stand in an appellate court, if there is evidence to support it. If it does not mean this, it advances little from where we now stand. It is, however, a miscarriage of justice, in one sense, to turn a finding from what it would have been but for error, whether there is support for the other event or not or even if the latter should happen to be the correct event.

Nevertheless the legislature has the right to say this much, because it is no more than saying to an appellant that he has had his day in court and it is a matter of grace to hear him further.

Instead of such a provision, I would say that the proposed bill should provide, that on an appeal the respondent's right to a jury trial on questions of fact should never be impaired without his consent, and, if error which militated against appellant's right to a fair jury trial is found in the record, the court should nevertheless not remand without respondent being first allowed to demand that the appellate court render the verdict it thinks the jury should have rendered.

To make a provision of this kind operative in every case, it should be made obligatory on appellant to furnish a record as complete as in the court below or the judgment should be affirmed, unless respondent stipulates that what is before the court is sufficient for a disposition of the case.

In addition to this, remands could be lessened by requiring appellate courts to disregard as prejudicial all merely technical error and all errors in procedure, which do not palpably interfere with the function of the jury in its consideration of facts. In other words, to the principle that there is presumption of prejudice from error, I would add that it extends only to that which could or might be an invasion of the province of the jury in its findings of fact. As to other error, every presumption should be the other way.

I can conceive that respondents in whose favour there was error below might sometimes prefer remands to having the appellate tribunal decide a cause, but if they do, at least, neither

party could complain, for this is what the appellant asks for and what his adversary grants. Nevertheless, the speculative feature in appeals would be largely eliminated, for if an appellant has really no meritorious action or defence he will believe respondent will in the Court of Appeal terminate the litigation, possibly with larger judgment in his favour than that appealed from, in the meantime securing its payment. I think the particularly desirable thing about appellate courts is to have them end, instead of prolong, litigation.

N. C. COLLIER.

St. Louis, Mo.

A HUMAN DOCUMENT.—It will be remembered that H. Rider Haggard in one of his stories, has the will of a shipwrecked man of wealth tattooed upon the shoulders of a companion, and represents the unique testament as having been admitted to probate in the chancery court in England. This flight of the imagination has since been justified by the action of a miser, named Monecke, who died in Mexico. His relations were unwilling that his body should be buried, as he had tattooed his will over his chest with some red pigment, instead of using pen and ink. The court directed that this remarkable "human document" should be transcribed and the copy duly attested in the presence of witnesses. This was done, and the court gave effect to its provisions.—*Exch.*

A GENEROUS TESTATOR.—Lord Pembroke gave "nothing to Lord Say, which legacy I gave him, because I know he will bestow it on the poor;" and then, after giving other equally peculiar legacies, he finished with, "Item, I give up the ghost."—*Exch.*

REVIEW OF CURRENT ENGLISH CASES.

POWER OF APPOINTMENT—GENERAL POWER—EXERCISE OF POWER BY WILL — APPOINTMENT OF EXECUTORS AND BEQUEST OF PECUNIARY LEGACIES—ESTATE OF TESTATRIX INSUFFICIENT TO PAY DEBTS AND LEGACIES—WILLS ACT, 1837 (1 VICT. C. 26), S. 27)—(10 EDW. VII. C. 57, S. 30 (O.)).

In re Seabrook Gray v. *Baddeley* (1911) 1 Ch. 151. In this case a testatrix having a general power of appointment made a will containing no residuary bequest of personal estate, whereby she made certain specific devises of her real estate and directed the remainder of her lands should be sold and the proceeds divided between her nephews who were to pay to each of the testatrix's three nieces £500; she made certain specific bequests and appointed executors. Her estate proved insufficient to pay her debts and legacies, and the question was whether the will amounted under the Wills Act, 1837, s. 27 (10 Edw. VII. c. 557, s. 30, Ont.) to an execution of the power, and, if so, to what extent. Warrington, J., held that the will operated as an execution of the power, by virtue of the Wills Act to the extent that might be necessary in conjunction with the testatrix's own property to pay the debts and legacies of the deceased testatrix.

RECEIVER — PARTNERSHIP ACTION — CONSENT ORDER APPOINTING RECEIVER AND MANAGER—PAYMENTS BY RECEIVER—INSUFFICIENCY OF ASSETS — INDEMNITY OF RECEIVER — LIABILITY OF LITIGANTS PERSONALLY TO INDEMNIFY RECEIVER.

Boehm v. *Goodall* (1911) 1 Ch. 155. This was an action to wind up a partnership, and by consent of parties a receiver and manager of the partnership estate had been appointed. The receiver had paid out moneys in carrying on the business of the partnership as a going concern which the assets of the concern were now insufficient to pay: and the receiver applied to the Court to compel the partners to indemnify him in respect of the balance due, but Warrington, J., refused the application, holding that the receiver was an officer of the court and could only look to the assets for his indemnity and the fact that he had been appointed by consent, did not put him in any better position: see, however, *Matthews* v. *Ruggles-Brise*, infra.

COMPANY — MEMORANDUM OF ASSOCIATION — ASSENT OF PREFERENCE SHAREHOLDERS TO NEW ISSUE OF PREFERENCE SHARES— PREFERENCE SHARES ALL HELD BY ONE PERSON—"MEETING."

