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THE LATE SIR CHARLES MOSS.

In a former volume of this Journal (vol. 33, p. 413) was published an article in which we referred to the late Sir Charles Moss's elevation to the Bench as a puisne judge of the Court of Appeal in 1897, and there gave a sketch of his life up to that time. It is not necessary therefore to recapitulate what was there said.

The judicial career which commenced with so much promise has unhappily been brought to a close; and our prediction of his fitness for the distinguished position which he had then attained, have been amply fulfilled, and when on the 11th day of October he breathed his last, both the profession and the public realized that they had lost an exceedingly able, excellent, and honourable judge.

To take up shortly the story of his life since his promotion to the Bench in 1897, we find after serving as a puisne judge of the Court of Appeal for five years he was on the elevation of the late Chief Justice Armour to the Supreme Court of Canada, made Chief Justice of Ontario, which position he held until his death. In 1907 he received the honour of knighthood.

Besides his close attention to the duties of his office, Sir Charles devoted a considerable amount of thought and time to the affairs of the Provincial University, of which he was a governor.

One of the leading characteristics of the late lamented judge was his modest, courteous and urbane manner to all with whom he came in contact. Notwithstanding the exalted position to which he attained, he was always the same kindly, unostentatious friend and companion that he had ever been. An able lawyer, particularly well versed in the principles of equity, he proved himself a most acceptable judge, always realizing that the course

of practice is made smooth by a judicial demeanour which, while it commands respect, is at once considerate and firm. Comparisons are said to be odious, and therefore we make none, yet, when we think of the late Chief Justice, we can never forget his illustrious brother who preceded him in the high office of Chief Justice of Ontario, and whose career was so prematurely brought to a close. For two such men from the same family the province has reason to be grateful.

Both brothers married daughters of the late Mr. Justice Sullivan, and their families may therefore be said to have been born, if not "in the purple," at all events in a legal atmosphere and surroundings, and in the sons of both families are to be found gentlemen who in the legal arena do honour to their distinguished progenitors and who in due time may be expected to attain similar distinction.

The funeral of the late Chief Justice was solemnized at St. James' Church, Toronto, on the 14th October and was attended by His Honour the Lieutenant-Governor, most of the judges and nearly all the men of prominence in the city; besides a multitude of humbler individuals.

For the benefit of future generations we may here say that the portraits of Chief Justice Thomas Moss by Berthon and the portrait of the late Chief Justice by Forster, which at present face each other at Osgoode Hall, are excellent likenesses.

The general esteem in which Sir Charles was held by his contemporaries has been well expressed in the columns of the Toronto *News*, and as the article is from the pen of a layman—a journalist of distinction—it is here reproduced as indicating the impression he left on those outside the profession to which he belonged. We re-echo all that is there said:—

"To the whole community the death of Sir Charles Moss will come with the pain and shock of a grievous personal affliction. He was a good man; brave, tender, fine and noble as any that ever lived amongst us. He achieved eminence at the Bar by faithful study and patient industry. He was trusted by clients, and loved by associates. As counsel he was singularly scrupulous in argument and rigidly honest in conclusions. He would not bend the law to devious meanings nor resort to any

stratagem even to achieve a legitimate result. But he was neither timid nor irresolute in defence of the interests committed to his hands. His integrity was so invincibly established that this was a strong refuge for his clients and a source of authority with judges and juries. On the Bench he had infinite patience with counsel and a bearing towards younger men at the Bar that was admirable.

"If he had strong convictions he had few prejudices. In his disposition there was nothing of envy and no narrowness. Once he was a candidate for the legislature, but for the wranglings and banalities of party warfare he was unfitted. It is just as certain, however, that he would have been a wise and prudent legislator as that he was a just judge and a sound adviser in the councils of the university. It never was said that Charles Moss broke his word or compromised with his own fine sense of rectitude. No man ever had a more gracious temper or had more of considerateness without condescension, or more of simple dignity without a taint of ostentation.

"It is so much the fashion to praise the dead that the language of eulogy does not always carry conviction. Too often we "hear the world applaud the hollow ghost which blamed the living man." But all that will now be said of Charles Moss was said with as much readiness and sincerity while he lived. Few men have had more of the love and respect of their fellows and all this he had, not because his tongue was tuned to flattery or because he was assiduous in courting popular favour, but because he was kind, and courteous and wholesome and honourable. That is the inheritance which does not come by seeking and which cannot be taken away. At the moment we hardly stop to consider whether he was a great lawyer or a great judge, whether he held high position or achieved much distinction. It is enough, as Matthew Arnold said of his friend, that—

> 'We retain
> The memory of a man unspoiled,
> Sweet, generous and humane.'"

JUDICIAL PENSIONS.

When the late John W. Ritchie, Judge in Equity for the Province of Nova Scotia, retired after many years of distinguished service he was in the full possession of all his faculties, and as well able as he ever had been to discharge the duties of his office. It is related that one of his friends expostulated with him for retiring under such circumstances. Why should he not have continued in the full enjoyment of his emoluments until he should become incapacitated for judicial work? His reply is worthy to be written in letters of gold over every judicial bench. "True enough, I am, I believe, fully competent to discharge my judicial duties, but the time will surely come and cannot be far distant when I shall no longer be competent and may not have the discernment to be aware of my incapacity. I might then be tempted to continue in office when I could no longer perform its duties with satisfaction to the public."

This incident naturally occurs to one's mind when reflecting upon the subject of judicial pensions and the difficult questions connected with the terms of the judicial office. It will be remembered that a number of years ago somewhere near the beginning of the present century an Act was passed providing that a judge who had reached a certain age and held office for a certain term of years should, on his retirement, receive a pension equal to the full amount of his judicial salary. As a temporary enactment its effect was most beneficial. A number of judges in several of the provinces availed themselves of its provisions to retire from service when they would, probably, but for the enactment of this provision, have continued in harness long after it had begun to gall them, and possibly in some instances after they had lost the power to carry the load with efficiency. It is probable enough that some pains were taken to impress them with the temporary nature of the provision. We are credibly informed that it was not the intention of those who were chiefly instrumental in securing the enactment that it should be a permanent arrangement. As a temporary provision its effect was excellent. It materially increased the efficiency of

the judicial bench. As a permanent enactment its effect is precisely the opposite to this. The original intention, so we have been reliably assured, was that it should be quietly dropped out of the statute when the revision should take place. But this intention has not been carried out, the reason in all probability being that those who understood the matter were too busy to think about it, and the revisors, naturally and properly, so far as their duties were concerned, left the statute as they found it.

A moment's reflection will convince any intelligent person that the present effect of the enactment is of the most mischievous character. It actually rewards a judge for his continuance in office after he has become utterly unfitted from age or infirmity for the proper discharge of his duties. If he were to retire upon discovering his infirmity he would receive by way of pension two-thirds of his salary as a judge. If he can manage to hold on for a few years longer, he will receive the full amount of his salary for the rest of his days. Is there a man living to whom this prospect would not present the temptation to continue in active service, although conscious of his unfitness for the performance of its duties? We do not say there may not be men who would be capable of resisting such a temptation. Doubtless there are many. But human nature being what it is, we believe that men of such character are in the minority. We are quite convinced that instances can be discovered in more than one province of the Dominion in which this statute in its present form is having the effect of keeping in active judicial service some, who but for the provisions of this law would have retired on their pensions and allowed their places to be filled with occupants better able than they are to satisfy the wishes of the profession and the requirements of the public. The subject is a delicate one and naturally those who are aware of such cases shrink from the discussion of them. But it is a duty devolving upon organs of professional opinion to present the facts.

There are two modes by which the present condition of things could be remedied. The simple repeal of the statute would remove the temptation that it holds out and would be a partial

remedy for the mischief. But it would not be a perfect remedy. Even under the old law there was a danger, the very danger that was so clearly apprehended by the late Judge Ritchie,—that a judge might continue to serve after he had become incapable of efficient service. He was tempted to cling to his office if he felt that his reduced pension was not an adequate provision. A better way would be to grant the full salary as a pension in every case in which a fair amount of service had been given. There need be no fear that such an arrangement would be abused. There is not a judge on the bench who would not rather continue in active service, than retire to the dullness and ennui of a pensioner, if he felt really able to discharge the duties of the office efficiently. The possible trifling addition to the outlay from the treasury is wholly unworthy of consideration, when it concerns a matter so vitally important to the public as the efficiency of our judicial system. But whether this remedy should be adopted or not certainly the statute should be repealed which in its present form actually holds out a very substantial reward to a judge for continuing to cumber the service for years and years after he has become wholly unfitted by age and infirmity to know what is going on in his presence.

