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ETIQUETTE OF THE BAR.

DUTIES OF COUNSEL AS TO THE ACCEPTANCE OR REFUSAL OF BRIEFS.

A discussion, rather than a controversy, has been going on in London in which leading members of the profession have taken part regarding the action of Sir Edward Carson and Mr. F. E. Smith, K.C., in acting as counsel for the Attorney-General and the Chancellor of the Exchequer before the Marconi investigation committee. Both the gentlemen named are leaders of the Bar; both are also leaders of the Unionist party in Parliament where the report of the committee would necessarily come up for discussion and criticism. The question at issue is—were the circumstances such as would justify counsel in refusing to follow the universal rule by which they are bound to accept briefs offered to them, no matter by whom. As counsel for the defendants their duty would be clear. As members of Parliament their first duty was to those whom they represented before that, the highest court of the realm. Was it possible for the same men to occupy these two apparently irreconcilable positions?

In an article in the *Times,* the leading exponent of public opinion, the following passage appeared: "The etiquette of the Bar, we are told by some of its members, left these counsel (Sir Edward Carson and Mr. F. E. Smith) no choice; they could not refuse briefs delivered to them; they acted in accordance with a laudable practice and tradition which gives all comers the service of eminent advocates."

Commenting on this Sir Harry Poland, an eminent authority, says in a letter to the *Times*:—

"There can be no doubt that this is not the etiquette of the Bar. These eminent advocates were absolutely free to refuse briefs in the *Marconi* case, and in the prosecution of Mr. Chester-

ton by Mr. Godfrey Isaacs, if they thought that appearance in such cases would interfere with their duty in Parliament to their constituents."

The same authority goes on to say that, having accepted briefs in these Marconi cases, the gentlemen named could not take part in any debates or divisions in the House of Commons on the report of the Marconi committee, and apparently they did not.

The same writer says again:—

"There are, of course, some cases in which counsel is bound in honour to appear for a client. Let me give an instance. Tom Paine was in 1792 prosecuted for a seditious libel—the first part of the 'Rights of Man'—and Erskine was retained for the defence. He was then Attorney-General to the Prince of Wales. Every effort was made to induce Erskine not to appear for the defendant. In his speech for the defence he referred 'to the calumnious clamour that by every art has been raised and kept up against me.' Then he went on to say:—

" 'Little, indeed, did they know me who thought that such calumnies would influence my conduct. I will for ever, at all hazards, assert the dignity, independence, and integrity of the English Bar; without which impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end. If the advocate refuses to defend from what he may think of the charge or of the defence, he assumes the character of the judge; nay, he assumes it before the hour of judgment, and in proportion to his rank and reputation puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favour the benevolent principle of the English law makes all presumptions, and which commands the very judge to be his counsel.' (State Trials, vol. 22, p. 411.)

"Erskine for his brave and honest defence was removed from his office of Attorney-General to the Prince of Wales."

Mr. Justice Neville, writing on the same subject, says:—

"Will you allow me, as a barrister of over 40 years' standing (we do not cease to be members of the Bar when we sit upon the Bench, though our rights are in suspension), to express my complete concurrence with the view stated by Sir Edward Carson?

"It is in accordance with the principles instilled into me in my youth, and follows, I believe, the best traditions of the Bar.

"To my mind the question raised is no mere question of etiquette, but one which affects the existence of the Bar, holding, as it does, the exclusive right of audience before the Superior Courts in the country."

Mr. F. E. Smith in a long letter to the *Times* deals with the subject at great length, defending the course taken by himself and his colleague, contending that to adopt the opposite course would lead to the conclusion that no practicing lawyer should be eligible for a seat in the House of Commons. Such a case as that under consideration has never before occurred in British history, and may never occur again. Should, however, it be clearly understood that men eminent at the Bar, and eminent also as the leaders of political parties in the House of Commons, are compelled by the rules of their profession to undertake duties in the courts which might prevent them from doing their duty as members of Parliament, Mr. Smith may find the tables turned upon him, and constituencies preferring as representatives men upon whose undivided attention to their political duties they could rely.

These men owed a duty to their constituents as representing them in the High Court of Parliament. Was not this their first and highest duty? Should they not have refused these briefs on the ground of the probability that their accepting them would prevent them from fulfilling their duty under their retainer from their constituents? Whether or not these two eminent counsel were trapped by their political opponents and cleverly "put out of business" as debaters by an appeal to their supposed paramount duty as counsel is not material to the discussion.

TRADITIONS OF PARLIAMENT.

Limitations imposed on Ministers of the Crown.

Turning now from the agents to the principals in this Marconi transaction, and dropping the question as to the manner in which the investigation was conducted, we find food for serious reflection. So far as proceedings in Parliament are concerned the matter is closed. The ministers accused have been exonerated from anything worse than "indiscretion." Their confessions have been made and accepted, and their friends have nothing but applause for their success in extricating themselves from a very dangerous position.

The official and professional view of the case is well presented in the following extract from the *Law Times* in which we fully concur so far as the charge of personal corruption is concerned:

"One good thing this Marconi affair has done is to dispose once and for all of the gross attacks that have been made against the personal honour of the Attorney-General. The charges of corruption and unfaithfulness to public duty have been shewn to be absolutely untrue, and the supposed evidence upon which the allegations were founded non-existent. Throughout the whole business Sir Rufus Isaacs has had the sympathy and confidence of the entire Profession, and his admirable speech on Wednesday last in the House of Commons, in which he admitted his mistake or error of judgment, was worthy of him as a man of honour and an ornament to the profession that he leads."

This is all very well as far as it goes. It would indeed have been a great misfortune if the personal honour, or professional reputation, of such responsible statesmen as the Attorney-General of England or the Chancellor of the British Exchequer could have been successfully impeached. But again the question arises as in the choice of counsel—why did these honourable gentlemen, both experienced men of the world, and both versed in business, choose to invest their hard earned savings in Marconi stock of all others? Other means of investment were open to them—why choose the stock of a company with

which the Government of which they were members was actually in negotiation or had been or might be? By doing so, they did something of the odium from which no special pleading will relieve them, and which no British Minister can do without forfeiting some portion at least of the respect to which his position entitles him will attach to them. The high tradition of the past should ever prevail not only in the British Isles but wherever British Constitutional rule is recognized and respected.

The Times thus sums up the situation in an article entitled "The charge and the apology":—

"The public will probably feel a certain sense of relief on reading the principal speeches of the Marconi debate in the House of Commons. We have no wish to treat an apology ungenerously, and we are very glad that it has been made; but we are bound to point out that neither Minister seems to understand how their conduct strikes the public. It may be put by way of a metaphor. A man is not blamed for being splashed with mud. He is commiserated. But if he has stepped into a puddle which he might easily have avoided we say that it is his own fault. If he protests that he did not know it was a puddle, we say that he ought to know better; but if he says that it was after all quite a clean puddle, then we judge him deficient in the sense of cleanliness. And the British people like their public men to have a very nice sense of cleanliness. In the speeches of both gentlemen on Wednesday, but especially in that of Mr. Lloyd George, there were too many and too vehement protestations of innocence. Neither the Attorney-General nor the Chancellor of the Exchequer is precisely fresh from the convent. Of course they had no corrupt intention. That is already admitted in the exoneration from the charge of corruption, to which, by the way, Mr. Lloyd George devoted a great deal more attention than was at all necessary, considering that he has been fully and by general consent exonerated. That charge no longer lies, and, though we deeply sympathize with him for having suffered under it, the point had no relevance to the motion or to the substance of Mr.

Cave's speech, which dealt with facts, not with motives. The public look at the facts, and what they feel is that men occupying those positions ought not to have made those mistakes and walked into those puddles. If they are so innocent and careless as not to know a puddle when they see one, then they ought not to occupy those extremely responsible positions. And similarly with regard to the line of action in the House of Commons last October. No man knows better than the Attorney-General what a suppressio veri is, and that it is extremely likely, if not certain, to mislead, however good the intention may be of the man who practises it. In our opinion a frank acknowledgment of the mistake, with the procedure known as throwing yourself on the mercy of the court, would have made a better impression on the public."

THE TRAINING OF JUDGES.

Fault has often been found, generally by those in opposition to the party in power, with the practice of placing on the Bench members of Parliament who for any reason wished to retire from political life, or whom it was expedient to make retire, and to whom the judicial office afforded a safe and honorable place of refuge. While the proffer of office of any kind as a reward for political service is not an act of corruption, it seems that something may be said for the choosing of judges from the ranks of those who have taken an active part in the work of the House of Commons and that there would be no fear of political animus being imported into questions of a judicial character even where political interests are at stake.

Speaking at a dinner given by the Lord Mayor of London to the judges, the Lord Chancellor said that "in other countries the judge belonged to a profession by itself. With us he was trained at the Bar, in the school of affairs, and often in that most remarkable of all colleges—in which he spent 25 years of his own life—the House of Commons. They might say what they liked about the House of Commons; but it remained the finest school

of affairs and the greatest representative institution in the world. (Cheers.) The greatest piece of good fortune that had come to him in his public life was that he had 25 years' training in that great school. The judges had a training and a tradition which he thought brought them in contact with the concrete realities of life in a way which was not easy where the training of the judges was different from what it is here. They learned by their very contact with public affairs to eliminate politics. He sat recently with three colleagues to hear a somewhat unusual and difficult case. It was a question of whether a member of Parliament had forfeited his seat or not. He had for his colleagues two very distinguished members of the opposite political party, and of his own party there was an ex-Chancellor and himself. He could only say that a more perfect tribunal he had never experienced, and he thought they all forgot that there was such a thing as politics in the world, or that there was anything but law to be considered. (Cheers.) These were the traditions of the Bench."

