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CHARACTER OF SERVANTS. BLACKLISTING.

1. Master not bound to give a character to his servant.

2. Master's duty as affected by statute.

3. Blacklisting. Generally.

4. Notices exchanged between different employers in the same line of business.

5. Notices circulated amongst the coemployes of the persons to which they relate.

6. Statutes with regard to blacklisting.

1. Master not bound to give a character to his servant.—The doctrine of the English and American courts is, that a master is morally, but not legally bound to give a character to his servant, when he is discharged from or leaves the employment[1]. It follows, therefore, that the master's refusal to furnish a character does not constitute a cause of action in favour of the servant, however faithfully and efficiently he may have performed his duties, and however clear and specific may be the proof of the injury resulting from such refusal[2]. The withholding of the re-

[1] *Pullman* v. *Hill* [1891] 1 Q.B. 524, 60 L.J.Q.B.N.S. 299, 64 L.T.N.S. 691, 39 Week. Rep. 263, per Lord Esher.

For some remarks as to the injustice of refusing a character to a faithful servant, see Paley's Moral and Political Philosophy, Book III, Part 1, ch 11.

A modern text-writer has undertaken to justify the common law rule in the following manner: "The reason for this rule is to be found in the consideration, that, if a master were compelled to give a character, it would necessarily follow that he must be held to the proof of the character he gives. The burden thus cast on the master would often give rise either to much litigation on the one hand, or to the giving of false characters on the other." Parkyn, Mast. & S. 132. No authorities are cited for this theory of the learned author's. It is not easy to see why the consequence here held out in terrorem should necessarily follow, if the present rule were changed. So far as appears, the burden of proving the falsity of the character given would in any event continue to rest on the servant.

[2] The earliest reported case in which an explicit recognition of this rule is found seems to be *Carroll* v. *Bird*, (1800) 3 Esp. 201, 6 R.R. 824, 17 Eng. Rul. Cas. 245, in which it was shewn that, after the plaintiff's

quested statement cannot be treated, for the purposes of enabling the servant to maintain an action, as being an act which is equivalent to a slander[3].

The extreme severity with which the rule may sometimes operate has recently been shewn in a very striking manner by its application in that class of cases in which several employers in a certain line of business enter into a mutual agreement that no person who has previously been in the service of one of them shall be hired by any other, unless he can produce what is known as a "clearance card" from his last employer. Although it is evident that an arrangement of this kind may render it extremely difficult, or even virtually impossible, for a servant who has not received the requisite certificate to obtain work similar to that which he has been doing the courts have declined to qualify the common-law doctrine[4]. The lawful act of refusing the clearance card is not converted into a tort by the fact that the refusal in

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wife was dismissed from defendant's service, another party, who was willing to employ her upon the presentation of satisfactory information regarding her character, declined to take her into his service, on account of defendant's failure to give her a character. Upon the admission of the plaintiff's counsel that he had no precedent for such an action, Lord Kenyon said that there was no case; nor could the action be supported by law. By some old statutes, regulations had been established respecting the character of labourers; but in the case of domestic and menial servants, there was no law to compel the master to give the servant a character. . might be a duty which his feelings might prompt him to perform; but there was no law to enforce the doing of it.

That the obligation of a master to give a servant a character belongs to the imperfect class and is not enforceable by law, has been held in Scotland also. *Fell* v. *Ashburton*, (Sc. Ct. of Sess. 1809) Fac. Dec. 446, cited in Fraser, M. & S. p. 129.

To the same general effect see *Moult* v. *Holliday* (1898) 1 Q.B. 125, (per Hawkins, J., arguendo); *Limbeck* v. *Gerry* (1896) 15 Misc. 663, 30 N.Y. Supp. 95; and cases cited in the following notes.

[3] *New York, C. & St. L.R. Co.* v. *Schaffer* (1902) 65 Ohio St. 414 (418, 419) 62 L.R.A. 931, 62 N.E. 1036.

[4] In *Cleveland, C.C. & St. L.R. Co.* v. *Jenkins* (1898) 174 Ill. 398, 51 N.E. 811, the court thus discussed the rights of the servant: "From the evidence produced on this question, and from the judicial notice which we take of the ordinary general management of railroads, it is apparent that what is known as a clearance card is simply a letter, be it good, bad or indifferent, given to an employé at the time of his discharge or end of service, shewing the cause of such discharge or voluntary quittance, the length of time of service, his capacity, and such other facts as would give to those concerned information of his former employment. Such a card is in no sense a letter of recommendation, and in many cases might, and probably would, be of a form and character which the holder would hesitate and decline to present to any person to whom he was making applica-

such cases is the result of the mutual understanding previously arrived at between the employers[5].

Both on principle and authority, it is clear that, if the existence of a custom on the part of employers of a certain class to give characters to their servants is proved, this custom enters into every contract of service, and a refusal to give a character

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tion for employment. A letter of recommendation, on the contrary, is, as the term implies, a letter commending the former services of the holder, and speaking of him in such terms as would tend to bring such services to the favourable notice of those to whom he might apply for employment. . . . An action for failure to give an employé either of the above forms of letters must be based either upon the common law or the statute, or arise out of the contract of employment, or be required by usage or custom. By the common law no such duty was imposed upon the employer. . . . A character is not given for the benefit of the ex-employé, although he may be either injured or benefited by reason of such character being given; nor does the right to give such a character arise out of a duty to the employé, but the right or moral duty, such as it is, is a duty in the interest of society and the public good, and neither the proposed employer nor the employé has a legal right to demand it. Such communications have been made not only by an ex-employer, but also by any person possessing the information and the belief that such information is true. They may be made either with or without request, in the interest of the public good and as a moral duty to society, when the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such a relation to him as to make it a reasonable duty, or at least proper, that he should give the information." In the lower court, (see (1897) 70 Ill. App. 415), the decision which was reversed by the above judgment, was put upon the ground that the evidence warranted the inference that there was a general custom prevailing on all roads, including that of the defendant, to issue, on discharge, and demand the presentation before employment, of clearance cards. It was admitted that, in the absence of proof of such a custom, the action could not have been maintained. But it was held that, as the existence of the custom must be taken as proved, and as the evidence shewed that the railroad company had no other causes of complaint against the employé than that several indictments were brought against him, under all of which he had been found "not guilty," and that previously he had served the company with a good record for ten years, the company had violated its duty in refusing to give him a clearance card.

In *Hebner* v. *Great Northern R. Co.* (1900) 78 Minn. 289, 80 N.W. 1128, the court remarked that "the real purpose of the service card is to assist men to obtain employment when going from one company to another, although such a card might prove a very serious obstacle to securing a new position when presented by a man discharged for cause, or supposed cause, because the reason for such discharge would be stated. It is also beyond question that such a card may or may not be shewn by one seeking employment, for this is a matter optional with the holder."

[5] In *New York, C. & St. L.R. Co.* v. *Schaffer* (1902) 62 L.R.A. 931, 62 N.E. 1036, 65 Ohio St. 414, commenting upon the charge of the trial judge to the jury, that the plaintiff could recover, if the defendant, in pursuance

constitutes a breach of duty for which an action will lie[6]. To justify the admission of an exception to the general rule on this ground, it must appear that the alleged custom was established, uniform, general, and presumptively known to the parties

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of conspiracy with other railway companies, refused to furnish a statement of his record, with intent to prevent the plaintiff from obtaining employment from any or all of those companies, the court said: "It is the undoubted and unabridged natural right of every individual not to employ, or to refuse to employ, whomsoever he may wish, and he cannot be called upon to answer to the public or to individuals for his judgment. Nor can the motives which prompt his action be considered. In general terms, such right is as much inherent in corporate bodies as in natural persons. But whatever one person may lawfully do, two or more persons may join in doing. There can be no such thing as a conspiracy to do a lawful thing unless by unlawful means. If one railroad company may lawfully refuse to continue in its employ a person who has been engaged in a war upon its interests, called a strike, or who has shewn himself to be negligent, incompetent, inefficient or dishonest, there does not appear to be any good reason why a number of railroad companies might not agree among themselves to not employ such a person. . . . If the defendant, by fraud, falsehood, or force, had brought about a refusal to employ the plaintiff, it would have committed a positive wrong against the plaintiff which would have been actionable. Of this, however, there is not a scintilla of proof. But an agreement to tell the truth about the plaintiff, or a refusal to say anything about him, would not make an otherwise legal concert of action an illegal one and authorize a recovery against the defendant."

In *McDonald* v. *Illinois C.R. Co.* (1900) 187 Ill. 529, 58 N.E. 463, the declaration after alleging a conspiracy between the railway companies having lines running into Chicago, to the effect that the employés of any and all of said companies would not be employed by any of them without a clearance given by the railway company by which any employé was last employed, alleged that the defendant company refused to give the plaintiff employé such an instrument as would "enable him to obtain employment in the railroad business." The plaintiff insisted that the point for decision was, whether it was lawful for all the employers in any line of industry to combine for the purpose of punishing a man who leaves their service during a strike by refusing him employment, unless his former master gives his consent to his employment. But the court held that no such question was presented by the pleadings and that, as there was no allegation that the company refused to grant the plaintiff a "clearance card," setting forth truthfully all the facts proper to be stated in a clearance card," or that it had been agreed by the two defendant companies that the consent of either should be the prerequisite of employment by the other, the declaration did not state a cause of action. This ruling in so far as it implies that, if the declaration had embraced these allegations it would have stated a cause of action, is inconsistent with the last mentioned case, and is not easy to reconcile with the decision of the same court, cited in note 4, supra.

[6] *Hundley* v. *Louisville & N.R. Co.* 105 Ky. 162, 48 S.W. 429, and cases cited in following notes.

to the contract[7], and not contrary to good morals or public policy[8].

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[7] In *Cleveland, C.C. & St. L.R. Co.* v. *Jenkins* (1898) 174 Ill. 398, the following points were decided: that it is the duty of a court to hold, as a matter of law, that an alleged usage or custom is not established where the proof consists of a few isolated transactions; that a letter of recommendation by a railway company to an employé, which is purely personal, and shews on its face it is not a general form, which would be given to other employés does not tend to establish a custom on the part of the company to issue clearance cards to employés leaving the service; that the fact of a railway company's requiring the production of certificates of recommendation by persons seeking employment does not create any legal duty on its part to issue the same to retiring employés, nor tend to establish a custom of issuing them.