WORKMEN'S COMPENSATION FOR INJURIES.

Sir William Meredith's interim report on this subject has been recently published and constitutes a bulky pamphlet of 478 pages. It includes the cases submitted on behalf of both manufacturers and workmen's organizations, as to the principles on which a new Act for Ontario should be framed.

It indicates the advance of public opinion on the question when we find that all parties are agreed on both the wisdom and justice of the principle of compensation, and the only variance is as to the best and fairest way of providing that compensation. It seems to be agreed on all hands that the present Ontario Act is unsatisfactory, and more particularly from the fact that before a workman can recover compensation thereunder he has fre-

quently to engage in a costly litigation, in which his antagonist, though nominally his employer, is really some wealthy and powerful insurance corporation, which is interested from a pecuniary point of view in defeating the claim, quite regardless of its merits. Both employers and workmen are agreed that the principle on which any new legislation should be based is that of insurance; but while the employers claim that the cost of providing such insurance should be shared with them, by both the workmen, and the government; the workmen, on the other hand, claim that they should be wholly free from any contribution whatever to the insurance fund. The claim of the employers is based on the alleged facts that (1) a large proportion of the accidents in industrial occupations (fully 25 per cent.) is due solely to the fault of workmen themselves; (2) that it is in the interest of the community generally that workmen meeting with accidents in the course of their employment, should be saved from becoming a burden on the public; and, therefore, that the public should pay a share of the compensation in such cases. The workmen, on the other hand, argue that those who derive profit and benefit from the services of workmen, should take the lean with the fat, and bear the loss occasioned by accidents to their employees.

Not unnaturally the question arises whether, in the final result, it is not the public which really bears the burden of making compensation; for by the inevitable law of self-preservation the employer will add to the cost of his goods or of his work which the public is called on to pay, not only the cost of making compensation to his workmen, but an additional sum besides, to meet interest thereon. And thus it comes to be considered whether, in the interest of the public, the cost of compensation to workmen should not be provided by general taxation, and whether the fund so to be raised should not be administered by the government in some simple manner, so as to save all the circuitous and costly proceedings which are apt at present to intervene between the occurrence of an accident and the recovery of compensation therefor. Such a suggestion from

a political point of view would probably not be popular; people do not like direct taxation, and, as a general rule, they will prefer to pay twice as much indirectly, as they would half as much directly. Although by direct taxation premiums of insurance and heavy legal expenses might be saved, it must be remembered that, on the other hand, a public fund could not be collected and administered without a certain large expenditure to salaried officials, which must, of course, be added to the cost of compensation.

We notice that one employer claims that in his particular business it is not possible for him to transfer to the consumer the cost to which he is put in making compensation to injured workmen, but we rather think that his case must be quite unique, and that in the great majority of cases the opinion is well founded that the expense of compensation is treated as part of the expense of a business, which is duly provided for by an added charge for goods or work, which in the long run the public pays.

There is not only the general principle of making compensation for injuries occasioned by accident at stake, but also the question to what classes of the community should that principle be extended. Hitherto the farming community has not been included among workmen entitled to compensation for injuries, although it appears by statistics, that at least fifty per cent. of the total accidents occurring in industrial pursuits, arise in farming operations. Domestic servants also are a class not at present in Ontario within the scope of the present Act.

The workmen appear to favour the view that "all workers" getting less than $2,000 a year should be included in the new Act to be passed, but when we examine the details of their proposals, it appears to be clear that they have in mind merely the workers in manufactories or other industrial occupations, because we find that they propose that the compensation fund should be raised by "compulsory insurance of employers in the State Department by a yearly tax levied on the industry or occupation, covering the risk of the particular industry or occupation," which tax they proposed shall be regulated by the "yearly wage roll."

But it may well be asked whether all wage earners are not entitled to the same protection against accidents in the course of their employment, and, therefore, whether farm labourers and domestic servants should not also be protected, as well as those engaged in manufactures, etc.; and why, indeed, it should not be extended to all persons who are earning their own living. of all classes interested will be duly considered.

This would bring us eventually to a system of universal insurance against accidents, to be carried out by general taxation, the whole community becoming in effect a vast mutual assurance society, and this, if it could be carried out honestly, and with reasonable circumspection, might prove really the best and most economical method. Industrial manual workers are, no doubt, a class most largely exposed to risks from accidents; but no class of the community is free therefrom, and an accident befalling a poor clerk in a store or counting house is attended often with just as much trouble and poverty to his family or dependents as in the case of an accident befalling a brakesman or a carpenter, and when we come to consider the matter there is no more reason why one class of workers should be compensated by the State in respect of accidents than another. Equality seems to demand that all should receive the same measure of protection. That being so, any scheme of general insurance against accidents cannot fairly be limited to any one or more classes of the community. Those exposed to the greatest risks are the most in need of such protection, but no class of the community, rich or poor, is altogether free from the risks of accidents, and if the State is to provide the protection, it seems that its protection should extend to all classes of the community and not merely to workmen engaged in industrial pursuits. Of course the amount of compensation would have to be limited to a certain sum, and that sum would have to be subject to reduction, according to the extent of the injury sustained, and also to a further deduction in case it should appear that the accident was solely due to the drunkenness or wilful carelessness or disobedience of the person injured.

The learned Commissioner gives no intimation as to his probable recommendations. He has gone to Europe for the purpose of obtaining first hand information as to the practical working of systems of compensation in force in England and other countries, and it is to be hoped that the result of his inquiries may lead to the establishment of some efficient system less costly and more equitable than that at present in force in Ontario; should the plan devised be satisfactory, it will, no doubt, be followed in other provinces of the Dominion.

In the meantime the present report indicates that the views of all classes interested will be duly considered.

THE DIVORCE RECORD OF 1912.

The Dominion Statutes for 1912 just received, shew that the total number of divorces granted by Parliament at its last session was sixteen, and that in all cases the divorces were granted on the ground of adultery. Ontario heads the list with nine cases, in six of which divorces were granted to women, and three to men; Quebec comes next with three cases, all granted in favour of men; Alberta next with two cases, one being granted in favour of a man and the other of a woman. Saskatchewan and Manitoba each furnished one case, and in each case the divorce was ganted in favour of a man. So that for the Provinces of Ontario, Quebec, Manitoba, Saskatchewan and Alberta there were in all, nine divorces granted on the ground of the unfaithfulness of women and seven on the ground of the unfaithfulness of men to their marriage vows. It may be remarked that the proportion of divorces granted to persons in Ontario, is in excess of those granted to persons in any other of the provinces, having regard to the relative populations of the different provinces, and in Quebec the proportion is less. We should hope that this does not mean, that where Protestantism prevails, laxer views of the obligations of the married state also prevail. Possibly, if the cases in which Roman Catholic bishops assume to pronounce decrees of nullity of marriage in Quebec were taken into account, the statistics might wear a different aspect.

TAKING THE BENCH OUT OF PARTY POLITICS.

Those in the United States who are interested in the laudable effort to take the Bench out of party politics are discussing various schemes with that end in view. One of these is in the direction of giving the Bar Associations some power in that regard. This is of interest to us to the extent that it gives a suggestion, the substance of which is not new in these columns: namely, that our Bar should have some voice in the selection of judges, so that their appointment might measurably, be taken out of the unsavoury realm of party politics. Just how this should be done would require careful consideration. Possibly by such appointments being made from those who might be nominated for judicial preferment by the Law Societies or Bar Associations in the Province where there might be a vacancy to be filled.

We sometimes congratulate ourselves that we have not an elective Bench, and, perhaps, on the whole properly so; but some of the judicial appointments that have been made in recent years and some names that are suggested for present vacancies lead one to doubt whether we are better off here than in some of the States of the Union. Our governments have so far excused themselves by saying that the best men will not go on the Bench —that they cannot afford it. This is perfectly true; but the obvious answer to this is, why does not the government pay proper salaries and so enable them to leave their private practice? It is a national scandal that the public has to be served in the most important service in the gift of the Crown by second-rate and third-rate men. Both political parties have been equally at fault in this matter. May we hope that the party now in power, having as we have heard a good working majority, will take up and deal with this most important question in the large and liberal way it demands.