THE SOLICITOR-GENERAL OF CANADA.

The appointment of Mr. Arthur Meighen, M.P., to the vacant office of Solicitor-General of Canada will receive general commendation. Mr. Meighen is an Ontario man and a graduate of the University of Toronto and the Law School. In his own province he has already made an enviable legal reputation. Although in Parliament for a few sessions only, he has rapidly come to the front in debate; and, with good legal acumen and sound judgment, has been of valuable assistance to his party, notably during the past session on points of law and otherwise arising out of the Naval debate. His prominence among the younger legal members of the House has been for some time admitted, and, although the names of several clever members of the Bar occupying seats in the House were mentioned for the position, the action of the Government in promoting him to a

near-Cabinet rank will be no surprise to those who have followed events at Ottawa.

It has been an open secret for some time that the Government intended the next Solicitor-General to be more than a figurehead, as has usually been the case in the past. Anyone acquainted with the new Solicitor-General knows that he will not only undertake, but will seek for useful work which ought to be done by the incumbent of that position.

We have, before now, urged in these pages that the office of Solicitor-General should either be abolished or that the Solicitor-General should be given work which would make him a natural successor to the Minister of Justice, for which position the value of training and experience need not be emphasized. At the present time the Department of Justice is notoriously undermanned. The experience and ability of the present Deputy Minister (Mr. Newcombe) enables him to do more than should be expected of any one man, but it cannot be expected that he can give sufficient attention to all of the many matters coming before him. The Departmental work is heavy, and even with a numerically large staff the Deputy himself must have personal knowledge of it. In addition to Departmental work, Mr. Newcombe takes Government briefs in the Supreme and Exchequer Courts and before the Privy Council.

Without venturing to suggest what the duties of the Solicitor-General ought to be, we think we have sufficiently indicated that a good man can render most valuable assistance to the Minister of Justice and to his Department. Further, he should have such knowledge of the Department as would enable him to speak authoritatively and to answer questions in the House in the absence of the Minister of Justice, following the practice of Under Secretaries in the Parliament of Great Britain.

We congratulate both the Government and Mr. Meighen on the present appointment.

AN IMPERIAL LINK.

Of the many links which bind together the seat of empire with the overseas Dominions, none is more potent and of greater value than the right of every British subject to seek for justice at the foot of the Throne, as that right is embodied in the right of appeal to the highest tribunal to be found in the Empire. That right of appeal may have its inconveniences—It may sometimes even work injustice from want of proper information, but never do its judgments fail from want of intellectual acumen, or from the presence of any motive that could interfere with the giving of an honest and impartial decision. To avoid this only weak point—that of full knowledge of the matters in dispute, the presence of Dominion judges has been provided for and now it has been decided to raise the number of such judges from five to seven.

In moving the second reading of the Appellate Jurisdiction Bill, the Attorney-General explained that it had three main objects. It provides for the appointment of two additional Lords of Appeal in Ordinary, bringing the number up to six; it proposes to make the judicial life peers *ex officio* members of the Court of Appeal; and it raises the maximum number of Dominion Judges empowered to sit on the Judicial Committee of the Privy Council from five to seven. In making these proposals, Sir Rufus Isaacs explained, the Government was carrying out a pledge given at the Imperial Conference in 1911, when it was agreed that there ought to be six Lords of Appeal in Ordinary to take part in the proceedings of the Judicial Committee. The appellate jurisdiction of that tribunal he described picturesquely as a link of Empire. It was the most extensive legal jurisdiction known to civilization, and it was necessary that those who exercised it should be equipped with a knowledge of the laws and customs of all the nations in the various parts of the King's Dominions.

RULES OF PRACTICE—ONTARIO.

It was found desirable, in connection with the revision of the statutes of the Province of Ontario, to introduce some of the Rules of Practice into their appropriate places in the statutes affecting procedure in the Supreme Court and also to transfer some of the statutory provisions to the Rules. It was, therefore, necessary to have a careful revision of the existing Rules.

This task was very happily placed by the Attorney-General in the hands of Mr. Justice Middleton. No better selection could have been made, and the Bench, the Bar and litigants are to be congratulated that this matter was delivered to such a competent person. Mr. Justice Middleton undertook the task—a task involving much labour, and one which could only be accomplished satisfactorily by a person thoroughly familiar with the subject, and having an intelligent appreciation of what is needed to make the machinery of the Court run smoothly and with the least possible friction.

The learned Judge, having prepared a draft revision of the Rules and tariff of costs, has given to the Law Society and the profession of the Province of Ontario a most interesting summary of his views and the result of his labours in a letter, or paper, which will serve as an introduction to the revision. We have much pleasure in now giving this to our readers. They will note that any suggestions for changes will be considered; but after it has gone through the hands of one so pre-eminently fitted to deal with the matter, it is not likely that the work will need any change. The letter is as follows:—

"By the courtesy of the Attorney-General, I am permitted to submit my draft of these rules for criticism before reporting to him; and I am transmitting to you herewith the result of my labours for your perusal and consideration. If on perusal you find occasion, I shall be glad if you will, at your earliest convenience, communicate with me, so that any changes which may be deemed desirable may be made before I send my report to the Government.

"When the Judicature Act of 1881 was passed, a schedule of rules was also enacted, taken from the English Judicature Act of 1873. These rules did not purport to deal with the entire

practice of the Court, but provided that in matters not dealt with the practice of the courts consolidated, that was most convenient should be followed. This brought about much confusion, as standards of convenience differed; and in 1888 a revision of the rules took place, when an endeavour was made to formulate a complete code of practice. To the rules originally introduced from England were added others having an English origin, and many of our former Chancery orders and common law rules; but throughout this revision there were many provisions that the practice should be as in the 'Court of Chancery prior to the Judicature Act.'

"In 1897, the rules were again revised. Many of these allusions to former practice were eliminated, and much was done to remove difficulties that had developed in the working of the former rules; yet the composite origin of the system was plainly apparent, and there remained a lack of uniformity of expression arising from this. In many cases, also, there was an overlapping of provisions adopted from different sources, which occasioned obscurity and confusion.

"In the present revision my endeavour has been to complete the assimilation thus begun, and the elimination of references to former practice. Comparatively few of those now engaged in practice had any experience before the Judicature Act, and any allusions to the practice, either at law or in equity, prior to 1881, are to the majority meaningless, and the occasion of needless research.

"Many of the rules which contained no express reference to any prior practice were originally prepared for the purpose of modifying the practice then existing, and are only to be understood in the light of the situation at the time they were enacted. These provisions are frequently negative in form, and amount to no more than the repeal of former rules, or, more frequently, the annulling of a practice that had grown up apart from any express enactments.

"Many other rules had their origin in an attempt to meet some particular difficulty, and have now become unnecessary by reason of some more far-reaching change in the practice or in general law.

"Other provisions had their origin in a statute passed to remedy some particular matter; the main provision of the statute being accompanied by a number of ancillary provisions, in some cases differing in detail from somewhat similar general provisions of the rules, but now not necessary, by reason of wide general provisions. In this revision I have endeavoured to make the rules a consistent whole, capable of being understood without any reference to the origin of the particular rule or to any former practice.

"I have also endeavoured to reduce the practice to the greatest possible degree of simplicity, and so to classify the rules that what is required to be known may be readily found. To this end, general provisions have been made, applicable to all procedure, and in this way much repetition is made unnecessary, *e.g.*, in the former revisions almost every section conferring power upon the court directed it to be 'exercised upon such terms as to costs and otherwise as may be just;' and almost every time limit is accompanied by the expression 'or such further or other time as the court or judge may allow.' The disappearance of these familiar expressions does not mean change, but merely that general provisions apply and render repetition unnecessary.

"Another familiar expression eliminated is 'the court or a judge.' This expression had its origin in the theory that the expression 'the court' referred to the court sitting en banc during term; and, to enable a function to be exercised othewise than by the court so sitting, the words 'or a judge' were added. This theory and expression appear to be obsolete. In these rules I have conferred all power upon the court, and have by a general rule defined how the powers of the court are to be exercised, *i.e.*, by a single judge sitting in court, save in certain cases where that power may be exercised by a judge in Chambers, local judge, or the Master in Chambers.

"The former rules contained many detailed provisions concerning the officers of the court and the discharge of their duty. These seem unnecessary; and it was thought better to leave these details to be worked out by Orders in Council dealing with the appointment of officers and their duties, and by directions from

the judges and the Clerk of the Crown and Pleas to the Inspector of Legal Offices.

"In addition to many minor changes embodied in the revision, in the interest of simplicity and uniformity some changes of importance are suggested; and to these attention is respectfully drawn.

"One of the greatest problems in the framing of rules of practice is to devise a system which will at the same time afford a simple and speedy mode of enforcing admitted or undisputed rights, and yet be sufficiently elaborate and elastic to be adequate to the working out of important disputes and the adjustment of intricate and complicated matters. To this end it is essential that there should be at the threshold some means of separating cases in which there is a real dispute from cases in which there is no real dispute, but an attempt to abuse the practice by the setting up of some pretended defence. At one time our courts were congested with actions upon notes, bills of exchange, and mercantile accounts, where there was no real question as to the liability of the defendants, but which were defended, and had to be taken to trial before judgment could be obtained. At that time, with a population of less than one-tenth of that at the present day, the Assize lists were longer than now.