[8] In *Thornton* v. *Suffolk Mfg. Co.* (1852) 10 Cush. 382, a discharged employé relied on the employer's breach of an implied agreement arising from custom to the effect that if she faithfully performed her duties for the term of at least twelve months, she should, upon giving a fortnight's notice, be entitled to leave, and to receive from her employers "a line" or honourable discharge, by means of which she might obtain employment in the other mills in a given city. The court in sustaining a non-suit said: "The ground relied on is, in consideration of services, the employer engages that, if the operative remains in the service a certain time, he would give her an honourable discharge; or in other words, that her service and conduct have been good and satisfactory. Were such a contract made in express terms, intended to be absolute, it seems to us that it would be bad in law, as plainly contrary to good morals and public policy. Such a discharge is a certificate of a fact; but if the fact is otherwise, if the conduct of the operative has not been satisfactory it would be the certificate of a falsehood, tending to mislead and not to inform other employers. Besides, if such custom were general, such a discharge would be utterly useless to other employers and utterly useless to the receiver. It could give other employers no information upon which they could rely. To avoid such illegality, it must be taken with some limitation and qualification, to wit, that the conduct of the operative has been such in all respects, including not only skill and industry in the employment, but conduct in point of morals, temper, language, and deportment, and the like, so that a certificate of good character would be true. Then it stands upon the same footing with the custom which governs most respectable persons in society, upon the termination of the employment of a servant, to give him a certificate of good character if entitled to it. In such case, it is for the employer to give or withhold such certificate, according to the conviction of the truth, arising from his own personal knowledge or from other sources. . . If an assurance of an employer on engaging a servant, that at the end of the time he will give him a certificate of good character, if he should then think him entitled to it, could in any respect be deemed a contract, and not the promise of an ordinary act of courtesy, it would be no breach of such contract, to aver and prove that the servant, after the termination of the service, demanded such a certificate and was refused it." It was also observed: "The fact that on account of a peculiar situation of the various companies in Lowell, in relation to each other, the common interest they have in maintaining their discipline, the certificates of good character is of so much more importance to the servant, than elsewhere, can make no difference to the servant, in regard to his rights. In the same proportion in which it is important to the servant out of employ, to

In cases where a servant has been successful in an action for wrongful dismissal, it is apparently proper, as a general rule, for the trial judge to order the master to restore a character handed to him by the servant when he entered the employment[9]. But a custom by which an employer whose servant is leaving him to take another situation should be bound to hand over to the new employer the character brought by the servant, has been pronounced unreasonable[10].

9. Master's duty as affected by statute.—In some jurisdictions the common law rule has been modified by statutes applicable either to employers generally, or to employers of a particular class; and there seems to be good reason to anticipate that enactments of this type will be greatly multiplied in coming years. The desirability of thus supplying the deficiencies of the common law cannot be consistently disputed by anyone who is of opinion that it is proper to protect employés by legislation against "blacklisting." See § 15, *post*. Manifestly the refusal to give a character may often be virtually the equivalent of "blacklisting" so far as regards the injury inflicted on the servant. The statutes which have already been passed may be conveniently classified under two heads:

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hold a certificate of good character and honourable discharge, it is important to corporations, their agents and servants, and all interested in them, to be cautious and conscientious in giving such discharges and recommendations, when they are honestly deserved, and in withholding them when they are not."

[9] Such an order was made by Hill, J., in *Gordon* v. *Potter* (1859) 1 F. & F. 644.

[10] In *Moult* v. *Halliday*, 77 L.T.N.S. 794 [1898] 1 Q.B. 125, 67 L.J.Q.B.N.S. 451, 46 Week. Rep. 318, 63 J.P. 8, Hawkins, J., thus referred to a point which had been incidentally discussed in the lower court: "I cannot say, I think that would be a reasonable custom. There is no obligation on a master or mistress to give a character to a servant, but, if a character is given, it should be a true one. A character may be true this month and false next. A servant may come into service with a good character, and yet during the first month circumstances may come to the master's knowledge which shew that it was undeserved and should be forfeited. It would be a scandalous thing if the master was bound after that to hand over the character which he knew was false. If the good character which the servant brought with her is handed over, it must be handed over in good faith. I think, therefore, that such a custom would be unreasonable, and, indeed, not honest, and therefore bad."

(*a*) Those which cover both the cases in which servants have been discharged, and the cases in which they have voluntarily left the employment[1].

(*b*) Those which deal only with the duty of employers to servants whom they have discharged[2].

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[1] A very comprehensive specimen of this class is the Employers and Employés Act, 1890, of Victoria (Australia), in which it is provided, under the penalties specified:

§§ 20, 21. That every servant shall receive at the termination of his service a certificate of discharge.

§ 22. That the servant shall produce the certificate on any new hiring.

§ 23. That a servant shall not be hired without the production of the certificate.

§ 24. That false certificates shall not be given.

Nearly two hundred years ago it was provided by the Irish statute, 2 Geo. 1, chap. 17, § 4, that "on the discharge or putting away of any servant from his or her service, or upon such servant's regularly leaving his or her service, the master or mistress of such servant shall give a certificate in writing under his or her hand, tnat such person who is therein named was his or her servant, and that he or she is discharged from the said service, and shall in the said discharge certify, if desired, or such master or mistress think fit, the behavior of such servant." This statute, however, seems to have remained virtually a dead letter for a century and a half, as the court stated in *Handley* v. *Moffatt* (1873) Ir. R. 7 C.L. 104, 21 W.R. 231, (see note 3, infra), that no action in which its provisions had been relied upon had been brought during that period.

[2] *Georgia*. By a statute passed in 1890 (Acts 1890-91, Vol. 1, p. 188) railroad, express, and telegraph companies were required to give to their discharged employés or agents the causes of their removal or discharge, when discharged or removed, and the amount of $5,000 was fixed as the penalty or damages for noncompliance with this requirement. In *Wallace* v. *Georgia &c. R. Co.* (1893) 94 Ga. 732, 22 S.E. 579, this act was declared unconstitutional. By the provision now in force (Code of 1895, § 1875) it is enacted that any employer, after having discharged any employé, shall, upon written demand by such employé, furnish to him, within ten days from the application, a full statement in writing of the cause of his discharge, and that, if any employer shall refuse within ten days after demand to furnish such statement, it shall be ever after unlawful for him to furnish any statement of the cause of such discharge to any person or corporation, or in any way to blacklist or to prevent such discharged person from procuring employment elsewhere. The penalty of treble damages, to be recovered in a civil action, is imposed for a breach of this provision (§ 1874).

Indiana. The enactment in Horner's Ann. Stat. (1901) § 5206 r. 3 is in part similar to that in the second of the Georgia statutes. But it is also provided that the written cause of discharge, when furnished at the request of the discharged employé shall never be used as the cause for an action for slander or libel either civil or criminal against the employer.

Kansas. By Gen. Stat. Dassler (1901) §§ 2422-2423 employers of labour are required, upon the demand of a discharged employé, to furnish in writing the true cause or reason for the discharge. Any employer who violates the provisions of the Act is declared to be guilty of a misdemeanour, and also liable to the party injured for treble damages.

Where a statute of this kind merely imposes a penalty for its violation, the question whether a servant who has been injured by such violation can maintain an action for damages against the delinquent employer is determined with reference to the considerations discussed in § 800, of the writer's treatise on Master and Servant[3].

Montana. The provisions of the Political Code, (1895) § 3392, are essentially the same as those in the second Georgia statute.

Ohio. The same description is applicable to the statute in this State, (Ohio Laws, Vol. 87, § 1).

By §128 (1) of the English Merchant Shipping Act, 1894, (57 & 58 Vict. ch. 60) it is provided, under penalty, that the master shall sign and give to a seaman discharged from his ship either on his discharge or on payment of his wages, a certificate of his discharge in a form approved by the Board of Trade, specifying the period of his service and the time and place of his discharge.

The same section (cl. 2) also prescribes that the master shall, upon the discharge of every certificated officer whose certificate of competency has been delivered to and retained by him return the certificate to the officer.

§ 129(1) provides that where a seaman is discharged before a superintendent the master shall make and sign, in a form approved by the Board of Trade, a report of the conduct, character, and qualifications of the seaman discharged, or may state in the said form that he declines to give any opinion upon such particulars or upon any of them, and the superintendent before whom the discharge is made shall, if the seamen desires, give to him or indorse on his certificate of discharge a copy of such report (in this Act referred to as the report of character).

The first of the above paragraphs is substantially the same as § 172 of the Merchant Shipping Act, 1854, (17 & 18 Vict. c. 104).

By U.S. Rep. Stat. it is provided: § 4551. That, upon the discharge of any seaman, the master of the ship shall sign and give him a certificate of discharge, specifying the period of his service and the time and place of his discharge, in a prescribed form.

§ 4453. That, upon every discharge effected before a shipping commissioner, the master shall make and sign, in a prescribed form, a report of the conduct, character and qualifications of the person discharged.

[3] In *Handley* v. *Moffatt*, (1873) Ir. R. 7 C.L. 104, 21 W.R. 231, where an action was brought for improperly dismissing a servant without giving him a certificate of character, as prescribed by the statute referred to in note 1, supra, it was shewn that the statute also provided that, if the master or mistress refused to give a discharge, the servant might procure a certificate from a justice of the peace or chief magistrate of the town, "to all intents and purposes as good as if the same had been given by the master or mistress." For this reason, it was held that the Act which created the duty also gave the remedy for its violation, and that the party aggrieved had no other.

In *Vallance* v. *Falle*, (1884) L.R. 13 Q.B. Div. 109, 53 L.J.Q.B.N.S. 459, 51 L.T.N.S. 158, 32 Week. Rep. 769, 5 Asp. Mar. L. Cas. 280, 48 J.P. 519, it was held that the only remedy for a breach of the duty imposed by

3. Blacklisting. Generally.—In several of the reported cases the remedial rights of servants who have suffered damage from the publication of their names in those circulars or notices which are now commonly known as "blacklists" have been determined with reference to the principles of the law of libel. But as the subject has been dealt with from other standpoints also, and a peculiar interest attaches to it, as one of the characteristic incidents of the conditions created by the industrial developments of modern times, it will be of interest to the profession to bring together all the decisions, English, Canadian, and American, in which its various juridical aspects have been discussed.

In its broadest sense the expression "blacklist" may be said to denote a document by means of which A., either voluntarily, or, as is most frequently the case, in pursuance of a previous arrangement, communicates to B. certain information about C., which is likely to prevent B. from entering into business relations with C. This description is comprehensive enough to cover the posting of workmen by labour organizations. But this aspect of "blacklisting" is more appropriately treated under the head of Trade Unions. The only species of "blacklist" with which we shall deal in this article is that which is issued by an employer of labour, with the object of rendering it more difficult for the persons mentioned in it to procure work. The cases relating to each of the two forms in which such a "blacklist" is published are reviewed in the following sections.