In *East* v. *Bennett* (1911) 1 Ch. 163, the validity of an issue of preference shares by a limited company was in question. By its memorandum of association the capital was divided into preference and ordinary shares, and the company was empowered to increase its capital, but it was provided that no new shares should be issued so as to rank equally with, or in priority to, the preference shares, unless such issue was sanctioned by resolution of the holders of preference shares present at a separate meeting specially summoned for the purpose. The articles contained a similar provision. Shortly after its incorporation a special resolution was passed authorizing an increase of capital. At that time one Bennett who was the holder of all of the original preference shares presided at the meeting and assented to the issue of new preference shares, and his assent was duly recorded in the minute book, and in pursuance of the resolution new preference shares were issued. Warrington, J., held that there was nothing in the constitution of the company to prevent all the preference shares being held by one person and that the word meeting was not to be construed strictly but must be held to apply to the case of a single shareholder, and in the circumstances he was of the opinion that there had been a sufficient compliance with the memorandum and articles and that the new issue of preference shares was valid.

TENANT FOR LIFE AND REMAINDERMAN—SETTLED MORTGAGES — ARREARS OF INTEREST—RENTS AND PROFITS—APPLICATION OF RENTS AND PROFITS—APPORTIONMENT OF RENTS AS BETWEEN CAPITAL AND INCOME.

In re Cooks, Cooks v. *Bayley* (1911) 1 Ch. 171. This was a contest between a tenant for life and a remainderman as to the apportionment of the rents and profits of mortgaged property the subject of a settlement by will. Prior to his death the testator had entered into receipt of the rents and profits of the mortgaged property and the trustees of his will continued in such receipt. The securities being deficient the question arose as between the tenant for life and the remainderman as to the proper apportionment of the rents. Warrington, J., determined that the trustees must apply each instalment of rent received since the testator's death from each mortgaged property, in satisfaction of

arrears of interest which, at the testator's death, were due in respect of the mortgage, and then distribute the balance as income up to, but not exceeding, the interest accrued since the testator's death on the mortgage, and any excess was to be treated as capital.

FIDUCIARY RELATION — GIFT — NATURAL AFFECTION — DUAL RELATION EXISTING BETWEEN DONOR AND DONEE—INDEPENDENT ADVICE.

In re Coomber, Coomber v. *Coomber* (1911) 1 Ch. 174. This was a family quarrel in which the validity of a gift from a mother to her son was impeached. Under the father's will all his property devolved on the mother, part of it being a long lease of a tavern. A son Harry had assisted his father in carrying on the business of the tavern and after his death he continued to do so for his mother. In September, 1905, she executed an assignment of the lease to him for his own use and the next day the license was transferred to him. No consideration was expressed in the deed, but Harry agreed to let his mother have £3 per week out of the business, and this sum was regularly paid to her in addition to the £3 per week derived from other property during her life. The judge who tried the action also found as a fact that the mother made the assignment in the belief that she was thereby carrying out her deceased husband's intention. The assignment was prepared by a solicitor who had acted for the mother in the affairs of her deceased husband's estate. He saw her alone and explained the transaction and she understood what she was doing. She died in July, 1906. One of the other children brought the action claiming a declaration that Harry was a trustee of the property so assigned to him. Neville, J., held that the gift being made by the mother to her son who, while carrying on the business as her agent, was in a fiduciary relationship to her, the burden of proof was on him to rebut the presumption that the gift was induced by that relation, and he thought he had failed to discharge that burden by shewing that his mother was independently advised; but he thought he had done so by shewing that the gift was not due to any relationship which the carrying on of the business as her agent had established but that it was wholly independent thereof and induced by natural affection and because she believed she was thereby effectuating her late husband's wishes. The action was therefore dismissed.

CONFLICT OF LAWS—MORTMAIN—TESTATOR DOMICILED IN ENGLAND —BEQUEST OF FREEHOLD MORTGAGES IN ONTARIO FOR CHARITY —COLONIAL LAW—9 GEO. II. C. 36.

In re Hoyles Row v. *Jagg* (1911) 1 Ch. 179. This was an appeal from the decision of Eady, J. (1910) 2 Ch. 333, (noted ante vol. 46, p. 657). It may be remembered that the case turns on the validity of a bequest by a domiciled Englishman of freehold mortgages of land in Ontario for a charity. Eady, J., held the bequest void, as being a gift of impure personalty and therefore within the Statute of Mortmain 9 Geo. II. c. 36, which at the time the will took effect was in force in Ontario, the gift, as he held, being governed by the law of the situs of the land. This decision the Court of Appeal (Cozens-Hardy, M.R., Moulton, and Farwell, L.JJ.) have affirmed, Moulton, L.J., dubitante. Farwell, L.J., thought that it was immaterial whether English or Ontario law applied, because at the time the will took effect the law was identical in both countries; but for the purposes of international law he was clearly of the opinion that mortgages of land, notwithstanding they are regarded as personal estate, do nevertheless come under the category of immovables.

TRUSTEE—INDEMNITY—CHANGE OF CESTUI QUE TRUST—NOVATION.

Matthews v. *Ruggles-Brise* (1911) 1 Ch. 194. In this action a trustee claimed to be indemnified by his cestui que trust in the following circumstances. In 1879 two partners of a firm took an onerous lease as trustees for the benefit of the partnership. In 1886 the partnership transferred all its assets to a limited company, and the company agreed to indemnify the firm against its liabilities; whereby the company became entitled to the benefit of the lease. One of the trustees died in 1886; and in 1887 the surviving trustee assigned the lease to the company taking a covenant of indemnity from the company. In 1881 the surviving trustee died, and in 1909 his personal representatives were sued on the covenants in the lease and were compelled to pay £5,874 for rent and breach of covenants in the lease and a proportionate part of this sum they claimed now to recover from the original partners. It was contended that the trustees by accepting the company in lieu of the firm as their cestui que trust had discharged the firm and that by their assignment of the lease to the company without taking anything but a covenant of indemnity they had parted with the trust property and the right to indemnity thereout, and had thereby discharged the partners.