Examinations under the Common Law Procedure Act, which enable a defence admittedly untrue to be struck out, afforded a partial remedy. Since the Judicature Act a motion for judgment after appearance, which calls upon the defendant to disclose his defence upon oath, has proved yet more efficacious; but even in this there is much waste and delay. The decisions have established the plainly just principle that summary judgment can only be granted where there is no issue to try; hence, judgment cannot be granted where there is a conflict of evidence, and the result of the motion depends solely upon the defendant's affidavit. Where the defendant makes an affidavit disclosing any defence there is no doubt as to the result of the motion, and it becomes a purely formal matter.

"These rules provide for the elimination of the plaintiff's affidavit and of the formal notice of motion to be served after

appearance, and substitute a special form of writ, calling upon the defendant, where the writ is especially endorsed to at once file an affidavit shewing the nature of his defence. The plaintiff is then given the option of treating the affidavit so filed as constituting the statement of defence to his claim endorsed upon the writ and of entering the action for trial without formal pleadings. Three weeks' notice of trial is required in this case, so as to afford opportunity for discovery and preparation for trial. The plaintiff may, at his election, cross-examine the defendant upon the affidavit, and if the plaintiff think fit he may move for judgment upon such cross-examination. He thus makes his motion for judgment after he has an opportunity of considering whether it is likely to succeed.

"Wherever a writ is specially endorsed, the special endorsement will stand as the statement of claim, and the defendant must file his defence in the usual time after appearance.

"While these provisions, it is hoped, will be found sufficient to prevent vexatious defences, it has been difficult to devise any entirely satisfactory remedy for vexatious actions. The temptation to bring an action without sufficient cause is not so great as the temptation to defend without reason. Under certain statutory provisions, security for costs may be ordered in classes of actions in which unfounded suits are more prevalent, *e.g.*, libel actions, and actions against public officers.

"The classes of cases in which security can be ordered has been somewhat enlarged. Where, on the plaintiff's examination, his case appears to be frivolous, power is given to order security; and a similar provision has been made where a worthless plaintiff has been chosen to prosecute a class action really in the interest of others. He is not a nominal plaintiff under the present decisions, as he is asserting his own right as a member of the class. Farther than as suggested in the rules relating to security it is not safe to go.

"Another change is the abolition of the order to produce. An affidavit on production is directed to be filed ten days after the time for defence. For many years an order to examine was

considered necessary. Its abolition has produced no inconvenience while reducing expense. This change is upon the same line.

"Petitions are abolished. All actions are to be instituted by writ; all other proceedings by originating notice; all interlocutory proceedings by a notice of motion.

"The scope of originating notice has been much enlarged. Under the present rules this procedure is confined to questions arising in the administration of an estate. In the new rules it is made to apply to the determination of any question upon the construction of a will or document, and is also made to afford means for determining in a summary way any question arising between parties when there is no question of fact in issue.

"Provision is made for determining any question under the Vendors and Purchasers Act upon originating notice, and for giving notice to any person having a claim or suggested claim giving rise to the difficulty, so that the decision may be binding upon him as well as upon the vendor and purchaser.

"Provision is also made that any question which would arise upon a quieting titles application may be determined in a summary way. Frequently titles have to be quieted where there is only one matter which really requires determination.

"A provision has been adopted from the English Partnership Act relating to realization upon the share of a partner against whom a judgment has been recovered.

"Some of the provisions found in the former rules have been omitted because they are now to be found in particular statutes, *e.g.*, rules relating to bailable proceedings and absconding debtors, rules relating to solicitor and client taxation, and to quo warranto.

"The result of all this has been to reduce the total number of rules to little more than half the number of existing rules.

"The summons for directions which has been adopted in the English practice has not commended itself to me. In practice in England it appears not to have accomplished that which was hoped from it. No doubt if counsel of ability, familiar with the details of the particular case, appear before an experienced judge and discuss the procedure in the particular case, the re-

sult ought to be satisfactory; but the actual result is far otherwise when the factors are different; and in practice it has been found that in most instances a stereotyped form of order is used, which follows the general provisions found in the rules.

"In a contributed article in the *Law Times* (133 L.T. 565), it is said: 'The compulsory summons for directions, from which certain judges hoped for so much, has proved very ineffective, and is deemed by all barristers in large practice with whom I have discussed it to perform the same functions as the fifth wheel of a coach. One has only to read the orders made on these summonses to see that they are all of a stereotyped character, and in the majority of cases wholly unnecessary.' The editorial comment on this is: 'It is difficult to see what useful purpose the summons for directions has served, and in the vast majority of cases it is wholly unnecessary.'

"In these rules provision is made for the directing of a speedy trial upon an injunction motion, and to permit a motion for judgment in mercantile cases immediately upon the issue of the writ. Attention is also drawn to Rules 142, 145, and 156, relating to pleading.

"The tariff of costs has been the occasion of much thought. I have been assisted in framing a new tariff by committees of the Ontario Bar Association and the County of York Law Association. As the new tariff of solicitor's fees departs widely from the tariff now in use, it may be well to give at length the reasons for recommending it.

"Two leading ideas must be kept in mind. As has often been said, natural justice demands that in ordinary cases the losing party should pay the costs; not upon the principle that 'to the victor belongs the spoils'—for costs are not to be regarded as spoils, but as an indemnity to the successful party who has been compelled to resort to the courts to obtain his rights.

"The second is that in cases in which costs are awarded, the amount actually given should be as nearly as practicable an indemnity for the costs necessarily incurred. If costs taxed do not amount to the sum which the successful party must pay his solicitor, to that extent the purpose fails for which the costs are

given: 'that he may be indemnified for the costs occasioned by his unjust vexation.'

"At the same time, such safeguards must surround the taxation of costs as to avoid costs being made an instrument of oppression. The temptation is ever present, not only to the solicitor, but to the client, to incur costs in the hope that the opponent will in the end have to pay. This sometimes is from malice or greed; more often with the idea that the client's interest will be served by making it plain that litigation can be made so burdensome that an opponent had better accept any compromise offered.

"The proposition has been repeatedly made that in the interest of the public and the solicitor the costs of litigation should be definitely fixed and ascertained, so that the parties might know in advance exactly how much is risked in litigation. The experiment has been tried by limiting the amount to be awarded as party and party costs, and has been found to be a failure. The solicitor for the successful party must be paid for the services actually rendered; and his opponent, knowing this and knowing that he incurs no additional risk, deliberately sets himself to increase the burden of the excess of solicitor and client costs over and above the party and party costs than can be awarded. Similarly, when the costs of an appeal have been fixed at a sum not adequate to indemnify, some litigants appeal every case, so as to discourage litigation with them; the verdict being sadly cut into by the excess costs. It must not be forgotten that litigation is war, that large corporations have much litigation, and that some frame their policy in dealing with litigants in such a way as to make litigation so full of terror, by reason of expense and delay, as to bring about the settlement of the majority of claims at much smaller sums than the claimants are really entitled to receive.

"When any so-called 'block tariff' is devised, if it is not to be in itself burdensome it must be based upon the actual costs of litigation conducted on economical lines. Then it becomes an easy matter, when the extra expense has to be borne by the opponent, to make the actual cost exceed the amount fixed. In some jurisdictions where the experiment has been tried, this defect

became very plain, and a remedy was sought in a provision giving the judge power to award a lump sum in addition to the fixed fee. This was a complete abandonment of the principle of certainty upon which the block tariff was based, besides introducing in its worst forms the evils of the personal equation. When the amount allowed for costs is discretionary, there are as many different standards as there are judges, and chaos reigns. It was found that Mr. Justice A. said: 'You are lucky to have a verdict, and should not ask for extra costs from the unfortunate defendant;' whilst Mr. Justice B. would have said in the same case, 'It is a close case, won by the skill of your advocate, and I shall give you a handsome increased fee.'

"Another objection to a block tariff is that the same allowance must be made for a case that is very simple, and for a case that is of necessity long and complicated. The doctrine of averages might be applied if all litigation were between the same litigants instead of between different parties; but there is no justice in making A. pay, in his litigation with B., part of the costs in a suit between X. and Y.

"In the tariff here proposed, a modified form of block tariff has been adopted, giving a lump sum from stage to stage of the action; some of the allowances being made subject to increase in the discretion of the taxing officer or judge. Regarded as a grouping of items now charged separately, this seems to be defensible; and an endeavour has been made to secure uniformity in the exercise of the discretion given, by providing, as now, that most of the increased fees are to be in the discretion of the taxing officers at Toronto. Where discretion has been given to local officers it was found that individual discretion varied to an extraordinary degree. Only by reference to some central authority can any uniformity be secured.

"The adoption of this system will do away with the present itemized bill, and it is believed will meet with acceptance, as there is no encouragement given for unnecessary and useless proceedings.

"W. E. MIDDLETON."