4. Notices exchanged between different employers in the same line of business.—It is to documents of this kind that the term "blacklists" is most commonly applied[1]. The cases in which their legal

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the provision of the English Merchant Shipping Act of 1854, which is referred to in note 1, supra, was by proceedings for the penalty specified.
In *Crall* v. *Toledo & O.C.R. Co.* 7 Ohio C.C. 132, a similar decision was rendered with respect to the statute of Ohio.

[1] In *State ex rel. Schaffer* v. *Justus*, 85 Minn. 279, 56 L.R.A. 75', 88 N.W. 759, the court observed: "Conceding that the word 'blacklist' . . . has no well-defined meaning in the law, either by statute or judicial expression, the general understanding of the term is that it has reference to the practice of one employer presenting to another the names of employés for the purpose of furnishing information concerning their standing as employés.

effect has been discussed may be conveniently arranged under four distinct heads, which have reference to the nature of the remedy sought by the servant.

(*a*) *Actions for libel.*—Under the general principles of the law of libel, it is clear that, where a notice shewing the unfitness of a discharged servant for the position he held is sent by his former employer to other employers in the same line of business, without malice, and for the sole purpose of enabling them to avoid the employment of unsuitable persons, the publication must be regarded as privileged, as being made *bonâ fide* upon a subject-matter in which the party communicating the information has an interest, or in reference to which he has a duty, to persons having a corresponding interest or duty[2]. On the other hand the privilege of the occasion will not protect an employer who inserts in a notice of this description a defamatory statement which he knows, or should know, to be false[3].

[2] In *Wabash R. Co.* v. *Young* (1904) 162 Ind. 102, 69 N.E. 1003, a declaration which alleged that the appellant railway company "blacklisted" the appellee, by informing another railway company that he was a "labour agitator," was held not to describe such malicious interference with the appellee's business as would create a liability at common law. An analysis of the judgment of the court discloses the following grounds for its decision: (1) That there was no averment that a charge of this nature was calculated to injure the appellee, or that any odium attached to members of such orders or to labour agitators; (2) That the charge was not libelous per se, as implying the use of unlawful or improper means to promote the interests of labouring men; (3) That no connection was shewn between the alleged statement and the failure of the appellee to obtain employment or his loss of any position; (4) That for aught that appeared in the declaration, the statement made concerning the appellee was true, and, if it was true, it could not render the appellant liable; (5) That the information given to the second railway company was not volunteered by the appellant, but was given in answer to an inquiry.

The general phraseology used in the text to express the quality of a privileged communication is taken from the judgment of Lord Campbell in *Harrison* v. *Bush* (1855) 5 El. & Bl. 344.

[3] An action was held to be maintainable for sending the following printed circular to a number of employers following the same business as the plaintiff's master: "John Lally, an apprentice in my shop, not out of his time, quit work without cause on August 1. If he is working for you now, or applies for work, you will understand the situation. Article eleven of the by-laws covers the case." *Lally* v. *Cantwell* (1890) 40 Mo. App. 44 (45) (former appeal, 30 Mo. App. 524, where it was held that the petition stated a good cause of action). The court said that the word "quit" implied "wrongfully quit," a false statement, as the plaintiff had not been legally bound as an apprentice, and could quit at any time.

(*b*) ***Actions for conspiracy.***—In the absence of proof that the agreement in pursuance of which the "blacklist" in question was sent out by his employer was entered into for a malicious purpose, the inclusion in it of a true statement to the effect that a certain servant participated in a strike does not furnish any ground for an action for conspiracy although, as a result of the "blacklisting," he was unable to procure or retain work under other employers[4].

(*c*) *Actions on the case.*—The effect of several decisions seems to be, that, even if a statement inserted in a certain "blacklist" was not libellous, and the agreement in pursuance of which it was circulated was not an unlawful conspiracy, a servant who has been injured from its publication is entitled to recover damages in a special action on the case, if it was false, and its false-

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[4] *Jenkinson* v. *Nield* (Q.B.D. 1892) 8 Times L.R. 540. The court held that the action came within the principle of *Mogul S. Co.* v. *McGregor* (1892) A.C. 51. There was no evidence, it was said, that the defendants were actuated by any other motive than self interest. If that were so, and they were not desirous of injuring the plaintiff, their conduct was not actionable.

In *Atkins* v. *W. & A. Fletcher Co.* (N.J. Eq.) 55 Atl. 1074, the members of a striking labour union attempted to procure an injunction for the purpose of preventing interference by the defendant with "picketing" by the members of the union. The bill alleged that the members of a certain Trades Association, including the defendant, had conspired together to prevent the employés discharged by defendant for striking from receiving employment by any of the members of the association. This allegation was declared to be based upon the erroneous idea that employers have not the right to combine freely to refuse employment to any kind or class of workmen precisely as employés have a right to combine freely to refuse to be employed by any employer who sees fit to employ workmen of whom they disapprove, or in any respect to conduct his business contrary to their views.

In *Worthington* v. *Waring* (1892) 157 Mass. 421, 20 L.R.A. 342, 32 N.E. 744, the petitioners, who had been employed as weavers in a mill owned by a corporation of which the defendants were the treasurer and superintendent, left their work after their demand for higher wages had been refused. The defendants then sent their names on a "black list" to the officers of other mills in the vicinity, informing them that petitioners had left on a strike. The petition alleged that the defendants and the officers of the other mills had thereupon conspired together not to employ the petitioners, with intent to compel them either to go without work in the vicinity or to go back to work at their former place at such wages as that corporation should see fit to pay them. It was held, (1) That striking employés whose names are put by their employers on a "black list" which is sent to other employers in the same city, with whom a combination has been made by an agreement not to employ "blacklisted" employés of other employers, cannot unite in an action against the employers, but

hood was known, either actually or constructively, to the employer who procured its insertion[5].

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if any right of action exists, it is in favour of each one separately; and, (2) That equity will not sustain the "blacklisting" of striking employés in order to prevent their employment by other members of an employers' association, nor will it compel the former employers to reinstate them or procure for them employment with other persons; but their remedy, if any, is in an action at law.

In *Bradley* v. *Pierson*, 148 Pa. 502, 24 Atl. 65, an action was brought by striking employés for damages resulting from their failure to obtain employment, in consequence of the distribution of "black list" circulars by their former employer. But as it appeared that an association of which the employés were members approved of their action in quitting, and paid them wages while they were out of work, the court said that the plaintiffs could not recover on the facts, and that it was therefore useless to discuss the law of the case.

Compare the cases cited in § 1, note 5, ante, as to the liability of employers who agree not to hire servants who have not received "clearance cards."

[5] In *Blumenthal* v. *Shaw* (1897) 23 C.C.A. 590, 39 U.S. App. 490, 77 Fed 954, the facts were as follows: Prior to the transfer of a business by M. to B. the defendant, a firm resident in another state, S., the plaintiff, a minor, and S.'s father entered into an agreement with M. whereby S. entered into the service of M. as an apprentice for a term of years. The parties regarded the agreement as though it were a valid statutory indenture of apprenticeship, although in fact it was not. When B. took over the business S. remained with them under the agreement. Subsequently S. was summarily discharged by P. the general foreman of the defendant. P. then sent out notices to other manufacturers in the trade in W., stating that S., an apprentice, had left without cause, and requesting that S. should not be employed. These notices were sent out in pursuance of an understanding among the manufacturers in the city that none of them should employ an apprentice belonging to another concern. It was shewn that S. had thereafter been dismissed from two factories where he had been employed, because of these notices. It also appeared that S. had applied to P. for "discharge papers" and had been refused. S. brought a special action on the case against F. B. & Co. to recover damages for the injury which he had sustained from being prevented from obtaining employment, and from being dismissed from places where he had procured work. *Held.* (1) That P., as the representative of absent principals who had invested him with a general agency, had implied authority to do those things in the course of the business which were appropriated and demanded by the occasion; (2) that the acts of P. resulting from his mistake in assuming that S. was bound as an apprentice during the remainder of his minority were binding upon the defendant; (3) that the theory of the defendant that S.'s alleged grievance was the publication of a libel, or the utterance of slander by the defendant's agent, was untenable; and (4) that, as S. had been emancipated by his father, he was entitled after he became of age to maintain an action against the defendant to recover damages for their tortious act.

In *Willis* v. *Muscogee Mfg. Co.* (Ga. 1904) 48 S.E. 177, it was laid down that, where several employers in a city make a rule that employés who leave without cause, must give notice, and continue working during the period covered by the notice, and agree to report to each other all employés who leave without compliance therewith, and, except in special

(*d*) *Suits for an injunction.*—One of the Federal courts of the United States has refused to grant an injunction to restrain a company from discharging its employés on the ground that they were members of a certain union, from placing their names on a "blacklist," from maintaining that "blacklist," and from permitting other employers to inspect it[6].

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cases, not to employ men so reported, such agreement, although voluntary, and not enforceable, is not, in the absence of malice, an unlawful combination or conspiracy which would make such companies liable to men properly reported for a violation of the rule; but that, an employer who wrongfully reports an employé, and thus damages him by preventing his getting work, is liable. The court said that "an employer has a right to select his employés according to what standard he may choose, though such standard be arbitrary or unreasonable. An employer certainly has a right to refuse to employ any one whom he knows to have left another employer in violation of a reasonable rule which both employers are seeking to enforce." Accordingly "an agreement among a number of employers to report such violations, and thus assist each other in the selection of their employés, is not unlawful, though coupled with an agreement to employ no one so reported." (See head note written by the court). "While the corporation," said Simmons, C.J., "which entered into the agreement above described had a right to do so, they owed a duty to their employés not to abuse that right. When one of them falsely reported an employé, to his injury, such employé may recover for the tort. The combination of employers was a powerful machine for the accomplishment of lawful results, but it was capable of misuse to the injury of innocent employés. When a company so misused it, such company must take the consequences. If the employer who promulgated the regulation made a mistake in its construction, and applied it to a state of facts which did not come within it, the employé injured by such mistake has a right to recover. The employer cannot arbitrarily place an employé upon the "black list" as having violated the regulation, when in point of fact the employé's conduct did not come within the terms of such regulation, and he therefore, had not violated it." As the plaintiff had introduced evidence from which the jury might properly find that the plaintiff had been discharged, or had left the service of the defendant, because the latter had insisted on a change in his contract of employment, and that the rule, therefore, did not apply to him, it was held to be error to grant a nonsuit.