Eady, J., however, held that the transfer of the lease to the company was part of the arrangement made by the firm with the company and that nothing which had been done had had the effect of releasing the original partners from their liability to indemnify their trustees against loss.

LANDLORD AND TENANT—LIGHT—QUIET ENJOYMENT—DEROGATION FROM GRANT—INTERFERENCE WITH PRIVACY OF TENANT.

Browne v. *Flower* (1911) 1 Chy. 219. This was an action by a tenant of a flat to restrain an alleged interference with the plaintiff's enjoyment of the demised premises. The facts were that the plaintiff and the defendant Lightbody were each tenants of flats in the same building, Mrs. Lightbody's flat was above that of the plaintiff, and she was under covenant to her landlord not to do anything on the demised premises which would be a nuisance to the tenants of the adjoining or neighbouring premises. Mrs. Lightbody falsely stating that the plaintiff had no objection, applied to the defendant Fowler for a mortgage of the premises and obtained from her leave to erect a stairway on the outside of the building from the ground to her premises, as a means of access thereto. This stairway when erected passed in front of two bedroom windows of the plaintiff's' premises; so that persons using the stairway could see into these rooms. This the plaintiff claimed was an invasion of her rights of privacy and quiet enjoyment, and she claimed a mandatory injunction for the removal of the stairway, or damages. Parker, J., who tried the action, held that what had been done by Mrs. Lightbody was not done on the premises demised to her and therefore was not a breach of her covenant, and neither did it amount to a breach of the covenant by the lessor for quiet enjoyment by the plaintiff of her premises. He therefore dismissed the action but as Mrs. Lightbody had obtained the leave to erect the staircase through a misrepresentation, he refused to give her her costs as against the plaintiff.

SALE OF GOODS—CONTRACT NOT TO BE PERFORMED WITHIN A YEAR—WRITING SIGNED BY PARTY TO BE CHARGED—STATUTE OF FRAUDS (29 CAR. II. 3. 3) S. 4—(R.S.O. C. 338, SS. 5, 12).

In *Prested Miners Co.* v. *Gardner* (1911) 1 K.B. 425 the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) have affirmed the decision of Walton, J., (1910) 2 K.B. 776 noted ante p. 18, to the effect that a contract for the sale of goods which is not to be performed within a year must be in writing and signed by the party to be charged.

INSURANCE—THEFT—EXCEPTION OF THEFT BY MEMBER OF INSURED'S STAFF—PRINCIPAL—ACCESSORY BEFORE THE FACT.

Saqui v. *Stearns* (1911) 1 K.B. 426 was an action on a policy of insurance against loss by theft. The policy contained an exception of theft committed by any member of the insured's business staff. The loss in question was occasioned by the porter of the insured acting in collusion with a member of a gang of thieves, he having admitted the leader into the premises and the theft having been committed in the porter's absence. Walton, J., who tried the action held that this was within the exception because the porter was as an accessory guilty of the theft, but the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ.) though agreeing in the result, held that the porter was not merely an accessory but a principal. The action, therefore, failed.

COMPANY—ACTION TO RESCIND CONTRACT TO TAKE SHARES—FORFEITURE OF SHARES PENDENTE LITE FOR NON-PAYMENT OF CALLS—INJUNCTION.

Jones v. *Pacaya Rubber Co.* (1911) 1 K.B. 455 was an action to rescind a contract for shares in the defendant company. Pending the action the defendants gave notice of their intention to forfeit the shares for non-payment of calls. The plaintiff then applied for an injunction to restrain the defendants from forfeiting the shares during the pendency of the suit. Lush, J., refused the application, but the Court of Appeal (Buckley and Kennedy, L.JJ.) granted the injunction on the terms of the unpaid calls being paid into Court to abide the result of the action. As Buckley, L.J., points out if the plaintiff should succeed in the action he would be entitled to an order for repayment of what he had paid on the shares which it is true he would have to return, but on which he would have a lien for the amount which he had paid, and it was, therefore, essential to him that the shares should remain in existence until the termination of the litigation.

PRINCIPAL AND AGENT—LIABILITY OF UNDISCLOSED PRINCIPAL—MANAGER OF HOTEL—LICENSE IN NAME OF MANAGER—UNAUTHORIZED PURCHASE BY MANAGER.

In *Kinahan* v. *Parry* (1911) 1 K.B. 459 the Court of Appeal (Williams, Buckley, and Kennedy, L.JJ.) have reversed the decision of the Divisional Court (1910) 2 K.B. 389 (noted ante, vol. 46, p. 615) not on the law, but on the facts. The question was

whether the defendants, the owners of a hotel, were liable for goods sold by the plaintiffs to the manager of the hotel in whose name the license stood, the manager having no authority from the defendants to buy from the plaintiffs. The case went off in the court below on the ground that the manager was in fact the agent of the defendants, who were liable as undisclosed principals; whereas the Court of Appeal find there was no evidence of that being the case.

MASTER AND SERVANT—LIABILITY OF SERVANTS INTER SE—COMMON EMPLOYMENT.