ARSON v. *INSURANCE.*

Statistics recently published shewing the loss of property by fire in the United States generally, and especially in the City and State of New York, disclose a state of things which seems hardly credible as existing in a highly civilized and professedly law abiding community. The system of insurance against fire intended for the protection of the honest trader, or *bonâ fide* owner of property, against the unavoidable losses caused by the accident of fire has been converted into a gigantic system of fraud, carried on at the expense of the shareholders of the insurance companies for the benefit of dishonest policy holders. This description of fraud is, we regret to say, not unknown in this country, and is coeval with the system of insurance itself. It is not confined to losses by fire, but has been practised on sea as well as on land, with the added criminality of risk of life as well as loss of property. But if we may believe the statement put before us, never has such a systematized method of robbery been attempted as that to which we refer. Simply to burn a house or shop for the sake of the difference between the insurance money and the actual loss is a game any one can play at who is willing to take the risk of prosecution for arson, but to increase the profit and lessen the risk, other means must be resorted to.

How great has been the success of such means, and on what a scale they have been put in practice we may learn from the statements gathered from figures given by such an authority as Mr. Arthur McFarlane and published in *Collier's Weekly*. The following paragraph is quoted from a paper by Sidney Brooks in the *Daily Mail*, London.

"About £50,000,000 of property is annually burnt up in the United States. That is anywhere from 8 to 13 times the per capita loss sustained through fire by any of the peoples of Western Europe; and the statistics shew that while the population of America has increased by only 21 per cent. in the past decade, her fire loss has increased by 84 per cent., exactly four times as fast.

"And this in spite of the fact that America boasts the most efficient and daring fire departments to be found anywhere, and that in the central and most crowded areas of several of the largest cities the law compels the erection of 'fireproof' buildings of steel, concrete, and hollow tile. Yet New York alone has more fires every year than all the capitals of Europe put together. One American in every 250 has a fire each year, and the actual value of the property destroyed represents probably less than half the amount extracted from the people to pay for additional safeguards and the increased cost of insurance. Not less than £100,000,000 is the full tribute thus annually paid by Americans, directly and indirectly, to the fire fiend."

This wholesale d . uction of property is not the work of isolated and independent incendiaries, still less the result of losses by fire which no precaution seems able entirely to prevent. Mr. McFarlane's conclusion is that from one-half to two-thirds of the fires in the United States are due to incendiarism. This means a destruction of property in the United States yearly of the value of $1,125,000 besides an equal or somewhat larger sum as an insurance tax.

The writer from whom we quote goes on to say:—

"Matters, indeed, have come to such a pass that the fire statistics are a closer index to the prosperity of the country and to the condition of particular industries than either Wall street or the bankruptcy returns or the official trade figures. Every period of financial and commercial depression is not only accompanied but heralded by a sudden increase of fires. The panic of 1907 took Wall street by surprise. But the fire insurance companies knew what was coming months before, and many of them prepared for it by cancelling half their risks."

Strange to say that while the losses by fire of property insured falls ultimately upon the shareholders, the companies, or rather their managers and agents are, to some extent, responsible for this state of affairs, especially the larger companies. Were there no fires there would be no insurance. A good fire and a prompt settlement are often the best of advertisements.

The more fires there are the easier it is to crush out the competition of smaller rivals. Finally, a big conflagration is an excuse for putting up the rates all over the country.

Again our writer goes to to make a charge against not only the law relating to arson as its exists in the United States, but also against the way in which it is administered. He goes on to say: "Effective investigation of the causes of fires by public officials hardly exists in any State in the American Union, and arson in consequence is one of the safest of crimes. And finally, even when the criminal is caught it is all but impossible to convict him. In some States, indeed, it appears to be an open question whether a man has not a legal right to burn his own property if he chooses; and, in all States the rules of evidence are such that unless the incendiary has actually been seen to light the fire and unless the match with which he did it can be produced in court, there is next to no chance of bringing him to justice.

"It is just a sample of what obtains all over the United States that, while in New York, by the testimony of its own Fire Commissioner, there are at least 4,000 cases of arson a year, there have been fewer than twenty convictions in the past decade."

As we have remarked above it was not by ordinary means that a state of things above described has been brought about. The records of the police courts prove that there are organized gangs of fire-raisers who are regularly employed by those interested to set fire to buildings as they may be directed, and who by means of their organization do so with comparative impunity.

We have not dealt with this subject in any spirit of invidious comparison, but because moral disease, like physical, is catching. There is so much in our conditions of life similar to those which prevail over the border that into whatever dangerous habits our neighbours fall, we are liable to follow their example. We have no figures at hand to shew whether or not we may have already done so, but it can do no harm by way of warning to point out to what dangerous lengths what may seem to be a small evil at first may grow, when circumstances are favourable for its development.

REVIEW OF CURRENT ENGLISH CASES.

WILL—LEGAL DEVISE—CONSTRUCTION — TECHNICAL WORDS—ESTATE IN TAIL MALE.

In re Simcoe, Vowler-Simcoe v. *Vowler* (1913), 1 Ch. 552. This was an application for the construction of a will whereby the testator devised his real estate to the plaintiff, one of his nephews, a bachelor, "and his issue male in succession, so that the elder son and his issue male may be preferred to every younger son and his issue male, and so that every such son may take an estate for his life with remainder to his first and every subsequent son successively according to seniority in tail male, and on failure of such issue" over to another nephew. Eady, J., held that the devisee took an estate in tail male in possession, and he rejected the contention that the devise should be read as a devise to the plaintiff for life with *cyprès* remainders to his unborn sons successively in tail with *cyprès* remainders over, on failure of those entails.

PRINCIPAL AND AGENT—STOCKBROKER — SPECULATIVE TRANSACTION—DEATH OF PRINCIPAL—CLOSING ACCOUNT — DUTY OF STOCKBROKER — TAKING OVER STOCKS BY STOCKBROKER.

In re Finlay, Wilson v. *Finlay* (1913), 1 Ch. 565. The Court of Appeal (Cozens-Hardy, M.R., and Buckley, and Kennedy, L.JJ.), have affirmed the decision of Warrington, J. (1913), 1 Ch. 247 (noted ante, p. 223). It may be remembered that the plaintiffs, as brokers, in order to minimise the loss of their client on certain stock transactions on his default had taken over the shares at the current market price, instead of attempting to sell them in the market, which would probably have occasioned a greater loss. This, the Court of Appeal holds, in the circumstances, was a legitimate way of closing the account.

WILL—POWER OF APPOINTMENT—SPECIAL AND GENERAL POWER OVER SAME PROPERTY—EXERCISE OF POWER.

In re Ackerley, Chapman v. *Andrew* (1913), 1 Ch. 510. In this case the point up for decision was whether a testatrix had executed a special power by her will. Under a will the testatrix had a general power to appoint the trust estate in default of

any child attaining a vested interest and she had also a special power to appoint in favour of any husband who should survive her during his life or any less period. By her will, without specially referring to either power, she did "give devise appoint and bequeath all my estate and property and effects whatsoever, and wheresoever, both real and personal, which I have power to dispose of by my will, to my husband, Alexander Chapman absolutely, and I appoint him sole executor of this my will." It was claimed on behalf of the surviving husband that this was not only a good exercise of the general power, but also of the special power which the testatrix had to appoint a life estate to her surviving husband. On behalf of an infant daughter it was contended that the will shewed no intention of exercising the special power, and that the words "my" and "absolutely" indicated an intention merely to exercise the general power. Sargant, J., however, was of the opinion that there was a clear intention on the part of the testatrix to bestow on her husband all the benefit she could, and that in the circumstances, both powers were well executed.

SETTLEMENT—POWER OF APPOINTMENT — TITLE—SALE — COMPOUND SETTLEMENT—TRUSTEES — SETTLED LAND ACT, 1882.

In re Gordon and Adams (1913), 1 Ch. 561. This case decides a neat little question of conveyancing. By a will a testator appointed trustees, and he empowered his wife by deed or will to appoint and dispose of all or any of his property as she should think fit, and in default, or until such disposition, and so far as it should not extend, the testator gave the lands in question to the use of his wife and her assigns for life with remainder to the use of one Gordon and his assigns for life, with divers remainders over. And the testator empowered his trustees to sell any part of his freehold estates thereinbefore given. The testator died in 1891, and his widow appointed Gordon her sole executor, and in exercise of the power of appointment appointed the land in question to Gordon for life with remainders over. She died in 1892, and Gordon having contracted to sell the land under the Settled Land Act, 1882, the purchaser objected that a good title could not be made until trustees were appointed for the compound settlement created by the two wills. But Eve, J., held that such appointment was unnecessary, because the appointment made by the widow's

will must be read into the will of her husband, and as the trustees of his will were still *in esse*, any further appointment of trustees was not necessary for the purpose of making title. The purchaser's objection was therefore overruled with costs.

PRACTICE—ORDER OF COURT OF APPEAL DECLARING PRIORITIES AND FOR SALE—APPEAL TO HOUSE OF LORDS—ENLARGING TIME FOR REDEMPTION PENDING APPEAL.

Munks v. *Whiteley* (1913), 1 Ch. 581. An order of the Court of Appeal was made in this case settling priorities, appointing a day for redemption and in default directing a sale. The defendants were desirous of appealing from the judgment of the Court of Appeal to the House of Lords, and applied to the Court of first instance to enlarge the time for redemption pending the appeal. A question was raised whether the application ought not to have been made to the Court of Appeal, but Parker, J., held that the application was properly made in the Court of first instance and granted the enlargement on terms.