In *Hundley* v. *Louisville & N.R. Co.* (1898) 105 Ky. 162, 49 L.R.A. 612, 48 S.W. 429, (see § 1, note 6, ante), it was laid down that, where several railway companies have made an agreement that no person discharged for good cause by any of the parties to the agreement shall be employed by any of the others, it is an actionable wrong for one of those companies to enter upon its records a false statement as to its reasons for discharging an employé. It was held, however, that the declaration in this case was defective, as not containing any averment that the servant had sought, and been refused, employment in consequence of the wrongful act, the reason assigned being that an agreement of this character is not legally injurious to the servant unless it has actually been carried out to his damage.

[6] *Boyer* v. *Western U. Teleg. Co.* (1903) 124 Fed. 246. After expressing its opinion that it was not unlawful to discharge the employés because they belonged to the union specified, the court proceeded thus:

5. Notices circulated amongst the coemployés of the persons to which they relate.—Another kind of "blacklist" is that which employers who hire large numbers of servants circulate either among all their servants indiscriminately, or among such superior employés as are invested with authority to engage and discharge subordinate servants. The right to publish such a document has so far been tested only in actions for libel, and it has uniformly been held that the privilege of the occasion is *primâ facie* an effectual bar to a claim for damages based on this ground[8]. Whether the

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"Suppose a man should file a bill alleging that he belonged to the Honourable and Ancient Order of Free-masons, or to the Presbyterian church, or to the Grand Army of the Republic; that his employer had discharged him solely on that account; that he had discharged others of his employés, and intended to discharge all of them for the same reason; that he kept a book which contained all the names of such discharged persons, and set opposite the name of each discharged person the fact that he had been discharged solely on the ground that he belonged to such organization; and that he had given such information to others, who refused to employ such persons on that account. Is it possible a court of equity could grant relief? If so, pray on what ground? And yet that is a perfectly parallel case to this as made by the bill."

[8] In *Hunt* v. *Great Northern R. Co.* (1891) 2 Q.B. (C.A.) 189, 60 L.J.Q.B.N.S. 498, 55 J.P. 648, it appeared that, after the plaintiff had been dismissed from the defendant railway company's service on the charge of gross neglect of duty, the railway company published his name in a printed monthly circular addressed to all its servants, stating that plaintiff had been dismissed and the reason therefor. The communication was unanimously held to be a privileged one. "Can anyone," said Lopes, L.J., "doubt that a railway company, if they are of opinion that some of their servants have been doing things which, if they were done by their other servants, would seriously damage their business, have an interest in stating this to their servants? And how can it be said that the servants to whom that statement is made have no interest in hearing that certain things are being treated by the company as misconduct, and that, if any of them should be guilty of such misconduct, the consequence would be dismissal from the company's service? I cannot imagine a case in which the reciprocal interest could be more clear." It was argued that the plaintiff's name need not have been mentioned by the defendants, and that the privilege of the occasion was lost because his name was mentioned. This contention was rejected. "It might possibly be," said Lopes, L.J., "that the mentioning of his name could be suggested as evidence of malice on the part of the defendants—not that I think the suggestion could be maintained for one moment. But, at any rate, it could only be used as evidence to shew that the defendants had abused the occasion, not that the occasion did not exist."

In *Hebner* v. *Great Northern R. Co.* (1899) 78 Minn. 289, 80 N.W. 1128, the record of the reasons for a railway servant's discharge was made in one of the books of the corporation, kept for its own information, and the only publication complained of occurred when the record was communicated by one of the clerks, employed by defendant in the office of the telegraph superintendent to another clerk; both of these persons being in-

servant can recover in any given instance on the ground of express malice is a question to be determined with reference to considerations similar to those which are controlling in all actions for defamation[9].

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terested, and both acting strictly within the line of duty, as being engaged in procuring the information necessary to enable them to fill out the card which was to be delivered to him the plaintiff. It was held that there was no undue public dissemination of the contents of the book; and that there was nothing in the evidence which indicated that care was not taken to confine the information to persons who were directly interested, and whose duty it was to know the reason for plaintiff's dismissal from defendant's service.

Where a notice to the effect that a railway servant has been discharged for insubordination is posted in various rooms set apart for his fellow servants, but sometimes visited without authority by members of the public, the communication is privileged. *McDonald* v. *Board of Works* (1874) 5 Austr. J. Rep. 34.

In *Missouri P.R. Co.* v. *Richmond* (1881) 73 Tex. 568, 4 L.R.A. 280, 11 S.W. 555, it was held that, in the absence of actual malice, an action for libel would not lie against a railway company for the circulation of a "black list" among the superior officials who employed men upon its own line. The court said: "Looking to the public interests involved in the safe operation of railways as well as the interests of their owners, it seems to us that one having reasonable ground to believe that a person seeking important positions in that service was incompetent, careless, or otherwise unfit would be under such obligation to communicate his knowledge or belief to all persons likely to employ such unsuitable person in that business as would make the publication privileged if made in good faith."

See also the next note.

[9] In *Tench* v. *Great Western R. Co.* (1873) 33 U.C.Q.B. (C.A.) 8, Rev'g 32 U.C.Q.B. 452, it was held by six out of nine judges that the evidence shewed a reasonable mode of publication, and no excess such as to take away the privilege or shew malice. Draper, C.J., one of those who took this view argued thus: "The station-master's offices or the booking offices in the cases pointed out, appear to me proper places for the notice to reach those to whom it was addressed, and the caution which McGrath was directed to give the employés in regard to these placards, shews a careful intent to do no more than was necessary to convey the information to those who ought to receive it. McGrath swears he did what he was ordered and no more. I think there was no evidence of express malice to be submitted to the jury." Spragge, C., one of the dissenting judges, expressed the opinion that, in the circulation of the paper in question, much more was done than was sufficient to answer all the legitimate purposes of the occasion: It was posted up, and kept posted up in some places for weeks, and in others for months, in offices of the company called private, but to which others than servants of the company obtained access, and there saw and read it, and in some of those offices in a conspicuous place, where it could be seen and read from the wicket at which the public purchased their tickets." Richards, C.J. also considered that the putting up of this notice in the offices of the company in such places as they could be seen by others than employés, without its being shewn there was any paramount necessity therefor, and the pasting it in the books of certain officers of the company, was independent evidence of malice to go to the jury."

In *Bacon* v. *Michigan C.R. Co.* (1887) 66 Mich. 166, 33 N.W. 181, the

6. Statutes with regard to blacklisting.—The present writer has no hesitation in expressing the opinion that the broader considerations of public policy point very decidedly to the conclusion that "blacklisting" should everywhere be greatly restricted, if not entirely prohibited, by legislation, in so far as it is concerned with the exchange of circulars or notices between different employers. It would of course not be expedient to enact any statute which would deprive employers altogether of the privilege of communicating information regarding the character of an employé to a person who is interested in ascertaining the truth; and there may be some difficulty in framing provisions which will leave this privilege intact, and at the same time afford adequate protection to employés. But it seems preferable to run the risk of circumscribing the privilege to some extent than to leave unchecked and unregulated a practice so

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plaintiff, a carpenter employed by the defendant company, when he was leaving a train in a hurry upon its arrival at the place where he lived, picked up by mistake a coat which was not his, leaving his own behind, and carried it with his tools to the company's shop, where he threw it across a bench. A few days later he was discharged for no assigned cause. In a subsequent issue of a "discharge list," sent out at intervals to all the agents of the company who were authorized to hire employés, his name was inserted with a memorandum to the effect that he had been discharged for stealing. *Held*, that there was evidence which would have justified the jury in finding that defendant was actuated by malice in fact, and that it was error to take the case from them.

In a certain issue of a "discharge list," circulated among all the agents of a railway company who had charge of the employment of its servants, it was stated that the plaintiff had been discharged for incompetency. In spite of his having drawn attention of the defendant's trainmaster to the mistake, and obtained a written statement that he had not been discharged on this ground the list was again issued without any correction, the result being that he was discharged several times upon different lines of railway operated by the company. *Held*, that the reissuance of the list after the trainmaster had notice of the falsity of the statement with regard to the plaintiff was a circumstance which justified the inference of malice. *Missouri P.R. Co.* v. *Bebee* (1893) 2 Tex. Civ. App. 107, 21 S.W. 384. On a previous appeal of this case, *Bebee* v. *Missouri P.R. Co.* (1888) 71 Tex. 424, 9 S.W. 449, the ground upon which the judgment of the lower court had been set aside was that certain evidence had been improperly excluded.

Where an order discharging an employé of a railway company was circulated among his fellow employés, with the statement that he had been dismissed for intimating that an officer of the company had used insulting language in speaking of another officer, and that such intimation was untrue, it was held that the language used was not so violent or disproportioned to the occasion as to raise an inference of malice. *Brown* v. *Norfolk & W.R. Co.* (1902) 100 Va. 619, 60 L.R.A. 472, 42 S.E. 644.

essentially repugnant to the free institutions of Anglo-Saxon civilization as that of "blacklisting." The ultimate effect of this practice, when developed on a large scale, would inevitably be the subjection of a constantly increasing number of employés to disabilities and restrictions scarcely less oppressive than those to which servants were formerly subjected in England by statutory provisions long since obsolete[1], and to which they are still subjected by the laws of some of the countries of Continental Europe. A passport system of this kind has always been found to be productive of serious evils even when it is worked by public officials; and it must be immeasurably more dangerous to leave in the hands of private parties so formidable an instrument of potential tyranny, capable of being used, and, as human nature is constituted, certain to be used in many instances, as a means of gratfying personal animosity or class hatred.

These considerations go far to justify the drastic action already taken by those American legislatures who have enacted statutes, of which the general purport is, that any corporation or individual who "blacklists" an employé, with the intent of preventing him from obtaining employment from any other person, is guilty of a penal offence[1]. One of the statutes, viz., that of Minnesota, has been pronounced to be constitutional[2]. Another

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[1]In 5 Eliz. ch. 4, § 10, it was enacted that a servant in any of the various occupations specified should be liable to imprisonment, if he departed from the city or parish in which he had been employed, without obtaining an official testimonial, stating that he was licensed to depart from his master and at liberty to serve elsewhere. It is manifest that if the practice of "black listing" is permitted to go on unchecked, the employers of our own times will be able by private compact to place large bodies of employés in a position analogous to that which would result from the operation of such a statute.