Lees v. *Dunkerley* (1911) A.C. 5. In this case an attempt was made to extend the defence of common employment to actions between fellow-servants. The appellants were employed by the respondents to superintend dangerous machinery in their factory. Through the negligence of the appellants in starting the machinery and their breach of the regulations made under the Factory Act, a boy in the respondents' employ was injured to whom the respondents had made compensation under the Workmen's Compensation Act, 1906. The Act provides expressly that the injured person may take proceedings against any person legally liable in damages as well as against the employer and that on the employer making compensation he shall be entitled to be indemnified by the person so liable in damages. The respondents had brought this action against the appellants and had recovered judgment. The appellants contended that common employment would be a defence to an action by the injured lad against them, and therefore they were not legally liable in damages. The House of Lords (Lord Loreburn, L.C., and Lord Halsbury, Atkinson and Shaw) without calling on counsel for the respondents, dismissed the appeal, the only authority for the appellant's contention being an obiter dictum supposed to have been uttered by Pollock, C.B., from which their Lordships dissented, "if he ever expressed that opinion." As Lord Loreburn points out, if common employment was a defence to an action between fellow workmen for negligence that would be tantamount to saying that every workman had a free hand to neglect his duty towards his fellow-workmen.

NEGLIGENCE—SAVAGE ANIMAL—LIABILITY OF OWNER.

In *Lowery* v. *Walker* (1911) A.C. 10 the House of Lords (Lord Loreburn, L.C., and Lords Halsbury, Atkinson and Shaw)

have unanimously reversed the decision of the Court of Appeal (1910) 1 K.B. 173, and Divisional Court (1909) 2 K.B. 433 (noted ante, vol. 45, p. 465, and vol. 46, p. 171). It may be remembered that the Court of Appeal held that a person having a savage horse in his field through which people were accustomed to pass without permission, was not liable for injury done by the horse to a trespasser. Their Lordships came to the conclusion that the plaintiff had passed through the field, not of right, but as one of the public who habitually used the field, and that the defendant knowing of such user did not prevent it; and that in such circumstances he was guilty of a wrongful act in keeping a savage horse in a field so used to his knowledge, without giving any warning to the plaintiff or the public of the dangerous character of the animal. The original judgment of the County Court judge was therefore restored. We notice the appeal was in formâ pauperis.

ADMIRALTY—COLLISION—BOTH SHIPS TO BLAME—LIMITATION OF LIABILITY—ADMIRALTY RULE AS TO DAMAGES.

Owners of Cargo of SS. Tongariro v. *Owners of SS. Drumlanrig* (1911) A.C. 16. This is an appeal from the judgment of the Admiralty Court in *The Drumlanrig* (1910) P. 249 (noted ante, vol. 46, p. 654). The action was by cargo owners of one ship against the owners of another ship with which it had been in collision, both vessels being to blame; and the court decided that the admiralty rule as to damages applied and that the plaintiffs could only recover against the defendant shipowners one-half the damage sustained. This decision the House of Lords (Lord Loreburn, L.C., and Lords Halsbury, Atkinson and Shaw) have now affirmed. It may be noted that Lord Loreburn refers to the doctrine of *Thoroughgood* v. *Bryan*, 8 C.B. 115, as laying down "a supposed rule" of the common law for which there was nothing to say either in principle or good sense, and that it was exploded by the House in *The Berrina*, 13 App. Cas. 1.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.] REX *v.* LUTTRELL. [Feb. 14.

Criminal law—Betting—Selling newspapers containing racing information — Conviction —Evidence—Stated case—Police magistrate—Pro forma finding.

Case stated by a police magistrate. The defendant was convicted on Nov. 4, 1910, for selling newspapers containing information that could be made use of by book-makers and others in making bets at the races held in Toronto. The conviction was under s. 235 (*f*) of the Criminal Code, as amended by 9 & 10 Edw. VII. c. 10, s. 3. The question stated was, whether the sale of papers containing records of the races two days after they were run, was with the intent to assist in betting, and whether the onus was on the Crown to prove that intent.

MEREDITH, J.A.:—The learned police magistrate seems to have been under a misapprehension of the nature of the offence with which the accused was intended to be charged: Criminal Code, s. 235 (*f*), as enacted by 9 & 10 Edw. VII. c. 10, s. 3. His statement is, that the charge against the accused was that of "having sold newspapers containing information that could be made use of by book-makers and others in making bets:" but there is, obviously, no criminal offence comprised in the statement; it would be extraordinary if there were. Under the Act, the offence, as applicable to such a case as this, is, selling "information intended to assist in, or intended for use in connection with, book-making," etc.

There was no evidence of any such intention on the part of the accused, in selling the papers in question; he was merely a newsboy, selling the newspapers in question, among many others, at a "news-stand." The purchaser had no intention of using them in any such manner, but bought solely for the purpose of laying an information against the boy. There was no evidence of any such intention, on the part of the printer or publisher of

any of the papers. All that was contained in the papers was news such as is commonly published in all newspapers; matters of public interest. Even the betting upon the races was not mentioned. To say that because, in some indirect way, some use might be made, or attempted to be made, of the news, for the purpose of betting, it ought to be found that that was the purpose of the publication or sale, is obviously absurd. If all things out of which evil can be evolved were prohibited, there would be little left; education would be prohibited, because it might be made use of for an evil purpose.

The gist of the offence is the intention; and the intention "to assist" or "for use" must be that of the accused; if the printer or publisher had such an intention, he is not absolved because the boy who sold had not; or is the seller absolved by the publisher's innocence, if he himself has the criminal intention in selling; each is answerable for his own sin of intention only.

If the detective had asked the boy for papers to assist him, or for use, in book-making or betting, etc., and the boy had then sold the papers, a case would have been made; but, as the case now stands, the boy may have been absolutely innocent of an offending; and there is no reasonable evidence that he was not.