COMPANY—WINDING UP—FLOATING CHARGE — DEBENTURES — PARI PASSU CLAUSE—INTEREST PAID TO SOME DEBENTURE HOLDERS TO A LATER DATE THAN OTHERS—DISTRIBUTION OF ASSETS—EQUALIZATION OF PAYMENTS.

In re Midland Express, Ltd., Pearson v. *The Company* (1913) 1 Ch. 499. This was a winding-up proceeding, and a question arose on the distribution of the assets as to the rights of certain debenture holders. The debentures were a floating charge on the assets of the company and were payable *pari passu*. It appeared, however, that some of the debenture holders had been paid interest on their debentures down to a later date than others, and as the assets were insufficient to pay the debentures in full the latter claimed that they were entitled to be paid in the first place, interest on their debentures down to the time that interest had been paid on the others, but Sargant, J., held that the amounts due to each debenture holder must be ascertained with interest down to the date of the Master's certificate, and that the assets ought to be distributed rateably according to the amounts so found due, as in the absence of any express provision to that effect, the debenture holders were not entitled to have the assets applied in equalizing the payments of the debentures.

EVIDENCE—ADMISSIBILITY—DECLARATION BY DECEASED PERSON—PATERNITY OF ILLEGITIMATE CHILD.

Ward v. *Pitt* (1913), 2 K.B. 130. The English Workmen's Compensation Act, it may be remembered, provides that the illegitimate offspring of a deceased workman is entitled to compensation. In the present case an attempt was made to prove that a posthumous illegitimate child was the child of the deceased by a statement of the deceased to the effect that he promised to marry the mother, that he intended to marry and make a home for her, that he admitted the paternity of, and intended to maintain, the child; but the Court of Appeal (Cozens-Hardy, M.R., and Buckley and Hamilton, L.JJ.) held that such statements are not declarations by a deceased person against his pecuniary interest and are not admissible.

PRACTICE — DISCOVERY — DEFAMATION — PUBLICATION TO UNKNOWN PERSONS—FISHING INTERROGATORY.

Barham v. *Huntingfield* (1913), 2 K.B. 193. This was an action for defamation imputing immoral conduct to the plaintiff, a married woman. The statement of claim alleged publication to one named person, and also during three specified years to various other persons unnamed. The plaintiff sought to ask the defendant whether he had in any of the three years uttered the words complained of, or words to the same effect, to any persons other than the person named, and the names of the other persons, if any. On behalf of the plaintiff, *Russell* v. *Stubbs*, 52 whether, in the circumstances, the action was premature; and second, whether the plaintiffs were bound by the certificate when issued, and the House of Lords (Lord Loreburn, L.C., and Lords Ashbourne, Alverstone, Atkinson and Shaw) answered both questions in the negative. The architect in their Lordships' judgment had disqualified himself as arbitrator by his conduct and therefore the plaintiffs were not obliged to postpone bringing their action until after the giving of his certificate, neither were they bound by his certificate when it was given.

PRACTICE—ASSESSMENT OF DAMAGES BY MASTER—APPEAL FROM ASSESSMENT—FORM TO WHICH APPEAL LIES—RULE 481—(ONT. RULE 579.)

Dunlop Pneumatic Tyre Co. v. *New Garage & Motor Co.* (1913), 2 K.B. 207. In this case judgment had been given by Phillimore, J., at the trial for damages to be assessed by a Mas-

ter. The damages were accordingly assessed by the Master. The defendant desired to appeal from the assessment, and the question was whether he should appeal to a Divisional Court or to the Court of Appeal. The Court of Appeal (Williams, Farwell and Kennedy, L.JJ.) held that the appeal lay to the Court of Appeal, presumably on the ground that it was, in effect, an appeal, not from the Master, but from Phillimore, J.

BUILDING CONTRACT—ARBITRATION CLAUSE—REFERENCE TO ENGINEER—DISQUALIFICATION—DISPUTE INVOLVING EXAMINATION OF ENGINEER—STAYING PROCEEDINGS—ARBITRATION ACT, 1889 (52-53 VICT. C. 49), S. 4—(9 EDW. VII. C. 35, S. 8, ONT.)

Bristol Corporation v. *Aird* (1913) A.C. 241. This was also an action to recover a balance due on a building contract which provided for a reference of disputes to the engineer employed by the owner. Upon the settlement of the final account a dispute arose of a substantial character between the contractor and the engineer, involving a probable conflict of evidence between them. The defendants applied under the Arbitration Act, s. 4 (see 9 Edw. VII. c. 35, s. 8, Ont.) to stay the action, but the Court of Appeal affirming, Scrutton, J., held that in the circumstances the action should not be stayed, and the House of Lords (Lords Atkinson, Shaw, Moulton, and Parker) affirmed the decision, their Lordships being of the opinion that the engineer had become a necessary witness, and therefore ought not also to be a judge of the matter in dispute; but their Lordships held that such a dispute as to one matter would not necessarily disqualify the arbitrator as to all other matters, and Lord Parker states that according to the practice of the Chancery Division an action may be stayed as to some matters in dispute and allowed to proceed as to others, though all the matters are subject to an agreement for reference.

POWERS OF PROVINCIAL LEGISLATURE—ALBERTA ACT, 1 GEO. V. C. 9, HELD TO BE ULTRA VIRES—CIVIL RIGHTS EXISTING AND ENFORCEABLE OUTSIDE PROVINCE.

Royal Bank of Canada v. *The King* (1913) A.C. 283. This is an important decision on the question of the jurisdiction of Provincial Legislatures. The appellant bank received on deposit from England at its branch in New York the proceeds of a mort-

gage bond issue of the Alberta Railway Company, guaranteed by the Province of Alberta. Under instructions from its head office in Montreal, a special railway account in respect of the above mentioned deposit was opened at its Alberta branch in the name of the Treasurer of the Province (no money being sent there in specie and the account remaining under the control of the head office), but the amount of the deposit was credited to the account in Alberta for purposes in connection with the construction of a contemplated railway wholly within the province as provided by statutes of Alberta and orders in Council of that province. By the Alberta Act, 1 Geo. V. c. 9 (which recited that the railway company had defaulted in payment of the interest on the bonds and in construction of the railway, and ratified the guarantee of the bonds), it was enacted that the whole proceeds of the bonds, including the amount deposited with the appellant bank, should form part of the general revenue of the province, free from all claim of the railway company or their assigns, and should be paid over to the treasurer of the province. The present action was accordingly brought by the Crown and Provincial Treasurer to recover the amount of the deposit held by the appellant bank. Stuart, J., who tried the action, gave judgment for the plaintiffs, which was affirmed by the Provincial Supreme Court. It may be remarked that the railway and construction companies were made parties defendants on their own application for the purpose of enabling them to resist payment, which, by the way, is a somewhat unusual proceeding; but it does not appear that any of the bond holders were made parties. The Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Macnaghten, Atkinson, and Moulton) have overruled the judgment of the Alberta Court and find that the Act in question is ultra vires of the Provincial Legislature, because the bond holders, having subscribed their money for a purpose which had failed, were entitled to recover the money from the bank at its head office in Montreal; that this was a civil right existing and enforceable outside the Province, and the Province could not validly legislate in derogation of that right.

REPORTS AND NOTES OF CASES.

Province of Ontario.

SUPREME COURT—APPELLATE DIVISION.

KENNEDY *v.* KENNEDY.

(11 D.L.R. 328.)

Garrow, Maclaren, R. M. Meredith, and Magee, JJ.] [Jan. 15.

Judgment—Effect and conclusiveness—What matters concluded.

The plaintiff is not estopped by judgments in former actions, where the same subject has not been adjudicated, although such former actions may have been between the same parties and concerning the same estate.

Kennedy v. *Kennedy* (1911), 24 O.L.R. 183; *Foxwell* v. *Kennedy* (1911), 24 O.L.R. 189, referred to. See also *Kennedy* v. *Kennedy*, 3 D.L.R. 536.

Perpetuities—In general.

Any gift not of a charitable nature, the purpose of which is to tie up property for an indefinite term, is void as creating a perpetuity.

Kennedy v. *Kennedy*, 3 D.L.R. 536, affirmed in this respect.

Wills—Restraints upon alienation—Perpetuities.

A bequest is void, as tending to create a perpetuity, by which the residue of an estate was given to executors or trustees to be used and employed by them in their discretion in maintaining and keeping up, until sold and disposed of, the testator's residence, as a home for his son, his son's family and descendants, or for whomsoever it should by the son be given by will or otherwise.

Kennedy v. *Kennedy*, 3 D.L.R. 536, affirmed in this respect.

Perpetuities—In general—Determining point of time in a will.

In considering a case in which the rule that a gift which creates or tends to create a perpetuity is void is invoked, it is not after-events that should be looked at, but the situation at the death of the testator; it must then be seen that the event which is to bring about a final distribution is certain to fall within the period prescribed; if it is not, the gift is void; and the fact that subsequently the event did actually happen within the time, is of no consequence.

Kennedy v. *Kennedy*, 3 D.L.R. 536, affirmed in this respect.

Wills—Devise and legacy—Description of beneficiaries—When annuitant is a "pecuniary legatee."

A mere annuitant under a will may be a "pecuniary legatee," within the meaning of that term in the residuary clause, where no contrary intention appears in the will, and where in aid of such construction it appears that the will contains other bequests to which the term "pecuniary" could not apply.