NOVEL JUDICIAL PROCEDURE.

A strange and unusual judicial proceeding took place in a recent case of *Login* v. *Pardee*, which ultimately went to the Court of Appeal.

An appeal was had from His Honour Judge MacWatt, Judge of the Surrogate Court of the County of Lambton, as to the quantum of commission to be allowed to the executors of a deceased person's estate. Judge MacWatt had allowed the executors a commission of $3,000 no reason being given; an appeal was taken from this allowance to Mr. Justice Middleton who reduced it to $1,000, being of the opinion that on the proper construction of the will, the executors were not entitled to both costs and commission. In giving judgment he said "The learned Surrogate Court Judge gave no reasons for fixing the commission at $3,000; and counsel for the executors stated that it was 2½ per cent. on the cash received and 2½ per cent. on the cash disbursed. It is really about 10% on the amount passing through the executors' hands if the temporary loan is ignored."

Judgment on the appeal was given on February 23, 1912. An appeal was taken therefrom by the executors to the Divisional Court which was heard on April 10th and disposed of on April 12th last. On March 6th, 1912, apparently for the purpose of the appeal to the Divisional Court, the Judge of the Surrogate Court gave what he called his "reasons" for his judgment. One of the "reasons" assigned was that one of the executors had informed him, on the passing of the accounts, that it was intended that the executors should be entitled to both costs and commission, he having drawn the will, and that the testator understood it that way.

There was really no evidence whatever before the learned Judge of these alleged facts, and even if there had been, they would have afforded no ground to support a judgment of a Court of law as to the proper construction of the will, which of course must speak for itself, and cannot be interpreted by

an alleged understanding between the testator and the person who drew the will.

But even a stranger feature of this curious case appears in these so called "reasons." The learned Judge adds to them the following clause:—"In the two cases cited by Middleton, J., *Re West*, 14 O.L.T.O.N. 422, Howell's Probate, 2nd ed., p. 303, the 'rate of commission, on the amount of compensation, is in the discretion of the Judge.' In *Re Morrison*, 13 O.W.R. 767, the estate was nearly $150,000 and the commission allowed by the Surrogate Court and confirmed by the Divisional Court, was $5,853.55 and therefore 'responsibility' was admitted."

Thus we are to suppose that on February 23rd, the learned Surrogate Judge not only anticipated that there would be an appeal from his decision, but also was able to forecast that it would be heard and disposed of by Middleton, J., and that that learned Judge, in allowing the appeal, would refer to two certain cases which the Surrogate Judge proceeded to discuss!

It is of the first importance that persons occupying judicial positions should be above all suspicion of partizanship and that their decisions should indicate nothing but a disinterested desire to do justice without regard to considerations which have no right to affect the course of justice. But when a learned Judge frankly admits that he was induced to come to the conclusion he did by reason of statements which were not evidence, and which he ought never to have entertained, and enters into an argument to support his judgment after it has been varied on appeal, he ought not to be surprised if a suspicion of partizanship is aroused, and he lays himself open to the charge of having acted as an advocate rather than as a Judge. This, of course, is quite apart from the gross irregularity of the course he took.

The case subsequently came before the Court of Appeal on which occasion the impropriety of the Judge's conduct was recognized and remarked upon, the so-called reasons for judgment being said to be rather in the nature of a brief for the appellant.

RE McLEOD AND AMIRO.

In the case of *Re McLeod and Amiro,* a note of which is to be found in 4 O.W.N. 97, an application was made to Riddell, J., in Chambers, for a mandamus to a Division Court Judge to re-open an appeal, and hear it on its merits.—Amiro had been convicted by a magistrate for operating an automobile on a highway contrary to the statute in that behalf. He appealed to a Division Court Judge who refused to go into the merits but dismissed the appeal on the technical ground that the information was insufficient in form and substance. No objection had been taken on that ground before the magistrate, and sec. 375 of the Criminal Code, which appeared to have escaped the attention of the learned Judge, expressly provides that no judgment shall be given on an appeal upon an objection to the information and complaint, which was not taken before the magistrate. The decision of the learned Judge was, therefore, clearly wrong, but though both the accused and the Judge consented to an order going to reopen the case, yet Riddell, J., refused the application on the ground that the Court had no jurisdiction to grant the order merely because the Judge had gone wrong on a point of law, and that the consent of the parties could not give the Court jurisdiction to make the proposed order. The learned Judge concludes his judgment with the following sentence, "I have not considered whether, all parties consenting, the Court below cannot open up the matter proprio motu." If what the learned Division Court Judge did can be said to be nullity, as being something expressly prohibited by statute, then it would seem that, even without the consent of parties, he could retrace his steps: see *Rex* v. *Marsham,* ante, p. 459.

MONEY ADVANCED TO BANKRUPT FOR SPECIFIC PURPOSE.

Money advanced to a bankrupt for a specific purpose—e.g., for the purpose of paying a pressing creditor—is impressed with a quasi-trust for that purpose, and cannot be recovered from the

creditor to whom it has been paid. An apt illustration of that well-established principle was afforded by the decision of the Divisional Court, consisting of Justices Phillimore and Coleridge, in the recent case of *Re Watson; Ex parte Schipper* (107 L.T. Rep. 96). It was originally enunciated in that precise form in *Re Rogers; Ex parte Holland* (8 Mor. 243). The decision there being to some extent in conflict with that in a case which arose very shortly before—namely, *Re Snyder; Ex parte Pixley* (8 Mor. 127)—it required perhaps further confirmation. That, it is satisfactory to know, it obtained by the subsequent decision of the Court of Appeal in *Re Drucker; Ex parte The Trustee* v. *Birmingham District and Counties Banking Company Limited,* 86 L.T. Rep. 785. All that had to be ascertained, therefore, by the Divisional Court in *Re Watson; Ex parte Schipper* (ubi sup.) was whether, having regard to the facts of the case as found by the learned County Court judge, there had been such a payment for a specific purpose sufficient to warrant the application of the principle; or whether the money advanced formed part of the "property of the bankrupt divisible among his creditors," according to sect. 44 of the Bankruptcy Act 1883, 46 & 47 Vict. c. 52, to which the official receiver, as trustee in bankruptcy, could lay claim. It appears to us that the court could not but take the view that the money advanced was within the principle; and that although a receiving order had been made after the commission of an act of bankruptcy, the money was capable of being disposed of before the trustee intervened. It could be retained with impunity by the creditor and was not able to be followed by the trustee. Clearly, it was handed over for the sole purpose of releasing the property which had been seized by the sheriff's officer on behalf of the execution creditor in ignorance of the bankruptcy. Otherwise, the persons who provided it would not have come forward at all. It was consequently impressed with a quasi-trust for the purpose of being used in the discharge of that particular debt, and never formed part of the general estate of the bankrupt

judgment debtor. As to the contention that the money which was advanced to ransom the property in the hands of the sheriff's officer was an advance made to the bankrupt on account of his prospective share in the gross takings at the theatre at which he was to perform, which share would be payable to his trustee in bankruptcy, the court could not do otherwise than allow that that was the case. But as Mr. Justice Phillimore pointed out, at the moment the advance was made there was nothing actually due to the bankrupt. The persons who found the money were under no obligation then to pay anything to the trustee. From whatever standpoint, therefore, the transaction is regarded, the principle referred to comes into operation, it would seem.—*Law Times.*

FRAUD BY AN AGENT.

The rule for deciding whether a principal is liable for the fraud of his agent is laid down clearly in the text-books. For instance, Bowstead on Agency states that every principal is civilly liable for every fraud committed by his agent in the ordinary course of his employment, and for the benefit of his principal, though he did not authorize it, and even if he had expressly forbidden it. There are plenty of authorities for that proposition, but they apparently have their origin in the interpretation of the decision in *Barwick* v. *English Joint Stock Bank*, 16 L.T. Rep. 461, L. Rep. 2 Ex. 259. There the plaintiff had been in the habit of supplying a customer of the defendants with oats on credit, upon the defendants' guarantee. He demanded a better guarantee, and the defendants' manager thereupon gave him a written guarantee that the customer's cheque to the plaintiff should be paid in priority to any other payment "except to the bank." The customer was in fact indebted to the bank to the extent of £12,000, but this fact was not known by the plaintiff. The latter then supplied the customer with oats to the value of £1,227 for carrying out a Government contract, and a cheque for £2,676 was sent to the customer by the Gov-

ernment in payment of this and other consignments. This cheque was paid by the customer into his account, but the customer's cheque in favour of the plaintiff was dishonoured by the defendants, who claimed to retain the whole sum in payment of their debt.