When the evidence is quite as consistent with innocence as with guilt, there can be no proper conviction.

There was no reasonable evidence of the criminal intention, which the enactment is aimed against, in either publisher or seller; the conviction was wrong; the accused should be discharged.

In another respect the learned police magistrate erred; it is not within his power to make a pro forma finding, with a view to stating a case; he must perform his duty, just as a jury must, by a real finding upon all question necessary for the proper determination of the case.

T. C. Robinette, K.C., for defendant. *J. R. Cartwright*, K.C., and *E. Bayly*, K.C., for the Crown.

RE BREAD SALES ACT. [Feb. 14.

Weights and measures—Bread Sales Act, 1910—*Sale of "small-bread"—Case stated by Lieutenant-Governor in Council—Constitutional Questions Act*, 1909.

Under s. 2 of the Constitutional Questions Act, 9 Edw. VII. c. 52, the Lieutenant-Governor in council referred to the Court

of Appeal for hearing and consideration the following question: "Under sub-s. 2 of s. 3 of the Bread Sales Act, 10 Edw. VII. c. 95, is 'small-bread' required to be sold in separate loaves, or can a number of loaves of small bread, so called, be joined together and so without being detached by the vendor, when the same exceeds in the aggregate twelve ounces in weight."

Section 3.—(1) Except as provided in sub-section 2, no person shall make bread for sale or sell or offer for sale bread except in loaves weighing twenty-four ounces or forty-eight ounces avoirdupois.

(2) Small-bread may be made for sale, offered for sale and sold in any weight not exceeding twelve ounces avoirdupois.

Moss, C.J.O.:—The right under the statute to refer the matter is scarcely open to question; but the expediency and utility of submitting questions of the nature of the present one has been strongly questioned by eminent judges in this country and in England.

For the purpose of illustration, it is sufficient to quote the observations of Osler, J.A., in *In re Ontario Medical Act*, 13 O.L.R. at p. 502: "The difficulty in the way of answering satisfactorily questions submitted under the Act for 'expediting the decision of constitutional and other provincial questions' has frequently been commented on by the courts which have been invited—or ordered—to solve them. Generally, they are abstract questions, the answers to which must almost necessarily be of an academic or advisory character, and practically not binding upon the court in a real litigation. I may refer to what I have said on this subject in *Re Lord's Day Act of Ontario*, 1 O.W.R. 312, and other like cases, and to the observations of Lord Halsbury in delivering the opinion of the Judicial Committee in the same case, [1903] A.C. 524, and to the certificate of the judge respecting a court-martial (1760), 2 Eden 371 (Appx.)."

It seems almost unnecessary to repeat what has been said by others, that the answer to the question determines nothing, and binds no one, not even ourselves.

As I read the question, an answer is only called for as to the effect of the legislation with regard to the sale of small-bread, and not at all as to the manner of baking, and, so understanding it, I answer that, as I read the enactment, where a number of loaves of small-bread, so called, joined together, exceed in the aggregate twelve ounces in weight, they are not to be so sold.

GARROW, J.A.:— . . . In my opinion, the plain meaning of sub-s. 2, properly considered in its relation to sub-s. 1, is that no small-bread, if made into loaves and so sold or offered for sale, no matter how much less the individual or detachable portions may weigh, shall exceed in weight twelve ounces. And the palpable object is to keep the loaf of small-bread so small that no purchaser need be deceived by having it put off on him for a full loaf of twenty-four or forty-eight ounces. . . .

MACLAREN, J.A.:— . . .I am of the opinion that sub-s. 2 of s. 3 . . . only permits the sale of "small-bread," so-called, when the loaf does not, or the loaves thereof joined together do not, in the aggregate, exceed twelve ounces in weight.

MEREDITH, J.A.:— . . . The question is one of fact: if there are really different rolls or loaves, or "small-bread"—an undefined expression—they are none the less rolls, loaves, or "small-bread" because they have run together in the baking, or are attached in the way loaves commonly have been ever since loaves were made, without any one dreaming that they were anything but several loaves, there is no infringement of the provisions of the enactment; but, if in truth and in fact, they are not so attached, but the bread is all in one piece, and it is not of one of the specified weights, there is such an infringement: and is none the less so for any colourable marks or other pretences of actual division, and whether so sold or offered for sale or even if so made for sale without any offering for sale or sale.

I desire to add an expression of my entire concurrence with Judge Morson in the views of the subject which he expressed in the case, under the Act, recently decided by him—*Rex* v. *Nasmith Co. Limited*, ante 116—views which I cannot help thinking, and saying, ought to commend themselves to all reasonable men, from whom only, and not from those too much possessed by the subject, legislation should emanate.

MAGEE, J.A.:— . . . "Small-bread" is not required to be sold in separate loaves when, if joined together, the aggregate weight does not exceed twelve ounces, and a number of loaves of "small-bread" may be joined together and so sold without being detached, where the same do not exceed in the aggregate twelve ounces in weight; but not if they do exceed in the aggregate that weight.

Cartwright, K.C., and *Nickle*, K.C., for the Attorney-General. *DuVernet*, K.C., and *Judd*, K.C., for the Bakers' Association.

HIGH COURT OF JUSTICE.

Clute, J.] KING *v.* BIRMEN. [Feb. 23.

Nullity of marriage—Insanity—Jurisdiction of High Court to declare marriage void.

Action for a declaration that marriage of the plaintiff with the defendant was null and void ab initio.

Held, that the High Court has no jurisdiction to declare a marriage void ab initio, upon the ground that one of the parties was of unsound mind, and therefore incapable of entering into the contract of marriage. The case does not come within the provision of the Judicial Act, R.S.O. 1897, c. 51, ss. 25 to 41, which should define the jurisdiction of the court.