[1]Colorado. 1 Mills Ann. Stat. Colo. p. 487, chap. 15; Georgia. Code of 1895, § 1873; Indiana. Horner's Ann. Stat. (1901) § 5206p; § 5206q, 2; Iowa. Code of 1897, §§ 5027, 5028; Kansas. Gen. Stat. Dassler (1901) Laws 1897, §§ 2421-2423; Minnesota. Laws, 1895, chap. 174; Missouri. Rev. Stat. 1899, § 2166; Montana. Political Code (1895) §§ 3390, 3391; Penal Code (1895) § 656; North Dakota. Rev. Code, 1899, § 7042; Oklahoma. Laws, 1897, p. 144; Virginia. Hurst's Code, 1898, § 3845b (Acts, 1891-92, p. 976); Wisconsin. Rev. Stat. 1898, § 4466b.

By the statutes of Georgia, Indiana, Montana, Virginia, Wisconsin, and Iowa, it is expressly provided that they shall not be construed as prohibiting the employer from furnishing, when requested by a discharged employé to do so, a truthful statement of the causes for his discharge.

has been declared invalid, but merely for the techniacl reason that it was made applicable to a class of employés not embraced in the title[3].

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[3] *Wabash R. Co.* v. *Young* (1904) 162 Ind. 102, 69 N.E. 1003 (1003, 1004).

C. B. LABATT.

A recent decision as to the law of dogs is referred to in the English *Law Times*. The writer recalls the case of *Jones* v. *Owen*, 24 L.T. Rep. 587, where the owner of two greyhounds was held liable for negligence for an accident caused by his permitting them to rush about a road, coupled with a chain, but otherwise uncontrolled. In a recent case a County Court judge in England held that the owner of a blind dog was liable for an accident caused by the animal getting into the way of a cyclist and causing his fall and injury. This finding which seems reasonable enough and might well be said to follow the reasoning in *Jones* v. *Owen*, was reversed by a Divisional Court. Our contemporary after referring to the perils incident to the use of modern roads from sleepy, drunken or reckless drivers, automobile "road hogs," etc., very properly says: "Among these dangers there is no greater terror to the cyclist and cautious motorist than the irresponsible dog. We should have thought that a dog owner, knowing that the animal was blind, and aware of a dog's habit to wander irresponsibly in every direction, would have been deemed negligent not to have adopted some means of controlling its movements." Possibly the members of the Divisional Court were not in the habit of bicycle riding; if they had been a more common sense view of the situation would perhaps have prevailed. The writer might have added to the irresponsible dog the reckless child or worst of all the indefinite and exasperating female who stops to dance a minuet in the middle of the road when she sees a bicycle approaching.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

INSURANCE—LIFE POLICY—MUTUAL ASSURANCE—STIPULATION AS TO PARTICIPATION IN PROFITS—POWER OF COMPANY TO ALTER RIGHTS OF POLICY HOLDERS BY BY-LAW.

In *British Equitable Assurance Co.* v. *Baily* (1906) A.C. 35 the House of Lords (Lords Macnaghten, Robertson and Lindley) have reversed the unanimous decision of the Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.,) (1904) 1 Ch. 374 (noted ante vol. 40, p. 342) affirming a judgment of Kekewich, J., on a very important question of insurance law. The plaintiff effected a policy of insurance on his life with the defendant company, upon the terms that he would abide by the deed of settlement, by-laws and regulations of the company. At the time the plaintiff effected the insurance a by-law was in force which provided that the net profits of that branch of the defendants' business, to be ascertained triennially, should be divided among the policy holders. After distributing the profits without deduction for a reserve fund, under that by-law, the company proposed to alter that practice by devoting a part of the profits of that branch to the creation of a reserve fund, and to alter their by-laws accordingly. By the deed of settlement the company had power to alter its by-laws, but the plaintiff claimed that the company had no power to alter its by-laws to the prejudice of his policy, and the Courts below so held: the House of Lords, however, came to the conclusion that there was no contract between the company and the plaintiff not to alter their practice in the distribution of profits, and that the action could not be maintained. As Lord Robertson puts it: "The whole question in the case is, did the company contract with the respondent to the effect of depriving themselves of the right (which they had under their constitution) to make this change? It seems to me not merely that they did not, but that, as part of the contract, the respondent bound himself to take only such profits as should be declared according to the rules of the company as they existed at each declaration."

DOMICIL—CHANGE OF—INTENTION.

Huntly v. *Gaskell* (1906) A.C. 56 was an appeal from the Scotch Court of Session on a question of domicil. A testator whose domicil of origin was in England, for thirty years prior

to his death had his principal residence in Scotland. During this time, however, he continued principal partner in a private bank in Manchester and was proprietor of large landed estates in England, and continued his occupancy as a tenant of a mansion in Manchester and of a house in London. He left a very large personal estate, and a will in English form, made a short time before his death, in which he was designated as of Manchester. He also made a will in Scottish form. Apart from making his home in Scotland there was nothing in his conduct to suggest any intention of his abandoning his English domicil. Whether or not he had in fact done so was important, because if he had in fact done so his power of disposition over his estate would by Scotch law be limited; and his children, of whom the plaintiff was one, would have been entitled to a certain share in spite of any testamentary disposition to the contrary. The Court of Session held that the testator had not lost his domicil of origin and the House of Lords (Lord Halsbury, L.C., and Lords Robertson and Lindley) affirmed that decision.

RIVER—RIPARIAN RIGHTS—ABSTRACTION OF THE WHOLE OF THE WATER FROM A RIVER—EX ADVERSO MILL OWNERS.

White v. *White* (1906) A.C. 72, although an appeal from a Scotch Court, deals with a question of general interest. The controversy concerned the alleged right of a riparian owner to abstract and use the whole water of a river. This right was claimed under a Crown charter which purported to grant the water of the river in question to the owners of the plaintiff's mill. The mill was situate on the River Kelvin, and it was conceded that it had the right to a certain preference, which was called the right to the first water, but the plaintiffs had recently considerably enlarged their consumption of water for this mill and claimed a declaration if need be to use the whole of the water of the river. The defendants were owners of a mill on the opposite bank of the stream, and denied the plaintiffs' rights to increase their consumption of water as they claimed. They contended that each opposite riparian proprietor is entitled to the natural flow of the stream as it passes his ground, and that such right does not depend on the ownership of any part of the volume of the stream. Lord Halsbury, L.C., remarked that the grant of a tract of a natural river and apparently of all the waters in it, is a novelty in the law, and one which, upon the facts of this case, it was impossible to insist on. Notwithstanding,

therefore, the terms of the charter, the House of Lords (Lords Halsbury, Robertson and Lindley) held that the rights of the parties inter se as opposite riparian proprietors were governed by the general law applicable to running streams, whereby every riparian proprietor has a prima facie right to the ordinary use of the water flowing past his land; and, apart from rights acquired by prescription, one owner cannot interfere with the rights of another riparian proprietor; and that any prescriptive rights must be measured by the extent of their actual enjoyment, and that to the extent only to which those prescriptive rights had been actually enjoyed by the plaintiffs were they entitled to any preferential user of the waters of the stream. The decision of the Court below was therefore reversed.

CONTRACT—CONSTRUCTION—"WHOLE OPERATION OF ITS RAILWAY"—PERCENTAGE OF EARNINGS.

Montreal Street Railway Co. v. *Montreal* (1906) A.C. 100 was an action brought by the City of Montreal to recover a percentage of earnings of the defendants' railway under a contract which provided for the payment of a percentage on their earnings from the whole operation of their railway, and the question at issue was whether or not the contract extended to earnings of the railway beyond the city limits. The case occasioned great diversity of opinion in the Courts below, five judges, including a majority of the Supreme Court of Canada being of opinion that it extended to earnings beyond the city limits, and six being of the contrary opinion. The Judicial Committee of the Privy Council (Lords Davey, James and Robertson and Sir Andrew Scoble) adopted the view of the majority and reversed the judgment of the Supreme Court. Their Lordships, looking at the contract as a whole, being of opinion that it was intended to be confined to "lines of railway for conveyance of passengers in the city."

MUNICIPALITY—DRAIN BECOMING INSUFFICIENT—NEGLIGENCE—EXERCISE OF STATUTORY POWERS.

Hawthorn v. *Kannuluik* (1906) A.C. 105 demands a brief notice. It was an appeal from the Supreme Court of Victoria. The action was brought against a municipality for damages caused by the flooding of the plaintiff's land, owing to the insufficiency of a sewer provided by the defendants. The defendants, in pursuance of statutory powers, had taken over the care

of a watercourse and converted it into a public drain, which, though sufficient at first, proved in course of time to be increasingly insufficient to carry off the mixture of slime and sewage poured into it, whereby the plaintiff's property was flooded. The Judicial Committee of the Privy Council (Lords Macnaghten, Davey and James, and Sir A. Wilson) affirmed the judgment of the Court below in favour of the plaintiff.

TRESPASS — INJUNCTION — EXPROPRIATION ACT — ARBITRATION CLAUSE—NEGLECT TO PURSUE STATUTORY PROCEDURE FOR EXPROPRIATION—ACTION—36 VICT. c. 102, s. 5, ONT.

Saunby v. *Water Commissioners of London* (1906) A.C. 110 is an appeal from the Supreme Court of Canada. The action was brought against the defendants for trespass on the plaintiff's land and interference with his rights of water. The defendants set up as a defence that they were authorized to do the acts complained of by Statute 36 Vict. c. 102, Ont., and that the plaintiff's remedy, if any, was by arbitration as provided by section 5 of that Act. It appeared that the defendants had not adopted the procedure prescribed by the Act for expropriating the plaintiff's property in question, but the Supreme Court of Canada nevertheless held, overruling the Ontario Court of Appeal, that the action would not lie, and the plaintiff's only remedy was by arbitration. The Judicial Committee of the Privy Council (Lords Macnaghten, Davey and James, and Sir A. Wilson) held that the Court of Appeal was right, and reversed the decision of the Supreme Court, and held that an injunction was rightly granted, but that it should be limited in duration until the defendants should have expropriated the property in the manner directed in the Act.

ONT. JUD. ACT, s. 113—INTEREST ON PAYMENTS IN ARREAR.

Toronto Railway Co. v. *Toronto* (1906) A.C. 117. This case is reported at length ante p. 205.

MASTER AND SERVANT—WRONGFUL DISMISSAL—JUSTIFICATION—DUTY OF JUDGE AT TRIAL—NEW TRIAL.