The plaintiff brought an action against the bank for false representation. Baron Martin ruled that there was no evidence to go to the jury in support of the plaintiff's case, and directed a non-suit. The plaintiff appealed, and, in directing a new trial, Mr. Justice Willes said: "The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." He goes on to cite instances, as where owners of ships have been held liable in trespass for the acts of masters abroad improperly selling the cargo; then he says: "In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

The words are not very clear, but they have always been interpreted to mean that if an agent committed a fraudulent act for his own private ends, even though it belonged to a class of acts which he was authorized to do in his master's service, his master would not be liable. Thus in *British Mutual Banking Company* v. *Charnwood Forest Railway Company*, 57 L.T. Rep. 833; 18 Q.B. Div. 714, the secretary of a company answered certain questions which were to put to him as to the validity of certain debenture stock of the company. The answers were untrue, and were fraudulently made by the secretary for his own benefit, the fact being that the secretary had fraudulently issued the debentures in question in excess of the amount which the company was authorized to issue. The plaintiffs in consequence of these answers lent money upon the stock and found after-

wards that it was valueless. They then sued the company for the fraud of their secretary.

The company had reaped no benefit from the fraud, and the Court of Appeal (Lord Esher, M.R., and Lords Justices Bowen and Fry), reversing the decision of the Queen's Bench Division, held that the company was not liable.

Lord Justice Bowen in his judgment refers with approval to the rule laid down by Mr. Justice Willes in *Barwick* v. *English Joint Stock Bank* (*ubi sup.*) and distinguishes that case. "In that case," he says, "the act done, though not expressly authorized, was done for the master's benefit. With respect to acts of that description, it was doubtless correct to say that the agent was placed there to do acts of 'that class.' Transferred to a case like the present, the expression that the secretary was placed in his office to do acts of 'that class,' begs the very question at issue, for the defendant's proposition is, on the contrary, that an act done not for the employer's benefit, but for the servant's own private ends, is not an act of the class which the secretary either was or could possibly be authorized to do."

A somewhat similar case was *Ruben* v. *Great Fingall Consolidated*, 95 L.T. Rep. 214; (1906), A.C. 439. There the secretary of the company had borrowed money upon the security of a share certificate which he had fraudulently issued to the plaintiffs, having affixed the company's seal without authority and forged the signatures of the two directors. The company refused to register the plaintiffs as owners of the shares, and the plaintiffs claimed damages. It was held that the secretary had no authority to do anything more than the ministerial act of delivering the share certificates, when duly made, to the owners, and that the company was not responsible for his wrongful act outside the scope of his authority. Lord Davey, in his judgment in that case in the House of Lords, says that where a secretary is acting fraudulently for his own illegal purposes, no representation by him relating to the matter will bind his employers. He adds: "The reason for the qualification is that a representation made under such circumstances, whether express

or implied, is also part of the same fraud, and cannot rightly be considered to be made by the servant as agent or on behalf of his master."

This aspect of the law of principal and agent was recently reviewed by the House of Lords in *Lloyd* v. *Grace, Smith and Co.*, reported in the Court of Appeal, 104 L.T. Rep. 789; (1911), 2 K.B. 489. The facts were as follows: Mrs. Lloyd, who owned two freehold cottages and a mortgage for £450, was dissatisfied with the income which she received from her property. Accordingly she called on the respondent firm and had an interview with their conveyancing clerk, Sandles, who conducted that branch of the business without supervision. Acting on his advice, she brought the deeds relating to the property with her next day and then signed two documents which he put before her. One was a transfer of the mortgage and the other an absolute conveyance of the cottages to Sandles himself. She did not read them, but signed without demur, and Sandles gave her a receipt for the deeds in his own name and afterwards, at her request, in the name of the firm. Sandles then called in the mortgage and misappropriated the proceeds, and mortgaged the cottages to secure a private debt of his own. Mrs. Lloyd sought to recover against the firm in the King's Bench Division; the jury found that Sandles professed to act as conveyancing manager for the firm, and added that in their opinion the plaintiff believed that she was dealing with the firm. Mr. Justice Scrutton upon these findings gave judgment for the plaintiff. The defendants appealed, and, upon the authority of *Barwick* v. *English Joint Stock Bank* (*ubi sup*),the Court of Appeal (Lords Justices Farwell and Kennedy) reversed the decision in the court below, Lord Justice Vaughan Williams being of the opinion there should be a new trial on the question of estoppel. Mrs. Lloyd then appealed to the House of Lords, and her appeal was allowed by the House (Earl Loreburn, the Earl of Halsbury, Lord Macnaghten, Lord Atkinson, and Lord Shaw of Dunfermline). That court expressed their opinion that the language of Mr. Justice Willes in *Barwick* v. *English Joint*

Stock Bank had been misunderstood, and that that case was not an authority for the proposition that a master was not liable for the wrong of his servant or agent committed in the course of his service, if it were not committed for the master's benefit. They stated the true principle to be that a principal is liable for the act of his agent in the course of his employment, whether he is acting for the benefit of his principal or not. In this they dissented from the dicta of Lord Bowen in *British Mutual Banking Company* v. *Charnwood Forest Railway Company* (*ubi sup.*) and of Lord Davey in *Ruben* v. *Great Fingall Consolidated* (*ubi sup.*)

This decision of the House of Lords affirms the view taken by Mr. Justice Quain of the decision in *Barwick* v. *London Joint Stock Bank* (*ubi sup.*) in *Swift* v. *Winterbotham,* 28 L.T. Rep. 339; L. Rep. 8 Q.B. 244—that is to say, provided only that the agent's fraud is committed in carrying out one of the "class of acts" which his principal employs him to do, the principal is liable; and the fact that the principal reaps no benefit from the agent's fraud has no effect on that liability.—*Law Times.*

MARRIED WOMAN'S ESTATE ON HER DEATH INTESTATE.

There seems still to be a misapprehension in the minds of some practitioners as to the devolution of a wife's choses in action if she dies intestate in her husband's lifetime—particularly if he dies afterwards without having obtained letters of administration to her estate. It is submitted, however, that the law on the point was settled by *Re Lambert's Estate; Stanton* v. *Lambert* (59 L.T. Rep. 429; 39 Ch. Div. 626), in which it was decided that the Married Women's Property Act 1882 has not altered the devolution of the undisposed-of separate personalty of a married women, and that accordingly on the death of a married woman without disposing of her separate personalty the quality of separate property ceases, and the right of the husband to such undisposed-of personalty accrues as if the separate use

had never existed. It is true that a wife's choses in action could only be recovered by the legal personal representatives of the wife, but they were not in any way subject to the provisions of the Statute of Distributions (22 & 23 Car. 2, c. 10), it being expressly provided by s. 25 of the Statute of Frauds (29 Car. c. 3) that the Statute of Distributions "shall not extend to the estates of feme coverts who shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates and recover and enjoy the same as they might have done before the making of the said Act." If letters of administration to the wife were granted to one of her next of kin, the administrator of the wife was held to be a trustee for the legal personal representative of the husband: (see *Humphrey* v. *Bullen*, 1 Atk. 459). The Married Women's Property Act 1882, s. 1, sub-s. 1, provides that "a married woman shall in accordance with the provisions of this Act be capable of acquiring, holding, and disposing by will or otherwise of any real or personal property as her separate property in the same manner as if she were a feme sole without the intervention of any trustee." But the Act does not deal with the devolution of property undisposed of by her. With regard to her real estate, it was decided in *Hope* v. *Hope* (66 L.T. Rep. 522; (1892) 2 Ch. 336), on the same principle, that, notwithstanding the provisions of the Married Women's Property Act 1882, a husband is still entitled on the death of his wife to an estate by the courtesy in her undisposed-of real estate.—*Law Times.*

ANOMALIES IN THE LAW OF LIGHT.