W. H. Price, for plaintiff. Defendant not represented.

Boyd, C., Riddell and Middleton, JJ.] [Feb. 21.

MURRAY *v.* MCKENZIE.

Infant—Gift of chattels—Repudiation after majority—Action for return—Delay—Change of position by donee.

Appeal by the plaintiff from the judgment of Mr. Justice SUTHERLAND, dismissing the action, which was for an account, and the return of certain jewellery given by the plaintiff, while an infant, to the defendant, who was his adopted mother's executrix.

BOYD, C.:—Authorities are scanty on the subject of gifts made by infants. An infant is, by our law and the English, incapable of making a valid will, for very obvious reasons; yet the modern view as to donations of chattels is that the gift of an infant is not void but voidable. See *Taylor* v. *Johnston*, 19 Ch. D. 603.

No doubt, the gift may be ratified after majority is attained by the infant, and this does not call for any positive act; length of time may be sufficient; or it may be otherwise made to appear that there was a fixed, deliberate and unbiassed determination that the transaction should not be impeached. See *Mitchell* v. *Hornfray*, 7 Q.B.D. 592. On the other hand, when the infant has derived no benefit from what has been done, and the position of the donee has not been affected by delay, the donor, come of age, may repudiate after a very considerable

time: Encyc. of the Laws of England, 2nd ed., p. 162; and an example is given in the text of a lapse of 37 years in *In re Jones*, [1893] 2 Ch. 461.

Bradford, K.C., for plaintiff. *W. R. Smyth*, K.C., for defendant.

COUNTY COURT—COUNTY OF WELLINGTON.

Jamieson, J.] SPOTTON *v.* GILLARD. [Jan. 3.

Chattel Mortgage Act—Insolvency of mortgagor—Implied knowledge of insolvency by mortgagee—Intent to give unjust preference.

D., a retail grocer in the town of Harriston being indebted to the defendants, a wholesale firm in Hamilton, in the sum of $448, finding that he could not successfully carry on his business without more capital, wrote the defendants on June 21st, 1910, advising them of this fact and stating that he had decided to sell out, and asking them to assist him in making a sale. Subsequently, and prior to July 20th, 1910, D. returned to the defendants six unpaid drafts. The senior partner of the defendants on looking over his books noticed the return of these drafts and immediately sent P., his solicitor, to Harriston to obtain payment of the account, or security. P., on July 20th, obtained from D. a loose, verbal statement of his affairs, which shewed a considerable surplus of assets over liabilities, but made no attempt to see D.'s books, or obtain particulars of the liabilities. P. then prepared a chattel mortgage for the $448 covering all D.'s stock, to the defendants, and it was executed by D. There was also some talk between D. and P. of D.'s seeing the defendants and by giving a larger mortgage obtaining further credit. On July 21st, P. wrote to the defendants giving them the figures furnished by D. and himself delivered the letter, and after perusal of this letter by the defendants, had them swear the affidavit of bona fides. The chattel mortgage was filed July 22nd. On July 23rd, D. consulted his own solicitor, who advised an assignment, which was made forthwith to the plaintiff. Action was brought to have chattel mortgage declared void under 10 Edw. VII. c. 64. D. swore at trial that at the time of the giving of the chattel mortgage his financial position was far from satisfactory and he knew he could not pay

all his debts. Defendant and P. both swore that they believed D.'s statement of his affairs and thought him solvent.

Held, applying the principle of *National Bank of Australia* v. *Morris* (1892), A.C. 290, that under the circumstances which had come to their knowledge, defendants if they did not actually know should have known that D. was insolvent; that D. was fully aware of his insolvency and that the chattel mortgage was given with the conjoint intent of giving defendants an unjust preference. Judgment accordingly declaring chattel mortgage void.

E. A. Dunbar, for plaintiff. *H. E. Rose*, K.C., for defendants.

NOTE.—The above judgment was confirmed on an appeal to the Divisional Court, Chancery Division, on March 13.—ED. C.L.J.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] FISHER *v.* JUKES. [March 3.

Appeal to Supreme Court—Leave to appeal—Special circumstances — Supreme Court Act, s. 71 — Discovery of new evidence.

The plaintiff had judgment in his favour which was affirmed by this court on appeal. During the reference to the Master to take the account ordered, the defendant for the first time noticed among the documents, which the plaintiff had produced before the trial, an affidavit which the plaintiff had made before the commencement of the action in which he had made a statement apparently at variance with his evidence at the trial. The trial judge's attention had been called to this affidavit at the trial, but he had not referred to it in his judgment, and it was not considered on the hearing of the appeal before this court.

Held, Cameron, J.A., dissenting, that, although this could not be treated as a discovery of new evidence warranting a new trial, yet it was such a special circumstance that, under s. 71 of the Supreme Court Act, this court might properly grant the defendant leave to appeal to the Supreme Court, after the lapse of time allowed for an appeal as of right.

Fullerton, for plaintiff. *Phillips*, for defendant.

Full Court.] GUNN *v.* VINEGRATSKY. [March 3.

Fraudulent preference—Action by judgment creditor of grantor to set aside—Parties to action—Assignments Act, R.S.M. 1902—Knowledge of solicitor, when imputed to client.