Clouston v. *Corry* (1906) A.C. 122 was an action for wrongful dismissal in which the defendants justified on the ground that the plaintiff had been guilty of drunken and disorderly conduct. The evidence of the plaintiff's drunken and disorderly

conduct shewed it to have been of a gross character, and was uncontradicted; the jury nevertheless found that it did not justify the defendants in dismissing the plaintiff, and gave a verdict in his favour for £875. This verdict was affirmed on appeal by the Court of Appeal for New Zealand. The Judicial Committee of the Privy Council (Lords Macnaghten, Davey, James and Robertson, and Sir A. Wilson) thought that the verdict was so unsatisfactory that it could not be allowed to stand and a new trial was ordered. The costs of all the proceedings below were ordered to abide the event of the new trial, but the plaintiff was ordered to pay the costs of the appeal to His Majesty in Council.

PRACTICE—APPEAL ADMITTED BY COURT BELOW DISMISSED AS INCOMPETENT—SPECIAL LEAVE TO APPEAL REFUSED.

In *Grieve* v. *Tasker* (1906) A.C. 132, an appeal to His Majesty in Council had been allowed by the Supreme Court of Newfoundland, but on motion of the respondent it was dismissed as incompetent and a special application for leave to appeal was also dismissed by the Judicial Committee. The action had been commenced in or prior to 1897 to recover a sum of money, and on October 13, 1897, judgment was awarded in favour of the plaintiff, declaring defendant's liability. On September 27, 1897, a letter was sent to the defendant from Scotland informing him that a discharge had been granted to him in bankruptcy. The defendant made no application to set up this defence, and on April 6, 1898, the Court pronounced a final decree for payment of $22,295 by the defendant. He then applied for leave to appeal to the Queen in Council, and afterwards abandoned the appeal. In June, 1899, he moved to set aside the judgment, or to limit its effect to its being made the subject of proof in the bankruptcy proceedings, which motion was dismissed June 7, 1899. He made another application of the same kind, which was also refused August 29, 1904. On December 1, 1904, the plaintiff obtained leave to issue execution, and on March 20, 1905, the defendant made a similar application to that of August, 1904, to restrain execution, which was refused, and from that order he now appealed to the King in Council. But inasmuch as it was clear that no substantial relief could be given to the defendant without his getting rid of the judgment of 1897 and 1898, the Judicial Committee regarded the appeal as altogether futile and dismissed it as incompetent.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] GIBB *v.* MCMAHON. [April 6.

Trust—Co-trustee—Joint action—Delegation of trust.

A trustee in Toronto wrote to a co-trustee in St. Mary's stating that an offer had been made to purchase a portion of the trust estate for $12,000, and giving reasons why it should be accepted. The co-trustee replied concurring in said reasons and consenting to the proposed sale. The Toronto trustee afterwards had negotiations with the solicitors of G. and at their suggestion offered to sell the same property to G. for $13,000, but without further notice to his co-trustee. The offer was accepted by the solicitors, whereupon the party who had offered $12,000 raised his offer to $14,000, and the trustee notified the solicitors of G. that the sale to him was cancelled. In a suit by G. for specific performance,

Held, affirming the judgment of the Court of Appeal ((1904) L.R. 522) that the letter written by the co-trustee in St. Mary's contained a consent to the particular sale mentioned therein only and could not be construed as a general consent to a sale to any person even for a higher price. Even if it could there were circumstances which occurred between the time it was written and the signing of the contract with G. which should have been communicated to the co-trustee before he could be bound by said contract. Appeal dismissed with costs.

Ritchie, K.C., for appellant. *Aylesworth*, K.C., and *Delamere*, K.C., for respondents.

Bd. Ry. Comm.] [April 6.

JAMES BAY RY. CO. *v.* GRAND TRUNK RY. CO.

Board of Railway Commissioners — Jurisdiction — Appeal to Supreme Court.

The Board of Railway Commissioners granted an application of the James Bay Ry. Co. for leave to carry their line under

the track of the Grand Trunk Ry. Co. but, at the request of the latter, imposed the condition that the masonry work of such under crossing should be sufficient to allow of the construction of an additional track on the line of the Grand Trunk Ry. Co. No evidence was given that the latter company intended to lay an additional track in the near future, or at any time. The James Bay Ry. Co., by leave of a judge, appealed to the Supreme Court of Canada from the part of the order imposing such terms, contending that the same was beyond the jurisdiction of the Board.

Held, 1. The Board had jurisdiction to impose said terms.

2. Per SEDGEWICK, DAVIES and MACLENNAN, JJ. that the question before the Court was rather one of law than of jurisdiction, and should have come up on appeal by leave of the Board or carried before the Governor-General in Council.

Appeal dismissed with costs.

Barwick, K.C., and *G. F. Macdonnell,* for appellants. *Chrysler,* K.C., for respondents. *A. G. Blair,* for the Board.

Ont.] CONNELL *v.* CONNELL. [April 14.

Will—Promoter—Evidence—Subsequent conduct of testator—Residuary devise—Trust.

In proceedings for probate by the executors of a will which was opposed on the ground that it was prepared by one of the executors who was also a beneficiary there was evidence, though contradicted, that before the will was executed it was read over to the testator who seemed to understand its provisions.

Held, IDINGTON, J., dissenting, that such evidence and the fact that the testator lived for several years after it was executed and on several occasions during that time spoke of having made his will, and never revoked nor altered it, satisfied the onus, if it existed, on the executor to satisfy the Court that the testator knew and approved of its provisions.

Held, also, that where the testator's estate was worth some $50,000, and he had no children, it was doubtful if a bequest to the propounder, his brother, of $1,000 was such a substantial benefit that it would give rise to the onus contended for by those opposing the will.

Appeal dismissed with costs.

Watson, K.C., for appellants. *Whitney,* K.C., *French,* K.C., and *Middleton,* for respondents. *Fisher,* for widow.

Province of Ontario.

COURT OF APPEAL.

Full Court.] Re Harsha. [Jan. 22.

Extradition—Forgery—Evidence of Commission—Identification of document—Irregularities in proceedings before extradition judge—Discharge of prisoner—Fresh proceedings—Proof of foreign law.

The prisoner was committed by a judge for extradition to a foreign state for the offence of forging tickets of admission to an entertainment. The evidence before the judge consisted of a certified copy of the indictment of the prisoner in the foreign state, the information of a police detective taken before the judge himself, and five depositions or affidavits sworn in the foreign state, consisting in great part merely of hearsay statements made by other persons to the deponents, not in the presence of the prisoner. These depositions proved some relevant facts, and raised a strong suspicion against the prisoner of having forged something, of having committed an offence which, if committed in Canada, would be forgery at common law, as well as under the Criminal Code, ss. 419, 421, 423; but neither a genuine ticket nor one of those with the forging of which the prisoner was charged was produced to any one of the deponents on making his deposition, or was verified or identified by any of them, or otherwise produced or identified before the extradition judge.

Held, Meredith, J.A., dissenting, that there was no proper evidence of the commission of the alleged offence; and the prisoner was entitled to his discharge upon habeas corpus.

Decision of Teetzel, J., reversed.

Semble, per Osler, J.A., that there were grave irregularities in the proceedings before the extradition judge; his warrant for the apprehension of the accused was issued without any information or complaint taken in this country, or a foreign warrant duly authenticated, having been before him; the prisoner was arrested on the strength of a telegram, and the depositions on which he was committed were not forthcoming pending their authentication until the day upon which the order was made remanding him for extradition; and s. 6 (2) of the Extradition Act could not have been complied with.

Semble, also, that there was nothing to prevent fresh proceedings being taken against the prisoner upon his discharge.

Semble, also, that, in the present state of the authorities, an extradition judge should require proof that the crime is an extradition crime as well by the laws of the demanding state as by our own.

J. B. Mackenzie, for prisoner. *R. W. Eyre*, for State of Illinois.

Full Court.] AMES *v.* SUTHERLAND. [Jan. 22.

Broker—Carrying stock on margin—Advance by brokers—Sale of shares—Measure of damages.

On an appeal from a Divisional Court reported 9 O.L.R. 631, 41 C.L.J. 333, 535,

Held, that the plaintiffs having admittedly paid money for the defendant at his request they had the usual right of action at law on the common counts for money paid.

That the defendant not having sought to redeem his shares nor made any tender of the amount due by him he cannot say the plaintiffs would not have restored his shares, which could have been bought in the market for a lower price than they were sold for and credited to him.

And that even if the plaintiffs were wrongdoers and had committed a breach of their contract, he was not entitled under the circumstances of this case to damages greater in amount than the price for which the shares had been sold and credited to him.

Judgment of a Divisional Court affirmed.

Biggs, K.C., for the appeal. *W. N. Tilley*, contra.

Moss, C.J.O., Osler, Garrow and Maclaren, JJ.A.] [Jan. 31.

DESERONTO IRON CO. *v.* RATHBUN CO., AND STANDARD CHEMICAL CO.—THIRD PARTIES.

Third parties—Leave to defend—Right to appeal—Motion to quash.

An order of directions under Con. Rules 213 giving a third party the right to appear at the trial of an action even though he be declared to be bound by the judgment is not equivalent to an order giving him leave to defend.

In an action where the third parties had no right to defend the action but had obtained leave to appeal in the name of the defendants of which they had availed themselves,

Held, that an appeal in their own name was not competent, and on motion was quashed.

J. H. Moss, for plaintiffs. *Armour,* K.C., for defendants. *J. Bicknell,* K.C., for third parties.

Full Court.] REX *v.* BURDELL. [Jan. 31.

Criminal law—Burglary—Possession of stolen property—Inference of guilt—Lapse of time—Jury—Verdict—Dissent of juror — Re-consideration — Judge's charge — Comment on failure of prisoner to testify.

The jury in a criminal trial may be sent back for further deliberation when, upon being polled, one of the jurors announces "not guilty," dissenting from the verdict of "guilty" announced by the foreman, and a subsequent unanimous verdict of "guilty" may properly be accepted.

Upon the trial of the prisoner for burglary and burglariously stealing property, the judge in his charge to the jury remarked that if they did not believe the evidence of a certain witness, they were "brought face to face with the fact that the prisoner is found in possession of a pouch which was stolen . . . and that he has not given a satisfactory explanation of how he came into possession of it."

Held, that the judge did not thereby intimate to the jury that the prisoner might have given evidence in his own behalf, and that an inference unfavourable to him might be drawn from the fact that he had not done so.

The burglary was on Dec. 18 or 19, 1903, and the prisoner was arrested on Feb. 16, 1904, with one of the articles stolen upon his person.

Held, that the judge could not properly have ruled, under all the circumstances of the case, that the lapse of time was so great as absolutely to repel any presumption that the prisoner was concerned in the burglary; and that the possession of the article and other circumstances warranted the jury in drawing an inference of guilt.