A mass of judicial decisions and a single Act of Parliament constitute the code of law to which we have to look for our law of light. Lord Macnaghten has aptly described the judge-made portion of this code as "an embarrassing chain of authority," and the Legislature's sole contribution has been described by Lord Halsbury as an Act "which illustrates the danger of attempting to put a principle of law into the iron framework of

a statute." These criticisms were passed by two learned authorities we have mentioned while delivering their respective judgments in the House of Lords in the celebrated case of *Colls* v. *Home and Colonial Stores Limited*, 90 L.T. Rep. 687; (1904), A.C. 179, at pp. 183, 191. That case deprived of their authority fully one-half of the reported cases on the law of light. Under these circumstances it is not surprising that this branch of the law as it stands to-day should contain a large number of striking anomalies. Some of the most important of these we propose to discuss in this article.

At the outset it may be well to remind the reader that there is no general right to light for the windows of a building. A man commits no wrong by obstructing his neighbour's light. But a right to light may be acquired, and when acquired, any interference with the light by the neighbour is actionable—provided the interference be such as to cause a nuisance in the eye of the law.

The mere mention of the law of light will bring to the mind of the average reader the time-worn phrase "ancient lights." This phrase in itself stands for one of the most striking of legal anomalies. Our law is most persistent in upholding a man's right of doing what he wishes with his own. But it is not consistent, as we shall shew, to persist in upholding this principle and at the same time to uphold the principle embodied in the term "ancient lights."

A man may build on his land, or he may refrain from building on it, and may put it to any other use he pleases. He may sell the right of building on it, and may in this way bind the land with an obligation not to build on it. He may sell a light easement to his neighbour, and thus deprive himself of his right of building. All this is highly consistent with the main principle that a man may do with his own as he pleases. No hardship results from his sale of the easement. His land, it is true, is thenceforth charged with an obligation in the hands of subsequent purchasers who cannot shake off the burden. But these purchasers will have paid less for the land than they would have done had the land been free of the obligation.

But what of lands charged with ancient lights? The position in this case is very different. The land is charged with an obligation. But it is charged, not by reason of anything done by the owner, but by the deliberate act of the neighbour. The land is depreciated, but the owner receives nothing on account of this depreciation. Part of his capital is gone—taken from him, as it were—in the short span of twenty years, not because he has done anything wrong, but because he has not raised a hideous hoarding against his neighbour's windows. Here, indeed, is an anomaly, and we may be pardoned if we dwell upon it a little longer.

Let us take, for example, the common case of an owner of an acre or so of land, not in a town nor in the heart of the country, but in a locality where land is utilized in part for building and in part for gardens, grazing, or agriculture. Suppose our owner to use his land as a garden in connection with his residence. Suppose, further, his neighbour to build on the boundary a house with windows on three floors overlooking the garden. Our owner cannot object. His privacy may have been encroached upon. But encroachment on privacy is no actionable wrong: see *Tapling* v. *Jones,* 12 L.T. Rep. 555; 11 H.L. Cas. 290, at p. 305. The view from the windows of his own residence may have been obstructed. But obstruction of prospect is not wrongful in the eye of the law: see *Dalton* v. *Angus,* 44 L.T. Rep. 844; 6 App. Cas. 740, at p. 824. He has, in short, no legal power of preventing the building. In this respect, no doubt, the law is founded on just and expedient grounds.

But the new windows overlooking his garden mean something more to our owner than the mere interference with privacy and prospect. For he will lose in time the building value of his garden. He must obtain an acknowledgment from his neighbour that the new windows are not privileged. But the neighbour may not be disposed to give any such acknowledgement; and so our owner must elect to take one of two courses. He may either "let the matter slide," trusting that it will be convenient for him within the next twenty years to build against

the overlooking windows; or he may erect a temporary screen against them.

Now, the erection of a temporary screen to stop the light of windows in a three-storied house is not a small matter. In the first place it is expensive. It is erected at the risk and peril of our owner. It must be substantially built, so as to be proof against heavy winds; and if it falls and damages the neighbour's property, or, for that matter, the property of any other person, our owner is responsible. In the second place it is unsightly. It ruins the appearance of the garden. In the third place it requires support, and support can only be secured by devoting a considerable part of the land to poles, posts, and stakes. Lastly, and this in a residential area, is by no means the least of its drawbacks; passers-by are apt—although most unjustly—to dub its erection a churlish act, and to regard our owner as an unneighbourly person.

Such, then, are the consequences of the recognition of the principle of "ancient lights." That principle is anomalous inflicting hardship without any countervailing benefit to anyone. Nor can any parallel be drawn between the prescriptive acquisition of the right to light and of the right to affirmative easements, for in the latter case adverse enjoyment of the easement, on which the acquisition is based, can be easily stopped without trouble or expense; whereas in the former case the difficulties of preventing adverse enjoyment are, at any rate as regards small owners, in practice insuperable.

We shall now take the reader a little deeper into the difficulties of the law of light, for the anomaly with which we next propose to deal is one which requires some understanding of that branch of our law before it can be appreciated.

The doctrine of the legal protection of the amenity of light was revolutionized by the judgments delivered less than ten years ago in the House of Lords in the well-known case of *Colls* v. *Home and Colonial Stores Limited* (*sup.*), to which we have already referred. It was then held that the right to light was a right to freedom from a particular form of nuisance. Up to then the trend of judicial authority had been towards regarding

the right as a right of property in the light. According to the House of Lords we are henceforth to consider the question only from the point of view of nuisance. It is not so much a question of the quantity of light which has been obscured by the offending building, as a question of the quantity of light which remains. If the owner of the house has sufficient light for the comfortable use and enjoyment of his house according to the usages of ordinary persons in the locality, no actionable wrong has been caused by the diminution of the light: (see per Farwell, J., in *Higgins* v. *Betts*, 92 L.T. Rep. 850; (1905), 2 Ch. 210, at p. 214). From this it follows that a building owner may to a certain extent rightfully diminish the light of his neighbour's privileged windows. The extent of rightful obscuration —to use an ugly but legitimate term—will depend on circumstances. The most important of these circumstances is the amount of light still available for the privileged windows after the obscuration.

In a great many cases light is derived from over the land of more than one owner. In these cases, in order to discover the extent of rightful obscuration, it becomes material to ask—Is the light available over the land of third parties to be taken into consideration? If so, the building owner can build much closer to the windows than he otherwise could have done.

Let us take a simple example. Suppose A. to own a room lighted by one window overlooking the dividing line between the lands of two adjoining neighbours B. and C. Can B. build close to A.'s window, provided the light from C.'s land is still sufficient for A.'s room? Now observe the anomaly up to which we have been leading, and the strange consequences which result from it. The answer to our question is "Yes," if A. is entitled to light as against C.; and "No," if A. is not so entitled.

"As regards light from other quarters," said Lord Lindley in *Colls' Case*, sup., at p. 210, "such light cannot be disregarded; for the light from other quarters, and the light the obstruction of which is complained of, may be so much in excess of what is protected by law as to render the interference complained of non-actionable. I apprehend, however, that light to which a right has

not been acquired by grant or prescription, and of which the plaintiff may be deprived at any time, ought not to be taken into account."

This view was indorsed by Lord Atkinson in *Jolly* v. *Kline*, 95 L.T. Rep. 656, (1907) A.C. 1, at p. 7, in more emphatic terms. "Light," said his Lordship, "which may with impunity be at any time obstructed . . . must necessarily be left out of consideration."

But this rule is not satisfactory. In nine cases out of ten B. and C. are strangers in title and in contract. There is no privity between them. B. has no knowledge nor has he generally the power of obtaining knowledge of A.'s rights as against C. Consequently he must build on the footing that the light over C.'s land is not privileged. The result will be that he will find himself obliged to build further from the window than he might have done had his land alone afforded the light to the window. For it is obvious that a room which has to depend for its light upon one-half of the window space is much more susceptible to a nuisance arising from any blocking out of the remaining light than is a room the whole window space of which is available for the access of light. Thus we get this anomaly, that a privileged window overlooking only part of the servient tenement is in fact a greater burden on that tenement than a privileged window wholly overlooking it.

We shall now deal with what we may describe as a statutory anomaly. The 3rd section of the Prescription Act—the section which deals exclusively with light—lays it down that where the access and use of light has been enjoyed for twenty years without interruption the right to the light is to be deemed absolute and indefeasible. The 4th section defines what is meant by the word "interruption." No act or matter, says this latter section, is to be deemed to be an "interruption" unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof and of the person making or authorizing the same to be made. These two sections must, of course, be read together. When so read we find a striking inconsistency.