Held, 1. A judgment creditor has a right to bring an action to set aside a fraudulent preference given by the judgment debtor without setting up that his action in on behalf of all the creditors; and, if the action was commenced within sixty days after the date of the alleged fraudulent preference, the plaintiff is entitled to the benefit of the legal presumption created by s. 40 of R.S.M. 1902, c. 8, in such a case, viz., that a conveyance which has the effect of giving a preference over creditors or over one or more of them, shall be utterly void as against such creditor or creditors. *Ferguson* v. *Bryans*, 15 M.R. 170, distinguished.

2. Sub-sec. (*b*) of s. 48 of the Act, providing that one or more creditors may sue on behalf of all the creditors to set aside a fraudulent preference, has not taken away the right of a judgment creditor to sue on his own behalf.

3. When it is the duty of the solicitor of the alleged fraudulent grantee to divulge a fact as to the title, if he is aware of it, there is an irrebuttable presumption that he gave his client notice of that fact. *Rollond* v. *Hart*, L.R. 6 Ch. 678; *Real Estate* v. *Metropolitan*, 3 O.R., at p. 490, and *Schwartz* v. *Winkler*, 13 M.R. at p. 505, followed.

New trial ordered so that the question whether the defendant was entitled to the protection of s. 44 of the Act, by reason of having made "any present actual *bonâ fide* payment in money" might be determined.

W. L. Garland, for plaintiff. *F. M. Burbidge*, for defendant.

Full Court.] [March 3.

DOMINION EXPRESS CO. *v.* CITY OF BRANDON.

Taxation—Corporations Taxation Act—Business tax—Construction of statutes.

Appeal from the judgment of Macdonald, J., noted vol. 46, p. 547, allowed with costs and this injunction be granted dissolved, the court holding that the business tax imposed by the city, being a tax based on the rental value of the premises occupied, was not a tax similar to that imposed by the Corporation Taxation Act, R.S.M. 1902, c. 164, s. 3 (m).

Coyne, for plaintiff. *Henderson*, K.C., for defendants.

Full Court.] [March 3.

HEWITT *v.* HUDSON'S BAY CO.

Workmen's Compensation for Injuries Act, R.S.M. 1902, *c.* 178—*"Workman," meaning of—Trial by jury.*

Appeal from decision of Metcalfe, J., noted vol. 46, p. 749, dismissed without costs, the court being equally divided.

KING'S BENCH.

Mathers, C.J.] [February 14.

COX *v.* CANADIAN BANK OF COMMERCE.

Bills of exchange and promissory notes—Holder in due course —Bills of Exchange Act, s. 56*—Consideration.*

The plaintiffs were directors of the Finch Company, Limited, and had indorsed specially to the bank a promissory note of the company for $2,000 made payable to them, and intrusted it to Finch, general manager of the company, so that he might get it discounted at the bank.

The manager of the bank refused to discount it, but promised that, if it were left with him to hold as collateral to the indebtedness of the company on notes for $5,000 then current, the bank would allow the company to overdraw its account and would also discount some of its trade paper. Finch left the note with the bank on that understanding and the bank afterwards carried it out by allowing overdrafts to the extent of $895 and discounting the company's trade paper to the extent of over $3,300.

Held, 1. The bank, having become a holder of the note without notice of Finch's want of authority to pledge it as he did, would have been entitled to recover against the plaintiffs upon it, if value or consideration had been given for it. *Lloyd's Bank* v. *Cooke* (1907), 1 K.B. 794, followed. *Smith* v. *Posser* (1907), 2 K.B. 735, distinguished.

2. The existence of the antecedent debt was not of itself a sufficient consideration to support the promissory note of the plaintiffs given as collateral security therefor. *Crofts* v. *Beale*, 11 C.B. 172, and *McGillivray* v. *Keefer*, 4 U.C.R. 456, followed. *Currie* v. *Misa*, L.R. 10 Ex., at p. 162, distinguished.

3. The bank was entitled to hold the note for payment of any overdrafts allowed or discounts made on the strength of it, which were a sufficient consideration. *Oldershaw* v. *King*, 2 H. & N. 399, 517, and *Crears* v. *Hunter*, 19 Q.B.D. 341, followed.

4. As these had all been paid off, there was no consideration left, and the plaintiffs were entitled to a declaration that they were not liable to the bank on the note.

Coyne, for plaintiffs. *Dennistoun*, K.C., and *Craig*, for defendants.

Mathers, C.J.] [Feb. 15.

GRACE *v.* OSLER.

Building contract—Damages for delay in completion—Termination by owners of the employment of the contractors before completion—Liability of contractor for results of accident caused by his negligence.

When pursuant to the terms of a contract for the erection of a building, the owners terminate the contract before completion and take over and complete the work themselves, although it is a term of the contract that the contractors shall pay as liquidated damages a fixed sum for every day's delay in completion beyond the time fixed by the contract, no such damages should be charged to the contractors for any time beyond the date when the contract was so terminated and the work taken over, unless there is something in the contract to take it out of the principle laid down in 3 Halsbury's Laws of England, s. 514. *Yeadon Water Works Co.* v. *Burns*, 72 L.T. 538, followed.

Neither would the owners be entitled to unliquidated damages for delay beyond the date when they terminated the contract: 1 Hudson, 543.

The defendants terminated the contract and took over the work because the foundation gave way and the walls subsided in consequence of an accident for which the trial judge held the plaintiffs responsible. The plaintiffs commenced this action before the defendants had completed the building.

Held, that the action must fail and that the defendants were, under the contract, entitled on their counterclaim to the following classes of damages. (1) Any excess of the expense of completing the building according to the original plans and specifications over the unpaid balance of the contract price. (2) Damages caused by the accident to the owner of an adjoining building

which the defendants had been compelled to pay, the contract having provided for that (3) Liquidated damages of $100 per day for the delay in completion up to, but not including, the date of the termination of the contract, such allowance to cover all claims for loss of business and rents or rent paid by defendants for other premises in the meantime. In completing the building, the defendants did not restore the original level of the floors, although this might have been done.