Leave to appeal was refused, and rulings of STREET, J., at the trial, were affirmed.

J. F. Faulds, for the prisoner. *J. R. Cartwright*, K.C., for the Crown.

Full Court.] REX *v.* LECONTE. [Feb. 6.

Criminal law—Conviction for keeping bawdy house—Crim. Code, ss. 207, 208—Warrant of commitment—Justices of the peace—Jurisdiction—Habeas corpus—Amended warrant—Reception on appeal—Form of conviction—Statement of offence.

The prisoner was convicted before three justices of the peace for being the keeper of a disorderly house, bawdy house, or house of ill fame, or house for the resort of prostitutes—following the words of sub-s. (*j*) of s. 207 of the Criminal Code—and was committed to gaol for six months under a warrant signed by two of the justices. She obtained a writ of habeas corpus, and upon the return of it moved for her discharge, which was refused by a Divisional Court. She then appealed to the Court of Appeal, and, after the appeal had been argued and judgment reserved, the justices returned a further warrant of commitment signed by all three justices, which was received by the Court of Appeal. The offence was stated to have been committed in a city, for which there was a Police Magistrate. The warrant returned to the Court of Appeal was signed by all three justices, under their respective seals, and set forth a conviction by them, all acting in the absence of, and one at the request of, the Police Magistrate.

Held, that under s. 208 of the Code, as amended by 57 & 58 Vict. c. 57, one justice had jurisdiction to adjudicate upon the charge, and by R.S.O. 1897, c. 87, s. 7, had authority to act in the city in the absence of the Police Magistrate; and if authority be given to one justice it may be executed by any greater number, and the fact that others join in making the conviction does not invalidate the proceeding.

Held, also, that the conviction and commitment, following the language of sub-s. (*j*) of s. 207 of the Code, properly set out and disclosed the offence: s. 846 (2) of the Code (63 & 64 Vict. c. 46).

Order of a Divisional Court affirmed.

J. B. Mackenzie, for the prisoner. *Cartwright*, K.C., for the Crown.

Full Court.] REX v. FINNESSY. [March 12.

Criminal law—Rape—Aiding and abetting—Specific act of unchastity—Questions as to—Right of prosecutrix to answer, but not companion—No substantial wrong.

On the trial of an indictment for aiding and abetting the commission of rape, the evidence shewed that prior to the commission of the offence the prosecutrix and one B. had been together all the evening and towards morning were for some time in a room in an hotel with the door shut and the gas turned out. On leaving the hotel they were met by the prisoner and another man, when B. was attacked by them. He then left the prosecutrix with them when the offence was committed. The prosecutrix and B. were called as witnesses for the Crown, and on cross-examination they were questioned as to what took place in the said room, which they refused to answer.

Held, that while the prosecutrix could properly be asked the question, as going to her credit, she was not bound to answer; but that it was different as to B; for not only did it go to his credit, but the effect of the answer might be to shew a favourable tendency to the prosecutrix, his mistress, and unfavourable one towards the prisoner in taking her away from him. but it appearing that no substantial wrong or miscarriage was occasioned by such refusal, a conviction was upheld.

E. Mahon, for the prisoner. *Cartwright,* K.C., for the Crown.

HIGH COURT OF JUSTICE.

Boyd, C., Street, J., Mabee, J.] [Jan. 24.

ROBINSON v. ENGLAND.

Costs—Taxation—Appeal—Objections—Solicitor's slip—Setting aside certificate.

Notwithstanding the provision of Rule 774 that the taxing officer's certificate of the result of a taxation of costs shall be final and conclusive as to all matters not objected to in the manner provided by Rules 1182 and 1183, the certificate may in a proper case be set aside in order to allow objections to be carried

in, and the certificate re-signed as of a later date; and this was ordered in a case where the solicitor for the party objecting had himself taken out the certificate, intending to appeal from it, but at the moment not remembering that it was necessary to carry in objections in writing, and had promptly applied for relief.

Order of MAGEE, J., affirmed.

In re Furber, [1898] 2 Ch. 528, followed.

J. C. Hamilton, for plaintiff. *Joseph Montgomery*, for defendants.

Boyd, C., Street, J., Mabee, J.] [Jan. 24.

IMPERIAL CAP CO. *v.* COHEN.

Sale of goods—Contract—Statute of Frauds—Order for goods —Agency—Correspondence.

The travelling salesman of a wholesale dealer is presumably not authorized by the customer who buys from him to sign a contract for the customer as purchaser; and this presumption is not rebutted by a written memorandum of the order being made in the purchaser's presence and a duplicate given to the latter; the entry of the purchaser's name made by the salesman is not evidence per se of his agency.

Held, upon the facts of this case, that there was nothing upon which the Court could conclude that the vendors' agent was acting, as the agent of the purchaser, and the subsequent letters of the purchaser did not identify the contract; and therefore the Statute of Frauds was an answer to a claim for the price of goods for which an order was orally given by the defendant to the plaintiffs' agent, but which the defendant refused to accept.

Judgment of District Court of Algoma reversed.

J. . . Jones, for defendant. *Middleton*, for plaintiffs.

Boyd, C., Clute, J., Mabee, J.] [Jan. 25.

BRADLEY *v.* ELLIOTT.

Vendor and purchaser—Contract for sale of land—Specific performance—Authority of agent—Statute of Frauds—Memorandum in writing—Absence of vendor's name—Inadequacy of price.

In an action to enforce specific performance of an alleged contract for the sale of land the only written memorandum of

the contract was a receipt for $100 "in part payment of lot 16," etc., describing it, mentioning also the balance of the price and the purchaser's name, but not disclosing the name of the vendor, and signed "P. W. Black, agent."

Held, that this was not sufficient to satisfy the Statute of Frauds, parol evidence to supply the name of the vendor not being admissible.

Semble, also, on the evidence, that the agent had no authority to bind the vendor by executing a contract, and that, on account of the inadequacy of the price, the Court would be slow to enforce specific performance.

Judgment of FALCONBRIDGE, C.J.K.B., reversed.

H. L. Drayton and *Slaght*, for defendant. *Middleboro*, for plaintiff.

Boyd, C.] ASHLAND CO. *v.* ARMSTRONG. [March 14.

Security for costs—Foreign corporation—Residence—63 Vict. c. 24 (O.)

To satisfy the terms of Con. Rule 1198 a corporation must be incorporated and have its head and controlling office within the jurisdiction where its business is carried on, and "residence," as contemplated by the practice as to security for costs, is not implied where a foreign corporation has only a constructive residence through agents acting in its business interests and licensed so to do in a comparatively small and transient way as the plaintiffs in this action; and the evidence not disclosing sufficient property of the plaintiffs within the jurisdiction they were ordered to give security for costs. Judgment of a local Master affirmed.

C. A. Moss, for plaintiffs. *Slaght*, for defendant.

Boyd, C.] ATTORNEY-GENERAL *v.* HARGRAVE. [March 21.

Action—Attorney-General—Action to avoid Crown mining leases—Misrepresentation—Jurisdiction.

Where an action was brought by the Attorney-General of the province to repeal and avoid mining leases of public lands of Ontario alleged to be granted by the Crown through misrepresentation and fraud on the part of the defendants, and the defendants set up in their defence matter attacking his status as

suing not in the interests of the public, but at the mere private solicitation of interested individuals.

Held, confirming the Master in Chambers, that this portion of the defence was objectionable and should be struck out because not open to investigation in this Court, inasmuch as the exercise of the discretion of the Attorney-General, as representing the Crown in the commencement and conduct of litigation, is not subject to the control of the Court.

Ballantyne, for plaintiff. *Johnston,* K.C., for defendant.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] THE KING *v.* BONNEVIE. [Feb. 15.

Criminal law—Suspended sentence—Previous conviction.

Under the provisions of the Criminal Code, s. 971, where a prisoner is convicted of an offence punishable with not more than two years' imprisonment "and no conviction is proved against him," the Court, in consideration of the trivial nature of the offence or of any extenuating circumstances, instead of at once sentencing the prisoner, may direct his release on his entering into a recognizance, etc.

Held, that the proper time for proving the previous offence under the provisions of this section of the Code is not upon the trial, but afterwards. And when there has been a previous conviction which has not been called to the attention of the magistrate, but of which he has a personal recollection, it is his duty to proceed on his own initiative and to inform himself by sending for witnesses or documents, and he may do this when the prisoner comes before him for sentence.

J. J. Power, for prisoner. *Attorney-General,* for the Crown.

Full Court.] CITY OF HALIFAX *v.* WALLACE. [Feb. 15.

Municipal corporation—Rates and taxes—Sale of property after assessment—Personal liability of vendor.

A lot of land owned by defendant was assessed for rates and taxes for the year 1903-1904 and on the 15th March the

book of general assessment was delivered to the collector of rates and taxes. On the 25th April, 1903, defendant conveyed the land to the ladies of the Sacred Heart Convent, who at once took possession. Under the provisions of City Charter s. 302 the annual assessment is required to be made up and delivered to the collector not later than the 15th of March in each year, and (s. 303) is to be rated on the owners of real and personal property by an equal dollar rate, and by other sections provision is made for the recovery of the amount in proceedings to be taken against the owner of the property. It being clear from the wording of the Act that in addition to the lien on the property there is also a personal responsibility on the part of the person assessed.

Held, that the owner of the property, when the property had once been assessed in his name, could not escape such liability by parting with the property.

F. H. Bell, for plaintiff. *T. J. Wallace* and *J. Terrell,* for defendant.

Province of New Brunswick.

SUPREME COURT.

Barker, J.] RE FREEZE. ·ily 14, 1905.

Infant—Married woman.

A married woman will not be appointed sole guardian of the person and estate of an infant.

W. B. Jonah, for application.

Barker, J.] [Sept. 19, 1905.

PORTWARDENS OF SAINT JOHN *v.* MCLAUGHLAN.

Portwardens—Fees of office—Competition.

Portwardens appointed by the City of St. John have no exclusive right to examine hatches of vessels arriving at the port so as to entitle them to fees for the services paid to an outside person.

C. A. Skinner, K.C., for plaintiff. *A. O. Earle*, K.C., and *J. R. Armstrong*, K.C., for defendant.

Barker, J.] [Oct. 20, 1905.

EASTERN TRUST CO. *v.* JACKSON.

Donatio mortis causa—Evidence—Delivery for safe-keeping.