Suppose X. builds a house overlooking Y.'s land, and Y.

forthwith erects a screen blocking out the windows. Eleven months after the erection the screen falls, or for some other reason ceases to exclude the light, so that X. enjoys light for a month. Then suppose Y. again erects the screen which stands for less than a year. Suppose, further, that the screen is erected annually for twenty years, but at no time effectually excludes the light for a consecutive twelve months. After twenty years from the erection of the windows can X. claim the right to light under the statute?

On the primâ facie construction of these two sections X.'s right is absolute and indefeasible. If it be held that he has not enjoyed the light without interruption, then clearly a meaning is given to the word "interruption" which the 4th section expressly declares is not to be given. On the other hand, to hold that X. has enjoyed light for twenty years under the statute, when, in fact, he has only enjoyed light for a few months during that period, seems to us a startling conclusion. Strange to say, this difficulty has never been satisfactorily disposed of by the courts, although the anomaly has been commented upon on more than one occasion: see, e.g., per Mr. Justice Brett in *Glover* v. *Coleman*, 31 L.T. Rep. 684, L. Rep. 10 C.P. 108, at p. 116.

There are many other anomalies in the law of light to which we might draw the reader's attention, but space does not admit of our dealing with them. For one of recent creation we would refer him to the decision of the Court of Appeal in the case of *Griffith* v. *Richard Clay and Sons, Limited*, 106 L.T. Rep. 963, (1912), 2 Ch. 291, where it was held, in effect, that the measure of damages in light cases for the infringement of light may be increased by the accident of the dominant owner possessing adjacent land other than the dominant tenement—a proposition wholly inconsistent with general easement law.

The law of light becomes less satisfactory as it becomes more complicated. Although we are generally sceptical with regard to the benefits of codifying Acts, we must admit that the time has come when some attempt ought to be made to rid this important branch of our law of some of the worst of its anomalies, and this, it would appear, can only be done by legislation.—*Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

TRADE UNION--WRONGFUL EXPULSION OF MEMBER—ACTION TO RESTRAIN UNLAWFUL EXPULSION—TRADE UNION ACT, 1871 (34-35 VICT. C. 31), S. 4—(R.S.C. C. 125, S. 4).

Luby v. *Warwickshire Miners' Association* (1912), 2 Ch. 371. This was an action to restrain the defendants, a trade union, from expelling the plaintiff, a member thereof. The action was defended on the ground that the union was an unlawful association within the meaning of certain English statutes not in force in Canada and therefore not necessary to be mentioned here, except to say that Neville, J., held that the defendants did not come within those acts, and as the rules of the defendant association did not authorize the defendants to expel the plaintiff as they proposed, he held the plaintiff entitled to the injunction prayed. This kind of action, it may be observed, is not excluded from the jurisdiction of the court under R.S.C. c. 125, s. 4.

LEASEHOLD—VENDOR AND PURSHASER—OPEN CONTRACT TO SELL —PURCHASER TO ASSUME COVENANTS OF LEASE—SUBSISTING BREACHES OF LESSEE'S COVENANTS—LIABILITY OF PURCHASER OF LEASEHOLD.

In re Taunton Building Society and Roberts (1912), 2 Ch. 381. This was an application under the Vendors and Purchasers Act. Roberts entered into a contract to buy from the Taunton Building Society certain leasehold property which was sold subject to the covenants and conditions contained in the lease and to the rent thereby reserved, and the purchaser was to indemnify the vendors against the rent and covenants. At the time the contract was entered into there were continuing breaches of the lessees' covenants to repair and paint (which were not usual covenants) in respect of which the lessors were threatening proceedings, but neither the vendors nor purchaser knew or had notice of the breaches, and the purchaser did not know the nature of the covenants. Parker, J., who tried the action held that the contract of sale only meant that the purchaser should take an assignment of the lease subject to the rent and covenants, and indemnify the vendors against payment of

rent and performance of the covenants in the future, but not that he was to pay arrears of rent, or assume liability for past breaches of covenant, and that as the purchaser had shewn breaches of covenant, he was not, under the Conveyancing Act, 1881, required to assume that all covenants had been performed. It was therefore held that the vendors had not shewn a good title as the lease had become forfeitable before the contract.

WILL—CONSTRUCTION—GIFT TO PERSON IN CASE SHE IS A WIDOW AT PERIOD OF DISTRIBUTION—DEATH OF LEGATEE BEFORE PERIOD OF DISTRIBUTION—GIFT TO PERSON IN CASE HE IS A WIDOWER AT PERIOD OF DISTRIBUTION—SURVIVAL OF MALE DONEE AND WIFE.

In re Laing, Laing v. *Morrison* (1912) 2 Ch. 386. In this case the will of a testator was in question, whereby he gave an annuity to his sister M., provided she should be a widow at his death, until her re-marriage, and he also bequeathed to her a legacy of £1,000 provided she should be a widow at the testator's wife's death, but in the event of her then being a wife in trust for her children. He also gave his ultimate residue in trust for certain named persons including his brother J. and sister M. subject to a proviso that J.'s share should only be paid to him if a widower when the testator's wife died; and that the share of M. should only be paid to her if she should be a widow when the testator's wife died which was the period of distribution, and that the share of J., if not then a widower, and of M., if not then a widow, should go to the children of M. M. never re-married, but predeceased the testator's wife, and J. was married and he and his wife survived the testator's wife. In these circumstances, it was held that J.'s share in the residue went to the children of M., but that M.'s share lapsed, and that the legacy of £1,000 to M. being contingent on her being alive at the testator's wife's death, also lapsed. The learned judge reached this conclusion regarding M.'s share and legacy with some hesitation, as it seems to frustrate the probable intention of the testator.

TRADE UNION—AGREEMENT FOR APPLICATION OF FUNDS TO PROVIDE BENEFIT—AGREEMENT TO REFUND PECUNIARY BENEFIT—ACTION TO ENFORCE AGREEMENT—TRADE UNION ACT, 1871 (34-35 VICT. C. 31), S. 4.—(R.S.C. C. 125, S. 4).

Baker v. *Ingall* (1912) 3 K.B. 106. This was an action to enforce an agreement made by the defendant, a member of a

trade union, whereby he agreed, that in the event of being able to return to his trade he would refund £100 received from the union on the supposition that he was permanently disabled. If a member failed in such circumstances to refund, the society, by its rules, was empowered to institute legal proceedings for the recovery of the amount. A Divisional Court (Phillimore, and Bankes, JJ.), had held (1911) 2 K.B. 132 (noted ante, vol. 47, p. 455), that the action was maintainable, but the majority of the Court of Appeal (Williams, and Buckley, L.JJ.), hold that the action is one within the meaning of s. 4 of the Trade Union Act, 1871, (see R.S.C. c. 125, s. 4), and, therefore, is not maintainable. Kennedy, L.J., however, dissented from this conclusion. The majority of the Court thought that the agreement to pay the £100 and the agreement to refund constituted but one bargain, and as the agreement to pay could not have been enforced by action so neither could the agreement to refund. Kennedy, L.J., thought the agreement to pay and the agreement to refund were distinct, and while the former could not be enforced by action, yet the agreement to refund was not an agreement within the meaning of the statute and was enforceable by action.

BREACH OF CONTRACT—DAMAGES—ACT DONE BY PLAINTIFF IN MITIGATION OF DAMAGES—SPECIAL CASE STATED BY ARBITRATORS—OPINION OF COURT THEREON—OPINION OF COURT FOLLOWED BY ARBITRATOR IN AWARD—APPEAL—ERROR ON FACE OF AWARD.

British Westinghouse Co. v. *Underground Electric Railway* (1912) 3 K.B. 128. This was an appeal from an award in which two interesting questions were raised, first whether the advice which the court gives to an arbitrator on a stated case, which advice he follows subsequently in the award he makes, is appealable; and secondly, whether a plaintiff, who in order to mitigate the damages resulting from a defective machine being delivered under a contract, purchases another and superior machine whereby the damages are in fact lessened, can recover the price of such other machine, the purchase of such other machines being a pecuniary advantage to the plaintiff even though the machine supplied by the defendant had been in accordance with his contract. On the first point, the Court of Appeal was divided in opinion, Buckley, and Kennedy, L.JJ., deciding that although the consultative opinion of the court was not appeal-

able, yet the refusal of the Divisional Court to set aside an award which followed that opinion, was appealable. Williams, L.J., dissented and considered that no appeal lay from an award following the decision of the Court on a case stated on the ground that that decision was erroneous. On the case stated by the arbitrator the court had held that the price of the machines bought by the plaintiffs to mitigate the damages occasioned by the defective machines supplied by the defendant was recoverable as damages for breach of the defendants' contract, and Williams, and Kennedy, L.JJ., agreed with that conclusion, but Buckley, L.J., doubted, thinking the award was not sufficiently explicit, that the purchase of the new machine was reasonable and prudent for the mitigation of damages apart from its prudence for the plaintiffs' pecuniary advantage independent of the contract, he therefore favoured the remittal of the award.