Wills—Devise and legacy—What property passes—"To maintain and keep up" a family residence, effect.

The discretion in a will "to maintain and keep up" a family residence will not ordinarily be construed to cover the support of any of the inmates of the residence.

Wills—Devise and legacy—"Discretion" of named trustee—Exercise by others.

While a testator may so express a "discretion" with respect to trust property as to make it exercisable by the named trustee only, yet where the exercise of the discretion has not been clearly limited by the terms of the will, the broader construction may be given.

Re Smith, Eastick v. *Smith*, [1904] 1 Ch. 139; *Crawford* v. *Fenshaw*, [1891] 2 Ch. 261; Trustee Act, 1 Geo. V. (Ont.), ch. 26, sec. 4, sub-sec. 6, referred to.

E. D. Armour, K.C., for the appellant. *Bicknell*, K.C., *Russell Snow*, K.C., *F. P. Galt*, K.C., and *W. A. Proudfoot*, for respondents.

Middleton, J.] SIMMERSON v. GRAND TRUNK R. Co. [April 9.

(11 D.L.R. 104.)

Master and servant—Liability—Person in charge—Brakeman giving signals.

A brakeman standing on the ground and giving signals to the engineer of a locomotive engaged in transferring cars from one track to another, is a person in charge or control of the engine, within the meaning of s. 3, s.-s. 5, of the Workman's Compensation for Injuries Act, R.S.O. 1897, ch. 160.

Allan v. *Grand Trunk R. Co.*, 8 D.L.R. 697; *Martin* v. *Grand Trunk R. Co.*, 8 D.L.R. 590, applied; and see Annotation to this case.

W. S. McBrayne, for plaintiff. *D. L. McCarthy*, K.C., for defendants.

ANNOTATION ON THE ABOVE DECISION.

Sub-sec. 5 of sec. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, should receive a liberal construction in the interests of the workman. An employer may be responsible for the negligence of an employee resulting in injury to another employee, although the one injured is in authority over the other. In an Ontario case the plaintiff was foreman of a railway yard of the defendants, and M. was his assistant and subject to his orders. In carrying out the plaintiff's orders M. gave a wrong direction to the driver of the yard engine, by reason of which the plaintiff was struck by the engine and injured. The engine driver testified that he took his instructions from M.:—*Held* (Lennox, J., dissenting), that there was reasonable evidence that M. was, on the occasion in question a person in charge or control of the engine, within the meaning of sub-sec. 5; and, upon the findings of the jury in an action to recover damages for the plaintiff's injury, the defendants were responsible for the negligence of M.: *Martin* v. *Grand Trunk R. Co.*, 8 D.L.R. 590, 27 O.L.R. 165.

Where a brakeman engaged in coupling cars at night is injured by reason of the negligence of the engineer in charge of the locomotive in failing to wait for a new signal to start, it having been prearranged between the two that the brakeman was to give such signal by lantern, the master is liable under sub-sec. 5 of sec. 3 of the Workmen's Compensation for Injuries Act, making an employer responsible "by reason of negligence of any person in the service of the employer who has the charge or control of any points, signal, locomotive, engine, machine or train upon a railway, tramway or street railway": *Allan* v. *Grand Trunk R. Co.*, 8 D.L.R. 697, 4 O.W.N. 325.

In the case of *McLaughlin* v. *Ontario Iron and Steel Co.*, 20 O.L.R. 335, an overhead crane in the defendants' factory, operated by electric power, was used to raise and move heavy castings from place to place. M., the man who operated the crane, sat in a cage which ran upon rails, and from it he regulated the movement of the crane; when the crane was brought to the place where it was to be used, it was lowered and raised according to the direction of the foreman, who stood on the ground below, near the casting which was to be moved. The crane had been in use where the plaintiff, a foreman moulder, was working, and he had told M. tha he did not require it any more, and, while M. was moving it away, it was raised above the plaintiff's head, the cable parted, and a heavy hook attached to the cable fell and injured the plaintiff. In an action to recover damages for the injuries sustained, the jury found that the injuries were caused by the negligence of M. in hoisting the hook and the sheaf of the crane over the plaintiff's head and letting it come in contact with the drum or something unknown, thereby breaking the cable:—*Held*, that M. was a person having the charge or control of an engine or machine upon a railway or tramway within the meaning of clause 5 of sec. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160; and

the defendants were answerable for his negligence. Clause 5 was held to be much wider in its scope than as it stood in the first Ontario Act, 49 Vict. ch. 28, which dealt with this subject.

For a general discussion of the law relating to negligence of a fellow servant, where an action is brought to recover under this section of the Workmen's Compensation for Injuries Act, where there is a person in a position of superintendence whose orders resulted in injury to the plaintiff, see *Brulott* v. *Grand Trunk Pacific R. Co.*, 24 O.L.R. 154.

SUPREME COURT.

PEPPERAS *v.* LEDUC.

(11 D.L.R. 193.)

Britton, J.] [May 2.

Contracts—Illegality of—Public policy — Immoral motives — Want of consideration—Promise ex turpi causa—Breach of promise—Plaintiff's marriage to another.

Held, 1. A promise made in consideration of the cessation of illicit cohabitation is void simply for want of any consideration, so that if made in the form of an instrument under seal there may be *primâ facie* a valid contract; yet if the transaction is of such a nature as to hold out an inducement or to constitute to either party a motive to continue the connection, the instrument would be void *ex turpi causa* and no claim or defence can be maintained which requires to be supported by allegation or proof of such an agreement; hence each of the parties thereto is powerless to enforce or to set aside an agreement of this character by judicial process.

2. Damages for a breach of promise of marriage cannot be recovered when the plaintiff has subsequently married a person other than the defendant.

J. H. McCurry, for plaintiff. *G. A. McGaughey*, for defendant.

ANNOTATION ON ABOVE CASE.

The ground on which the Court refuses to enforce immoral contracts is that they are against public policy as encouraging and aiding immorality. Where the plaintiff knew that the additions which he made to a house were for the purpose of increasing the defendant's immoral trade,

the Court refused to aid in enforcing a mechanics' lien for the work done: *Pearce* v. *Brooks*, L.R. 1 Ex. 213; *Clark* v. *Hagar*, 22 Can. S.C.R. 570; *Miller* v. *Moore*, 17 W.L.R. 548 (Alta.).

In *Perkins* v. *Jones*, 7 Terr. L.R. 103, the plaintiff said to the defendant, referring to a certain named lot: "If you can get me that lot I will build." Accordingly the defendant, a builder by trade, did purchase the lot for the purpose of building a house thereon for the plaintiff; and a few days later the plaintiff entered into a written agreement respecting such lot and house, with the defendant, and paid $500 cash down. The house was intended for purposes of prostitution, as the defendant knew, and before the defendant had done anything toward building other than "brushing" the lot, the plaintiff gave notice to the defendant that she had decided not to build and demanded an immediate return of the $500 paid by her: *Held*, *per curiam*, that there had been part performance of the contract and that subsequently the plaintiff could not recover the money paid by her thereunder. *Quære*, *per* Newlands and Harvey, JJ., whether money paid under an immoral contract can be recovered back under any circumstances: *Perkins* v. *Jones* (1905), 7 Terr. L.R. 103.

The effect of illegality in the matter or purpose of an agreement is to render it wholly void of legal effect; no claim or defence can be maintained, which requires to be supported by allegation or proof of an illegal agreement: *Taylor* v. *Chester* (1869), 38 L.J.Q.B. 227, L.R. 4 Q.B. 314; *Odessa Tramways Co.* v. *Mendel* (1878), 47 L.J.C. 505, 8 Ch.D. 235. See *Hyams* v. *King* (1908), 77 L.J.K.B. 796, [1908] 2 K.B. 696; Leake on Contracts, 6th ed., 564. Either party may repudiate the agreement, with or without alleging a reason, and may afterwards justify on the ground of the illegality: *Cowan* v. *Milbourn* (1867), 36 L.J. Ex. 124, L.R. 2 Ex. 230.

The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of contrary to the real justice as between him and the plaintiff. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law, there the Court says he has no right to be assisted: Mansfield, C.J., *Holman* v. *Johnson*, 1 Cowp. 343.

Illegality which will avoid a contract as against a party will avoid it also as against his representative: *Phillpotts* v. *Phillpotts* (1850), 20 L.J. C.P. 11, 10 C.B. 85. And the effect of illegality is the same in equity as at law. A contract or instrument which fails in a court of law by reason of its illegality cannot be enforced in equity; although money has been paid and received in respect of that contract. Equitable terms can be imposed on a plaintiff seeking to set aside an illegal contract as the price of the relief he asks; but as to any claims sought to be actively enforced on the footing of an illegal contract, the defence of illegality is as available in a Court of equity as it is in a Court of law: *Thomson* v. *Thomson* (1802), 7 Ves. 470; *Re Cork and Youghal Railway* (1869), 39 L.J.C.