A person on his death-bed handed to his wife out of a satchel which he kept in a closet of his bedroom $2,000 in bonds and $1,550 in cash, telling her to "take them and put them away; wrap them up and lock them up in your trunk." At the same time he handed to her a pocket book containing $150, saying that it was for present expenses. A few minutes later he handed to his business partner remaining contents of satchel, consisting of $1,000 belonging to the firm. Subsequently he made a will bequeathing to his wife $3,000, a horse, two carriages, and all his household effects; to his partner his interest in partnership property; to two grand-nephews $500 each; and to nieces and nephews the residue of his estate. His private estate was worth about $8,000. When giving directions for the drafting of his will, on the amount of the legacies to his wife and grand-nephews being counted up, he said, "there is more than that."

Held, that there was not a donatio mortis causa to the wife, the deceased intending no more than a delivery for safe-keeping.

J. A. Belyea, K.C., for plaintiff. *A. O. Earle*, K.C., for legatees. *A. J. Gregory*, K.C., for Mrs. Jackson.

Barker, J.] EVANS *v.* EVANS. [Dec. 19, 1905.

Husband and wife—Purchase in wife's name—Gift.

Where property purchased by a husband as a home for himself and wife was by his direction conveyed to her, so that the title might be in her in case of his death, it was held that a gift was intended, to take effect upon his death if she should survive him.

A. J. Trueman, K.C., and *W. H. Trueman*, for plaintiff. *W. B. Wallace*, K.C., and *E. S. Ritchie*, for defendant.

Province of Manitoba.

KING'S BENCH.

Dubuc, C.J.] ROBINSON *v.* GRAHAM. [Feb. 10.

Attachment of goods—County Courts Act, R.S.M. 1902, c. 38, ss. 200-206, 252, 253—Rateable distribution amongst execution creditors—Meaning of word "trader"—Is a baker a manufacturer?

This was a contest between the plaintiff who had judgment against the defendant in two suits commenced by writs of attachment issued out of a County Court, and one Sheave who had judgment against the same defendant in a suit commenced by a special writ of summons in the same Court, as to whether Sheave was entitled to his pro rata share of the proceeds of certain goods that had been seized and sold under said writs of attachment. The defendant was a baker and, incidental to his business as such bought and sold candies, cakes and confectionery, and the County Court judge held that he was a trader within the meaning of ss. 200-206 of "The County Courts Act," R.S.M., 1902, c. 38, and decided in favour of Sheave.

Held, on appeal, 1. Whether the defendant was a trader or not, ss. 200-206 of the Act do not apply when goods are sold under a writ of attachment, in which case ss. 252 and 253 govern, and Sheave could not share as he had not sued out any writ of attachment. Secs. 200-206 of the Act, although enacted subsequently to ss. 252 and 253, do not repeal or do away with the effect of the latter sections. A general later statute does not abrogate a special statute by mere implicaion and will not be interpreted as revoking or altering the special enactment when the terms of the latter may have their special application without being so interpreted: *Bailey* v. *Vancouver,* 24 S.C.R. 62.

2. The defendant was not necessarily a trader because of his dealing in candies, cakes and confectionery, if that was merely incidental to his business as a baker: *Thomas* v. *Hull,* 6 P.R. 172, followed.

Quære, whether a baker is a manufacturer and so comes within the definition of a trader given in s. 200.

Appeal allowed with costs.

Heap, for plaintiff. *O'Reilly,* for Sheave.

Dubuc, C.J.] IN RE ANDERSON. [Feb. 10.

Life insurance—Benevolent Society—Appropriation by will of benefit to persons other than beneficiary named in policy.

This was a case stated for the opinion of the Court as to whether a provision in the will of the deceased, whereby he revoked the benefit of a certain life insurance policy held by him in "The Ancient Order of United Workmen," in which his wife was named as the beneficiary, and directed that the money should fall into and form part of his general estate, was effective to that end or whether the widow was not entitled to the money on his death notwithstanding such revocation in his will, also as to whether the widow, if found so entitled, was bound to elect as between such benefit and other provisions of the will in her favour. The order had been incorporated in 1877 under the provisions of The Charitable Associations Act, now c. 18 of the R.S.M. 1902, and, according to its constitution and rules by which all its members were bound, no member had any right in or control over the money for which he was insured, except to name the beneficiary to whom it should be paid on his death which right was limited to certain relatives, and a member had not the right to name a creditor as a beneficiary or to appropriate the money so that it could be applied in payment of his debts.

Held, 1. There had been a contract entered into between the deceased and the Order by which it was agreed that the money should be paid to his wife, and that he could not afterwards abrogate or alter such contract or change the destination of the money except in accordance with the constitution and general laws of the Order, and so the widow was entitled to the money. *Leadley* v. *McGregor*, 11 M.R. 9; *Johnston* v. *C.M.B.A.*, 24 A.R. 88, and *Babe* v. *The Board of Trade of Toronto*, 30 O.R. 69, followed.

National Trust Co. v. *Hughes*, 14 M.R. 41, distinguished on the ground that the insurance in that case was governed by The Life Insurance Act, R.S.M. 1902, c. 83, which applies only to insurance in ordinary life insurance companies.

2. The widow was not put to her election, but should have the insurance money as well as the benefits given her by the will of the deceased. *Griffith* v. *Howes*, 5 O.L.R. 439, and *In re Warren's Trust*, 20 Cr. D. 208, followed.

Minty, for widow. *Hull*, for executors. *Wilson*, for legatees.

Full Court.] JOHANNISON *v.* GALBRAITH. [Feb. 10.

Arbitration and award—Setting aside award—Pleading—Allegation that award relied on invalid—General relief.

Judgment of PERDUE, J., noted vol. 41, p. 621, allowing defendant's demurrer to the statement of claim, reversed on appeal on the ground that the prayer in the original statement of claim for general relief was sufficient to cover the setting aside of the award as the facts added by the amendment set up such a case as, if true, would entitle the plaintiff to ask specifically for that relief. Dictum of KILLAM, J., in *Rogers* v. *Commercial Union Ass. Co.*, 10 M.R., at pp. 675 and 676, and notes at page 625 of *Bullen* v. *Leake*, 5th ed., followed. *Gaughan* v. *Sharpe*, 6 A.R. 417, distinguished.

Held, also, that this Court has jurisdiction to set aside an award whether or not it is one to which the provisions of 9 & 10 Wm. III. c. 15, apply. That statute provides for summary proceedings to set aside awards of a certain kind, and limits the time within which such proceedings may be taken, but the Court of Chancery formerly could, and this Court can now, exercise jurisdiction over award independently of that statute. *Smith* v. *Whitmore*, 2 De G. J. & S. 297, followed.

Per MATHERS, J., Rule 773 of the King's Bench Act provides a code of procedure only for the enforcement of award, and Rule 774, which reads, "The former practice with respect to awards shall not be abolished, but the same shall only be followed by special leave of the Court or judge" should be interpreted as if it read, "The former practice relating to the enforcement of awards, etc."

Wilson, for plaintiff. *Potts*, for defendant.

Province of British Columbia.

SUPREME COURT.

Duff, J.] [Dec. 23, 1905.

CARROLL *v.* CITY OF VANCOUVER.

Land—Compulsory appropriation by waterworks company—Crown—Pre-emption record.

Held, that before the lands of any person can be compulsorily appropriated under the provisions of any statute giving a com-

pany or corporation such powers, the area sought to be appropriated must be set out and ascertained in accordance with the terms of the statute.

Macdonell, for plaintiff. *Hamersley,* K.C., for defendant.

Full Court.] [Jan. 25.

CANADIAN CANNING CO. *v.* FAGAN.

Taxes, distress for—Notice of sale—"At least ten days"—"Ten clear days"—Time, computation of—Damages—New trial.

The plaintiff company was organized in 1899. The defendants were tax-collecting officials of the Provincial Government. Of three canneries purchased by the company two of them were from the liquidators of defunct companies. One of these, the Star cannery, was in arrears for personal property tax for 1894, 1895, 1896, 1899, 1900 and 1901. Claim was made by defendant Fagan for these arrears together with arrears in respect of the other properties from 1899. The company contended that they were liable only for taxes on their property acquired since their incorporation, and tendered the sum of $890 in satisfaction of all claims to the end of 1902, which was refused; distress was made on the goods and chattels of the company and in pursuance of a notice dated 5th August, 1902, a sale was had on the 15th of certain goods of the company for $825 and costs. This notice was given under s. 88 of the Assessment Act, which requires tha. the collector shall give "at least ten days' public notice of the time and place of such sale." At the trial, DUFF, J., held that the notice was one day short.

Held, on appeal, 1. The provision in s. 88 of the Assessment Act directing that the collector of taxes shall give at least ten days' public notice of the time and place of sale of goods for delinquent taxes, means "ten clear days," and the party making a distress on less notice becomes a trespasser ab initio.

2. Sec. 87 does not create the relationship of landlord and tenant between the parties; nor does it give a lien upon goods such as the preferential charge upon lands under s. 80.

Martin, K.C., for plaintiffs (respondents). *Maclean,* K.C., D.A.-G., for defendants (appellants).

Book Reviews.

Conveyancing and Other Forms. A collection of precedents adapted to the law in every Province, etc., with clauses applicable to special cases. Third edition, revised and enlarged, with notes on cases and references to statutes. By A. H. O'Brien, M.A., Assistant Law Clerk of the House of Commons; author of "Chattel Mortages and Bills of Sale," "Digests of the Fish and Game Laws of Ontario and Quebec," etc. Toronto: Canada Law Book Company, 1906.

That a new edition of this work should be required within three years of the previous edition would indicate both the necessity for a good work upon conveyancing and continued confidence in Mr. O'Brien's book. This new edition contains all the important forms in the previous edition, and has been largely increased both in size and matter. The two hundred and fifty pages now added comprise many subjects not in the previous edition, viz., forms relating to Acknowledgements, Railways, etc., and forms for use in Alberta, Saskatchewan, New Brunswick, Prince Edward Island and the Yukon. The forms for Manitoba and Nova Scotia have been largely added to. A number of new special forms and clauses appear under the headings, Company, Chattel Mortgages, Conveyances, Landlord and Tenant, Mining, and Mortgages. The law of dower in every Province is given, also an Index of Law, and many useful notes, while the very complete Index of Forms is not the least valuable part of the book. The type is clear and the publishers' part well done. The author's reputation is a sufficient guarantee that the matter within the covers is what might be expected.

Flotsam and Jetsam.

Thinking men in the United States, as here, are beginning to discuss the over-production of law with special reference to new legislation and the tinkering of statutes. In the United States the grievance is said to be very serious; some 14,000 statutes being enacted yearly as compared with 292 in England. We would present that "horrid example" to our legislatures in this country.