PRACTICE—COSTS—TRIAL BEFORE REFEREE—"EVENT"—SEPARATE ISSUES—ISSUE ON WHICH PLAINTIFF SUCCEEDED—STATUTE OF LIMITATIONS—NO ORDER AS TO COSTS OF ISSUE ON WHICH PLAINTIFF SUCCEEDED—RULES 976, 977—(ONT. RULE 1130

Slatford v. *Erlebach* (1912) 3 K.B. 155. It is perhaps somewhat rash to say it, but this is a case which appears to us to have been decided by the court on the authority of Rule 976 which really had no application, whereas Rule 977 which was never referred to, appears to be the one that really governed the case. The action was for breach of contract, the defences being, denial of contract, and Statute of Limit tions. The case was referred to a referee for trial, who found the issue as to the contract in favour of the plaintiff and the issue of the Statute of Limitations in favour of the defendant. Judgment was given dismissing the action with costs, except in so far as they had been increased by the defences on which the defendant had failed. Rule 976 provides inter alia that "where any action, cause or matter or issue is tried with a jury, the costs shall follow the event unless the judge by whom the cause, matter, or issue is tried, or the court, shall, for good cause, otherwise order." The plaintiff under this Rule claimed to be entitled to the costs of the issues on which he had succeeded. The taxing master held that he was so entitled. Horridge, J., thought that he was not, and the Court of Appeal (Williams,

and Buckley, L.JJ.), thought that he was. But we may observe in the first place the case was not tried with a jury, but by a referee, and Rule 976 applies to cases tried with a jury. Rule 977, however, of which there is no Ontario counterpart, expressly provides "where issues in fact and law are raised upon a claim or counterclaim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event." The Court of Appeal held, that under Rule 976 "event" means the result of an issue and not the event of the action, and the same ruling would apply to Rule 977.

SECURITY FOR COSTS—NOMINAL PLAINTIFF—BANKRUPT—ACTION BY BANKRUPT FOR PERSONAL EARNINGS.

Affleck v. *Hammond* (1912) 3 K.B. 162. This was an action by an undischarged bankrupt to recover the amount of a note given for personal services rendered by the bankrupt in procuring a loan for the defendants. The defendants contended that the plaintiff was a mere nominal plaintiff, and that his trustee in bankruptcy was entitled to the money sued for. The trustee had, in fact, withdrawn his claim. They applied for security for costs. Scrutton, J., refused the application, and the Court of Appeal held that he was right, because the money claimed was "personal earnings" of the bankrupt and as such exempt from the claim of the trustee, and therefore the plaintiff was not a mere nominal plaintiff.

LANDLORD AND TENANT—LEASE—ASSIGNMENT OF REVERSION—LEASE BY ASSIGNEE—ATTORNMENT—4-5 ANNE C. 3 (AL. C. 16), S. 9—(1 GEO. 5, C. 37, S. 61, ONT.).

Horn v. *Beard* (1912) 3 K.B. 181. In this case the head note is defective, the editor having transposed plaintiff and defendant in the second paragraph. The facts were that owners of land made a lease to the defendant for three years, they then assigned the reversion to the Penny Bank who went into possession and made a lease of the premises to the plaintiff for 21 years to commence in præsenti. The defendant never attorned to the plaintiff, but a quarter's rent being due by the defendant, the plaintiff brought the action to recover it. The only question argued was whether an attornment was necessary before action, and the Divisional Court (Lush, and Ridley, JJ.), came to the conclusion that, under 4-5 Anne, c. 3 (al. c. 16), s. 9 (see 1 Geo. V. c. 27, s. 61, Ont.), no attornment was necessary,

and therefore the judgment of the County Court in favour of the plaintiff was affirmed.

EXTRADITION—DISCHARGE FROM CUSTODY—"COMMITTED TO PRISON"—ARREST UNDER WARRANT—LAPSE OF TWO MONTHS AFTER ARREST—EXTRADITION TREATY WITH FRANCE, 1876, ART. 10.

The King v. *Governor of Brixton Prison* (1912) 3 K.B. 190. This was an application by a prisoner arrested under the Extradition Treaty with France, for discharge from custody on the ground that under article 10 of the Treaty, he was entitled to be discharged if not surrendered and conveyed away within two months after "committal to prison." Two months had elapsed since the applicant had been taken into custody under warrant of a magistrate, and the proceedings for his extradition were still pending. The Divisional Court (Darling, and Channell, JJ.), held that "committal to prison" in the Treaty meant the committal of the accused by the magistrate on the conclusion of the proceedings before him to await the warrant of the Secretary of State for his extradition, and did not mean his committal in the first instance pending the inquiry as to whether or not he should be extradited. The motion was therefore refused.

REPORTS AND NOTES OF CASES.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

TORONTO AND NIAGARA POWER COMPANY *v.* CORPORATION OF NORTH TORONTO.

Construction of Statutes—Provisions inconsistent with powers conferred by special act—Power of company to erect poles for electric power without consent of municipality.

Appeal by special leave from a judgment of the Court of Appeal for Ontario, who had reversed a judgment of Boyd, C., at the trial.

The action was brought by the appellants asking for an injunction to restrain the respondents from interfering with them in carrying on their work of erecting poles for carrying wires along the highway known as Eglinton avenue, in the town of North Toronto. The judge at the trial gave judgment for the plaintiffs, but his judgment was reversed, as above mentioned.

The company appealed.

Nesbitt, K.C., *Atkin*, K.C., and *McCarthy*, K.C., for the plaintiffs, appellants.

Sir R. Finlay, K.C., and *T. A. Gibson*, for the respondents.

The appellant company by their Act of Incorporation, passed in 1902, had power to erect poles and do all things necessary for the purpose of the exercise of their powers. Certain sections of the Railway Act 1888 as amended by the Act of 1899 were to apply to the appellants and their undertakings in so far as these provisions were not inconsistent with the Act of Incorporation.

Section 90 of the Act of 1888, as amended by the Act of 1899, which was one of the sections made applicable, gave power to any company to enter on a public place for the exercise of their powers with the consent of the municipal authority.

Held, that the restriction in this section was inconsistent with the provisions of the Act of Incorporation, and that the appellants could enter upon and break up the streets of a town for the purpose of erecting their poles without the consent of the municipal authority.

Section 247 of the Railway Act 1906 applies only to railway companies within the definition clause of the Act.

Judgment of the court below reversed.

Province of Ontario.

COURT OF APPEAL.

Full Court.] RE FRASER. [June 18.
FRASER *v.* ROBERTSON.
MCCORMICK *v.* FRASER.

Appeal—Further evidence on—Jurisdiction—Lunacy issue—Proceedings on—Incompetent person—Power to examine alleged lunatic—Jurisdiction—Taking fresh evidence—Powers of appellate court—New trial—Examination of alleged lunatic by appellate court.

Appeal by Michael Fraser from the order of a Divisional Court, *Re Fraser*, 24 O.L.R. 222, 19 O.W.R. 545, declaring him of unsound mind.

Held, 1. The power of appellate courts to direct the reception of further evidence is purely statutory, and exercisable only to the extent conferred either expressly or by fair implication.

2. In dealing with the reception of further evidence bearing upon matters which have occurred before the decision upon the merits at the trial, an appellate court should exercise great caution, owing to the danger of throwing open the whole matter after it has been investigated at a trial, and the opinion of the trial judge and his reasons for it have become known. *Trimble* v. *Hortin*, 22 A.R. 51, referred to.