277, L.R. 4 Ch. 748. See *Chapman* v. *Michaelson* (1908), 78 L.J.C. 272, [1909] 1 Ch. 238. A bond or covenant or other security subsequently given for a debt originating in an illegal consideration or transaction, or for a prior security for such debt, is vitiated by the same illegality: *Fisher* v. *Bridges* (1854), 23 L.J.Q.B. 276, 3 E. & B. 642; as a bill given to a broker for his charges in effecting an illegal insurance: *Ex p. Mather* (1797), 3 Ves. 373; a bill in renewal of a bill given for a gaming debt: *Wynne* v. *Callander* (1826), 1 Russ. 293; a security given to a compounding creditor by way of illegal performance: *Geere* v. *Mare* (1863), 33 L.J. Ex. 50, 2 H. & C. 339; a bond given to the holder of a note which had been given for an illegal purpose and indorsed to the holder when overdue: *Amory* v. *Meryweather* (1824), 2 L.J.O.S.K.B. 111, 2 B. & C. 573.

A guarantee of an illegal debt is illegal and void; but a guarantee of a debt which is merely void and not illegal, as the loan of a company in excess of their borrowing powers, is valid: *Yorkshire Waggon Co.* v. *Maclure* (1881), 51 L.J.C. 253, 19 Ch.D. 478. See *Re Coltman* (1881), 51 L.J.C. 3, 19 Ch.D. 64.

The effect of illegality is the same, in whatever form the contract is framed, whether in the form of a simple contract or of a contract under seal, or of a bond with an illegal condition: Co. Lit. 206*b*; *Duvergier* v. *Fellows* (1828), 7 L.J.O.S. C.P. 15, 5 Bing. 248, (1830), 8 L.J.O.S. K.B. 270, 10 B. & C. 826, (1832), 1 Cl. & F. 45, and though the contract is apparently valid in form and matter, extrinsic evidence is always admissible in variance of or in addition to the contract in order to shew that the transaction is illegal and therefore void, even in the case of a covenant or contract under seal: *Collins* v. *Blantern* (1767), 2 Wils. 341, 1 Sm. L.C. 355. The facts shewing illegality, either by statute or common law, must be pleaded; they cannot be proved under a bare denial of the contract: Ord. XIX. rr. 15, 20. See *Willis* v. *Lovick* (1901), 70 L.J.K.B. 656, [1901] 2 K.B. 195; but where the illegality appears from the plaintiff's own evidence (as in the case of a criminal conspiracy to create a market by fictitious dealings in shares) it is the duty of the Court to take judicial notice of the fact, and to give judgment for the defendant, although the illegality is not raised by the pleadings: *Scott* v. *Brown*, [1892] 2 Q.B. 724, 61 L.J.Q.B. 738. The Courts will grant discovery in aid of the defence of illegality unless there are special circumstances of exemption: *Benyon* v. *Nettlefold* (1850), 20 L.J.C. 186, 3 Mac. & G. 94.

Money paid in consideration of an executory contract or purpose which is illegal, upon repudiation of the transaction may be recovered back, as upon a total failure of consideration; but it cannot be reclaimed after the happening of the event: *Taylor* v. *Bowers* (1876), 46 L.J.Q.B. 39, 1 Q.B.D. 291; *Wilson* v. *Strugnell* (1881), 7 Q.B.D. 548, 50 L.J.M.C. 145; *Hermann* v. *Charlesworth* (1905), 74 L.J.K.B. 620, [1905] 2 K.B. 123. Money deposited with a stakeholder upon a wagering contract may be reclaimed and recovered back after the event, at any time before the money

has been actually paid over; but not if the stakeholder has paid it over according to the event before his authority is revoked: *Howson* v. *Hancock* (1800), 8 T.R. 575.

The party seeking to recover money paid upon an illegal contract or purpose must give notice that he repudiates the transaction before it is executed, and reclaim the money, in order to entitle him to maintain an action; and merely bringing the action is not sufficient notice: *Busk* v. *Walsh* (1812), 4 Taunt. 290; *Palyart* v. *Leckie* (1817), 6 M. & S. 290.

After the execution of the illegal contract or purpose, money paid under it, whether as the consideration or in performance of the promise, cannot be recovered back; for the parties are then equally delinquent, and the rule applies that "*in pari delicto melior est conditio possidentis*": *Taylor* v. *Chester* (1869), 33 L.J.Q.B. 227, L.R. 4 Q.B. 313. The rule applies where the illegal purpose has been executed in a material part, though it remains unexecuted in another material part: *Kearley* v. *Thomson* (1890), 59 L.J.Q.B. 288, 24 Q.B.D. 742; and where it has been executed as far as possible, and further execution has become impossible: *Re Great Berlin Steamboat Co.* (1884), 54 L.J.C. 68, 26 Ch.D. 616.

The true test for determining whether or not the plaintiff and the defendant were *in pari delicto* is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party: *Simpson* v. *Bloss* (1816), 7 Taunt. 246; *Taylor* v. *Bowers* (1876), 46 L.J.Q.B. 39, 1 Q.B.D. 291; *Hyams* v. *Stuart King* (1908), 77 L.J.K.B. 796, [1908] 2 K.B. 696. But in the case of purely equitable remedies, the Court may refuse its assistance to a *particeps criminis*, who does not rely upon any part of the illegal transaction, as a person invoking the jurisdiction of the Court of Chancery must come into Court with clean hands: *Ayerst* v. *Jenkins* (1873), 42 L.J.C. 690, L.R. 16 Eq. 27. Accordingly money lost fairly at illegal gaming or wagering, and paid, cannot be recovered back: *Howson* v. *Hancock* (1800), 8 T.R. 575; *Thistlewood* v. *Cracroft* (1813), 1 M. & S. 500; *Dufour* v. *Ackland* (1830), 9 L.J.O.S. K.B. 3. So with money paid or accounted for as the price of goods sold and delivered under an illegal contract of sale: *Owens* v. *Denton* (1835), 4 L.J. Ex. 68, 1 Cr. M. & R. 711. And money paid to induce a person to become bail for another cannot be recovered back, after the purpose is completed by acceptance of the bail, whether the principal makes default or not: *Herman* v. *Jeuchner* (1885), 54 L.J.Q.B. 340, 15 Q.B.D. 561. See *Consolidated Exploration Co.* v. *Musgrave* (1899), 69 L.J.C. 11, [1900] 1 Ch. 37, which is perhaps to be supported upon the ground that the transfer of shares was *ultra vires*, and the transferee a trustee for the company.

Where money was deposited with a company's banker for the purpose of giving the company a fictitious credit, it was held that after an order was made for winding up the company the money could not be recovered back: *Re Great Berlin Steamboat Co.* (1884), 54 L.J.C. 68, 26 Ch.D. 616. Upon this principle a premium paid upon an illegal insurance, after the

risk has determined, is not recoverable. though the underwriter cannot be compelled to pay the loss: Marine Insce. Act, 1906, sec. 84; *Vandyck* v. *Hewett* (1800), 1 East 97; *Allkins* v. *Jupe* (1877), 46 L.J.C.P 824, 2 C.P.D. 375; *Harse* v. *Pearl Life Assce.* (1904), 73 L.J.K.B. 373, [1904] 1 K.B. 558. But if the premium in such case has been paid or secured by a bill only, there is no remedy on the bill, being the security for an illegal debt: *Ex p. Mather* (1797), 3 Ves. 373. So an underwriter having paid the loss under an illegal insurance cannot recover it back; and though he has only paid it to the broker of the insured, who has not paid it over: *Tenant* v. *Elliott* (1797), 1 B. & P. 3.

Upon the same principle goods or other property delivered under an illegal agreement or for an illegal purpose, may be reclaimed and recovered back so long as the agreement or purpose remains unexecuted. Where goods were delivered under a fictitious sale for the purpose of protecting the possession whilst the owner compounded with his creditors, it was held that he might repudiate the transaction before the composition had been carried out, and recover the goods from the pretended buyer, or from a subvendee to whom they had been delivered with notice of the illegal transaction: *Taylor* v. *Bowers* (1876), 46 L.J.Q.B. 39, 1 Q.B.D. 291.

But if the contract is executed and a property either general or special has passed thereby, the property must remain; and upon this ground a lien for work done upon a chattel, though under an illegal contract, is valid; *Scarfe* v. *Morgan* (1838), 7 L.J. Ex. 324, 4 M. & W. 270. Upon the same principle a conveyance of property executed upon trust for the absolute use of a woman, cannot be set aside upon the ground that it was executed in consideration of illicit cohabitation: *Ayerst* v. *Jenkins* (1873), 40 L.J.C. 690, L.R. 16 Eq. 275. See *Phillpotts* v. *Phillpotts* (1850), 20 L.J.C.P. 11, 10 C.B. 85.

No claim can be allowed for compensation or contribution between persons engaged in an illegal transaction: Jessel, M.R., *Sykes* v. *Beadon*, 48 L.J.C. 522, 11 Ch.D. 197. Where two persons had joined in an illegal wager which they won, and one of them advanced to the other his share of the winnings, which the loser failed to pay, it was held that he could not recover back the sum so advanced, because he could not maintain such claim except through the illegal contract: *Simpson* v. *Bloss* (1816), 7 Taunt. 246; Leake on Contracts, 6th ed., 569.

An exception to the rule, that money paid in execution of an illegal contract cannot be recovered back, is made where the party who paid the money acted under undue pressure or influence on the part of the receiver, and therefore was not *in pari delicto* with the latter: *Lowry* v. *Bourdieu* (1780), 2 Dougl. 468; *Williams* v. *Bayley* (1866), 35 L.J.C. 717, L.R. 1 H.L. 200; *Jones* v. *Merionethshire Perm. Bg. Soc.* (1891), 61 L.J.C. 138, (1892), 1 Ch. 173. And this rule has been applied to money extorted by an abuse of legal proceedings; as where a party paid a sum of money to obtain his release from an arrest under a colourable legal process: *De Cadaval* (*Duke*) v. *Collins* (1836), 5 L.J.K.B. 171, 4 A. & E. 858.