Held, that they could not recover the amount of any permanent injury to the selling value of the property caused by such unevenness, but only what it would have cost to restore such level.

Minty and *C. S. Tupper*, for plaintiffs. *Munson*, K.C., and *Haffner*, for defendants.

Book Reviews.

Burge's Commentaries on Colonial and Foreign Law, generally, and in their conflicts with each other and with the Law of England. New edition, under the editorship of ALEXANDER WOOD RENTON, one of the judges of the Supreme Court of Ceylon, and GEORGE GRENVILLE PHILLIMORE, Barrister-at-law, in six volumes. Vol. 3, on the subject of Marriage and Divorce. London: Sweet & Maxwell, Limited, 3 Chancery Lane; Stevens & Sons, Limited, 119 Chancery Lane. 1910.

The Comparative Law of Marriage and Divorce. Reprinted from vol. 3 of Burge's Commentaries on Colonial and Foreign Law. London: Sweet & Maxwell, Limited, 3 Chancery Lane; Stevens & Sons, Limited, 119 Chancery Lane. 1910.

These two volumes are the same. This monumental compendium of the law of marriage and divorce, treated comparatively as to all countries where there is any law on the subject, forms vol. 3 of Burge's well-known series of works on Colonial and Foreign Law. The original publication was in 1838.

The work deals with the law of marriage and divorce in the principal legal systems of the world, including the Roman Civil Law, the Canon Law, Roman Dutch Law, the ancient and modern French Law, the codes of Belgium, Italy, Spain, Germany, Austria, Hungary and Switzerland. The laws of the

British dominions and of the United States, as well as the Oriental systems in force in British India, Burmah China, Japan and Siam are also contained therein.

As our readers may remember, the international aspect of the marriage state is now mainly regulated, at least for most of the nations of Europe, by the recent Hague Convention, so that it has to some extent assumed the aspect of a uniform private international law of marriage. England and the United States, however, have not as yet taken any part in framing an international agreement for the regulation of conflicts between the different national systems.

The scope of the work may be gathered from the headings of the following chapters, each of which refer to the various systems affected. I. Principal original systems of marriage law; II. Capacity for marriage; III. The marriage ceremony; IV. Nullity of marriage; V. Constitution of marriage—Private international law; VI. and VII. Personal capacities of husband and wife; VIII. to XV. Effect of marriage on property of husband and wife in relation to (1) Roman law; (2) Roman Dutch law; (3) French law; (4) The above named continental nations of Europe; (5) The law of Scotland; (6) The law of England; (7) The law of the British dominions, United States, India, Burmah, China, Japan, and Siam; (8) Private international law, in relation to the effect of marriage on the property of husband and wife. Chapters XVI. and XVII. deal with the subject of divorce. As to this, by the way, the Royal Commission on divorce, sitting in London has done its work and the report will be issued as soon as some statistics have been collected.

Marriage is undoubtedly the most important item in the personal relation of humanity and its constitutional attributes and consequences are pre-eminently interesting, not only to society at large, but to legislators and jurists; and this volume would appear to contain all that could possibly be said on these subjects.

Apart from its value in its legal aspect, this book is very interesting reading, and a great acquisition to any library.

Principles and Practice of the Law of Evidence. By W. Blake Odgers, M.A., LL.D., K.C. With Canadian notes by the Hon. Mr. Justice Russell, of Nova Scotia. London: Butterworth & Co., 11 and 12 Bell Yard, Temple Bar. 1911.

It was well that such an excellent work as Powell on Evidence should not be lost to the profession. Mr. Odgers, so well

fitted for the task, has taken the matter in hand and largely recast and re-written and so brought up-to-date Mr. Powell's book. The result is most satisfactory. To Canadians the value of the work has been largely enhanced by the introduction of Canadian notes by the Hon. Mr. Justice Russell. We need scarcely say that this has been done with great diligence and in his usual thorough and luminous manner.

The subject matter now appears under four main heads: Relevancy, Proof, Cogency and Procedure. The principles and practice of the law of evidence is stated under each head in large type, whilst the decisions illustrating the procedure and rules follow in small type, make it very comfortable reading, as well as handy for ready reference. The cases are brought down to March 1, 1910.

The matter contained in the Canadian notes has its own separate table of contents, of statutes, and of cases—a very convenient arrangement. These notes appear at the conclusion of the various chapters of the English edition. These references to the authorities in the various Canadian reports clear up many perplexing points in connection with the law of evidence, as it is in England, sometimes varied by the decisions of our own Courts. The result is that we have a complete and unique compendium of the law on the subject of evidence as applicable to this Dominion.

A Digest of Equity Jurisprudence. By J. ANDREW STRAHAN, M.A., LL.B., Barrister-at-law, and G. H. B. KENRICK, LL.B., Barrister-at-law, of the Middle Temple. 2nd edition. London: Butterworth & Co., 11 and 12 Bell Yard, law publishers, 1909.

As this is a second edition little need be said about this most useful manual except to remark that the authors are both examiners respectively in equity and common law at the University of London. The plan of the book is in the nature of a digest, stating concisely the legal propositions and rules of equity which are discussed. These are followed by notes referring to the authorities cited to prove the propositions. This is a book that should be in the hands of every student, and will be found most useful in every Law School as well to teachers as to learners.