Another exception is, where a statute has been passed with the object of protecting a particular class of persons, the members of that class may recover payments made by them. Thus the fees of a sheriff are fixed by statute, and an overpayment may be recovered: *Woodgate* v. *Knatchbull* (1787), 2 T.R. 148, *Dew* v. *Parsons* (1819), 2 B. & A. 562. So money paid in excess of the legal interest allowed by the statutes against usury could be recovered back: *Ashley* v. *Reynolds* (1731), 2 Stra. 915; *Bromley* v. *Holland* (1802), 7 Ves. 3; as now is the case where a moneylender charges a higher rate of interest than the Court sanctions in an application under the Moneylenders Act, 1900 (Imp.): *Saunders* v. *Newbold* (1904), 74 L.J.C. 120, (1905), 1 Ch. 260, affirmed *sub nom. Samuel* v. *Newbold* (1906), 75 L.J.C. 705, [1906] A.C. 461.

Province of Manitoba.

COURT OF APPEAL.

PETITT *v.* CANADIAN NORTHERN R. CO. (No. 2).
(11 D.L.R. 316.)

Howell, C.J.M., Perdue, and Cameron, JJ.A.] [May 6.

Damages—Death—Pain and suffering—Accidental death—Recovery by decedent's family—Elements.

In an action by the widow and administratrix of the deceased for damages under the Manitoba Act, for compensation to families of persons killed by accident (R.S.M. 1902, ch. 31), the measure should be for the widow's pecuniary loss sustained because of the death, in a sum that will give her the physical comfort which she had at the time of her husband's death out of his labour earnings to be continued during the expectancy of life, subject to the accidents of health and employment; but not covering the physical and mental suffering of the deceased nor the mental sufferings of the plaintiff for the loss of her husband.

Blake v. *Midland*, 18 Q.B. 93, and *C.P.R. Co.* v. *Robinson*, 14 Can. S.C.R. 105, referred to; *Petitt* v. *Canadian Northern R. Co.* (No. 1), 7 D.L.R. 645, varied.

Statutes—Statutes adopted from England—Effect of English decisions.

A statute practically copied from an English Act is taken subject to judicial decisions upon it given in England.

Trimble v. *Hill*, 5 A.C. 342, referred to; *Petitt* v. *Canadian Northern Northern R. Co.* (No. 1), 7 D.L.R. 645, varied.

Damages—Death—Loss of services—Accidental death—Recovery by decedent's family—Excessiveness.

$5,000 is an excessive recovery by a surviving wife under the Manitoba Act (R.S.M. ch. 31) for accidental death of her husband, and the recovery should be reduced to $3,000, where he was 65 years old and earned only $45 monthly, and she was 57 years old, though he was apparently a strong, healthy man.

Rowley v. *London*, L.R. 8 Ex. 221, and *Lamonde* v. *G.T.R. Co.*, 16 O.L.R. 365, referred to; *Petitt* v. *Canadian Northern R. Co.* (No. 1), 7 D.L.R. 645, varied.

O. H. Clark, K.C., for defendants. *W. H. Trueman*, for plaintiff.

Province of Saskatchewan.

SUPREME COURT.

Re John P. French.

(11 D.L.R. 379.)

Haultain, C.J., Newlands, and Lamont, JJ.] [April 10.

Land titles (Torrens system) — First registration—Failure to establish legal or equitable title.

Held, 1. Under the Land Titles Act, R.S.S. 1909, ch. 41, an applicant is not entitled to be registered as owner where he fails to establish that he has any estate either legal or equitable in the land in question.

2. In Saskatchewan, a Master of Titles has no jurisdiction, on a reference to him by a registrar, to pass upon and direct the registration of a title which depends for its validity solely on the application of equitable doctrines, since a purely equitable claim not evidenced by any document cannot be made effective until a Court of competent jurisdiction has declared the claimant entitled to an interest in the land.

William Beattie, for appellant. *A. E. Doak*, for respondent.

Book Reviews.

The Canadian Annual Digest, 1912. Toronto: Canada Law Book Co., Ltd. 1913.

This Digest contains all Canadian Reported Cases for last year. It is arranged according to the standard law classification inaugurated in the year previous. The system adopted is one that gives great assistance to the practitioner in looking up decided cases, so that he may know when he has exhausted all that are to be found in the reports. The permanent main titles and subdivisions are continued so far as the matter allows. The number feature in connection with this digest is helpful. The bracketed letters and numbers being permanent classification signs. An explanation of the system is given in the publishers' note. The profession will appreciate the care and thoroughness which characterize this digest.

The Law of Automobiles. By ZENOPHON P. HUDDY, LL.B., of the New York Bar. Third edition by HOWARD C. JOYCE. Albany, N.Y.: Matthew Bender & Company. 1912. Arthur Poole & Co., agents for Canada.

The "Road hog," as motors used to be called in England, a nuisance as well as a convenience, has come to stay. The value of this new mode of transportation is not confined to those who use them, for it has become a source of profit to lawyers and law publishers, as is evidenced by the fact that three editions of this work have been issued since 1906, indicating the amount of litigation which the vagaries of this new invention have given rise to. The author's work has met with the approval of the profession, and is one which every up-to-date library should have. A selection is given of Ontario cases; but we think a little more attention should be paid to this in a new edition.

Wertheimer's Law Relating to Clubs. By A. W. CHASTER, Barrister-at-law. Fourth edition. London: Stevens & Haynes, Bell Yard, Temple Bar. 1913.

Clubs are more in evidence year by year. The first edition of this book was published in 1885, and still another edition has now been called for. Every lawyer in this country may not need the book, but all law libraries will be expected to have it. The matter is excellently well put together.

Bench and Bar

Mr. A. H. O'Brien, who recently resigned his position as Law Clerk of the House of Commons, has been appointed Counsel to the Speaker of the House. This is the first time, so far as we can ascertain, that this title has been given in Canada, and although Mr. O'Brien has acted as the Speaker's Counsel for some time he is to be congratulated upon being the first Parliamentary officer to be given the title. Mr. O'Brien, who has been a law officer of Parliament for 17 years, was formerly assistant editor of this Journal and has always been a contributor. He is also well and favourably known to the profession as the author of "O'Brien's Conveyancer," the standard authority on that subject; also of "Barron & O'Brien on Bills of Sale and Chattel Mortgages," etc.

The position of general counsel to the Canadian Pacific is now taken, on Mr. Creelman's retirement, by Edward W. Beatty. The reputation which Mr. Beatty acquired for himself, both as a lawyer and as a business man, shews the wisdom of the company in appointing him to that very responsible and arduous position. Mr. Beatty was born at Thorold, Ont., in 1877, is a graduate of Toronto University, and hails from Osgoode Hall as his legal birthplace. He was called to the Bar in 1901. The same year went to Montreal, and became general solicitor of the C.P.R. in 1910. We predict a successful career for him in his new position.

We recently came across a statement of claim in which the following clauses occurred, and were stated in the words and figures following:—

"8. On or about the 29th day of August, 1910, the shareholders voted to reduce the directorate from 6 to 5, thus eliminating the victorious plaintiff.

9. Beath then sued on his 10,000 shares, similarly succeeded, and was also eliminated, after which Harris of Orillia was elected to take his place.

10. Maclennan having successfully sued, met the official axe, and the office of the company moved to Orillia.

11. Orillia proved too hot for the president and his henchmen, after Harris issued his writ against the company, and North Bay now is the head office."

Saunders, Stephen, Bullen, Leake, and Metcalfe, and all that race would turn in their graves were they to behold the heights, or shall we say, the depths, to which modern pleadings have come.

Such pleading as the above runs a close race with the rhetorical efforts of a former Irish member of the Ontario Bar, who was accustomed to startle and amuse the profession some years ago with similar feats of graphic pleading. The rapid way in which individuals are said to be eliminated and meet "the official axe" and "the hot time in the old town," so succinctly described betoken an exceptional genius for forensic pleading which is not too often met with—Why, because Maclennan was decapitated, "the company moved to Orillia" is not explained, and from an artistic point of view is very properly left to the imagination.

As we go to press word comes of the decease of Mr. John Westlake, K.C. Professor Westlake—for he will always be "Professor" in the minds of his old Cambridge pupils—was not only a distinguished lawyer: he had a spirit open to the appeal of every humane and liberal cause. His vast stores of learning were available to the inquiries of the veriest tyros in juridical science. His saturation in the legal atmosphere of Continental thinkers was (especially in a practising barrister) amazing. His sanity and balance were no less remarkable than were his enthusiasms. He protested equally against the Russian coercion of Finland and the Italian coercion of Turkey. As an original founder of the Institute of International Law, he was the doyen of international lawyers. It is nearly sixty years since, as a young wrangler, he wrote "A Treatise on Private International Law." For condensed hard thinking, scientific consistency, and cogent sense, the treatise has never been surpassed; probably never equalled. In the domain of public international law he was less successful. His extremely subtle intellect was less suited to grappling with broad questions of statecraft. But in that most difficult and delicate tissue of problems which is presented by the conflict of laws, he was unapproachable.—*Law Magazine and Review.*