3. Ontario Rule 498 (C.R. 1897) does not throw the case in appeal open for the reception of further evidence unless grounds are shewn for obtaining the special leave of the Court; and such leave will, in general, be confined to the production of such evidence as, upon an application of which the opposite party in the appeal would be notified and would have an opportunity of meeting, a proper case is made for adducing at that stage; though, where it appears to the appellate court, that, by reason of some slip or oversight, evidence necessary for the full elucidation of a point, or which would complete more issues, has been omitted, it may in its discretion, of its own motion or less formally the proof of some instrument or fact bearing upon the direct production of the necessary evidence. *Re Fraser*, 24 O.L.R. 222, reversed on appeal.

4. An issue as to lunacy under sec. 77 of the Lunacy Act, 9 Edw. VII. (Ont.) c. 37, is to be conducted in the same manner

and according to the same rules of law and procedure as any other trial.

5. Power to examine an alleged lunatic is conferred by subsec. (4), of sec. 7 of the Lunacy Act, 9 Edw. VII. (Ont.) c. 37, only upon the judge presiding at the trial of the issue as to his soundness of mind, and cannot be exercised by an appellate court. *Re Fraser,* 24 O.L.R. 222, reversed on appeal.

6. The powers, jurisdiction and authority conferred upon the court by section 3 of the Lunacy Act, 9 Edw. VII. (Ont.) c. 37, or its inherent jurisdiction, as representing the king, over the persons and estates of lunatics or persons of unsound mind, can be exercised only after a declaration, upon due inquiry, that the person in question is of unsound mind.

7. In an issue as to lunacy a Divisional Court has no power, either under the Lunacy Act, 9 Edw. VII. (Ont.), c. 37, or under the Ontario Con. Rules, or otherwise, of its own motion and against the protest of one of the parties to the issue, to re-open the case and to call for and hear a large amount of fresh evidence, and to determine the issue upon the original evidence and the fresh evidence thus obtained, not as upon an appeal but as in the first instance. *In re Enoch and Zaretsky Rock and Co.'s Arbitration,* [1910] 1 K.B. 327, and *Kessowji Issur* v. *Great Indian Peninsula R. Co.,* 96 L.T.N.B. 859, specially referred to; *Re Fraser,* 24 O.L.R. 222, reversed on appeal.

8. Where an appellate court is not satisfied upon the argument of the appeal that the case has been so fully developed as to enable a proper decision to be given, it should direct a new trial.

9. Where, in an issue as to lunacy under s. 7 of the Lunacy Act, 9 Edw. VII. (Ont.), c. 37, a Divisional Court has, of its own motion and against the protest of one of the parties to the issue, improperly called for and heard fresh evidence, and itself examined the alleged lunatic, and, upon the original evidence and the further facts thus ascertained, has determined the issue and reversed the decision of the trial Judge, and it appears that much of the fresh evidence so obtained may be important, the proper course is, not to determine the issue upon the record as it stood when the appeal came before the Divisional Court, but to direct a new trial. *Re Fraser,* 24 O.L.R. 222, considered.

Appeal allowed and a new trial ordered.

Watson, K.C., *John King,* K.C., and *F. W. Grant,* for appellant. *Creswicke,* K.C., and *A. McLean Macdonell,* K.C., for respondent.

Full Court.] RE ONTARIO BANK. [Sept. 20.

MASSEY AND LEE CASE.

Winding-up — Contributory — Bank—Transfer of shares after commencement of winding-up proceedings—Estoppel—Powers of liquidator.

Appeal from an order of an official referee placing the appellants Massey and Lee upon an amended list of contributories in respect to double liability upon shares of the Ontario Bank standing in their names. The appellants were the holders of the shares in question when the winding-up order was made, but which were subsequently transferred. In the first list made by the liquidator the names of the transferees were inserted and the appellants omitted. It was contended by the appellants that the placing of the transferees on the list amounted to an estoppel, and that the appellants were free. It was said that the fact of the appellants not appearing on the list was due to an oversight.

Held, 1. That there was no estoppel.

2. That there could be no estoppel by any act of the liquidator as his powers were so limited that except in some minor matters he could only act under the discretion of the court.

M. K. Cowan, K.C., for appellants. *Bicknell,* K.C., and *Strathy,* for the liquidators.

Full Court.] RE SOLICITORS. [Sept. 27.

Solicitor of company becoming a director.

It would be dangerous to encourage the idea that, under any circumstances, a solicitor acting for a client may as such become a director upon the board or act as an officer of a joint-stock company, and be at the same time in the pay of the client for the services so rendered to the company.

Pringle, K.C., for the clients. *Hodgins,* K.C., for the solicitors.

HIGH COURT OF JUSTICE.

Middleton, J.] [Sept. 17.

BOECKH v. GOWGANDA QUEEN MINES LIMITED.

Res judicata—Dismissal of action where plaintiff relies upon grounds he unsuccessfully sought to set up in original action.

A defendant who has failed to plead any defence open to him in an action cannot obtain any relief by any subsequent proceedings. His only remedy would be an application for indulgence in the original action. In this case such an application had been made but was dismissed.

J. W. McCullough, for plaintiff. *M. L. Gordon*, for defendants.

Boyd, C.] [Sept. 19.

CAMPBELL v. TAXICABS VERRALS LIMITED.

Company—Legal existence but no organization—Authority of solicitors.

Motion by plaintiff to set aside all proceedings entered into by defendant's solicitors and for an order directing the solicitors who defended the action to pay plaintiff's costs on the ground that the company was never organized and therefore could not authorize a defence.

Held, that a company existing under letters patent without any organization may defend an action brought against it. *In re Dunn* (1911), 1 K.B. 966, does not apply.

J. MacGregor, for plaintiff. *J. M. Godfrey*, for defendant.

Boyd, C.] RE BAYNES CARRIAGE CO. [Sept. 20.

Company—Winding-up Act, s. 2 (e), 13, 107 to 133, 134, 135, D. —Evidence of directors in support of petition.

Motion to set aside a subpœna calling on the directors of a company to testify on an application for a winding-up order on the ground that their evidence could not be received under the Dominion Act because the procedure under the Con. Rules is not available under that Act.

Held, that there was no reason why the directors should not be examined as witnesses, when there was no imputation of *mala fides*. The policy of our methods is to facilitate and simplify proceedings. English cases in other conditions cannot control what is the manifest intention of our legislature.

H. A. Burbidge, for the company and the directors. *Grayson Smith*, for the petitioners.

Riddell, Middleton, Lennox, JJ.] [Sept. 30.

WILSON v. SHAVER.

Sale of goods—Warranty—Meaning of "due to calve."

The words "due to calve" on a day named in reference to a cow described in a catalogue furnished to intending purchasers at an auction of cattle is not a warranty that the cow would calve on the day named.

Laidlaw, K.C., for plaintiff. *Shaver*, for defendant.

Province of Manitoba.

KING'S BENCH.

Mathers, C.J.] WATTS v. TOLMAN. [Oct. 2.

Common law remedy—Effect of statute also giving right of action.

When there is a remedy at the common law that right of action is not abrogated or interfered with by the fact that a statute which deals with the subject matter of the action and gives certain remedies does not expressly provide for or retain the common law right of action.

And therefore, an action lies by a borrower for the excess of interest exacted by a lender without reference to R.S.M. 1902, c. 322, s. 7, which provides a remedy where a suit, action, or other proceeding concerning a loan of money has been brought by the money-lender, but does not provide for any action at the suit of the borrower.

J. F. Davidson, for the plaintiff. *H. F. Tench*, for the defendant.

Bench and Bar.

JUDICIAL APPOINTMENTS.

Isidore Noel Belleau, of the Town of Levis, in the Province of Quebec, K.C., to be puisine judge of the Superior Court for the said Province of Quebec for the Judicial District of Kamouraska, vice Hon. Mr. Justice Cimon, who has been transferred to the Districts of Beauce and Montmagny.

Hon. Ernest Cimon, a puisne judge of the Superior Court for the Province of Quebec; to be transferred from the Judicial District of Kamouraska to the Judicial Districts of Beauce and Montmagny, vice H. C. Pelletier, resigned (Oct. 26.)

Alexander Casimir Galt, of the City of Winnipeg, K.C., to be a puisne judge of the Court of King's Bench for Manitoba, vice Hugh Amos Robson, Esq., resigned (Nov. 2.)

Flotsam and Jetsam.

It would seem that the claim made by Alberta to being the first to comply with the conditions of the Dominion Act respecting juvenile delinquents, cannot be substantiated, for it would seem that a juvenile court under the Act has been in existence in Winnipeg for some three or four years and doing good. Probably the fact that the proceedings are private, as they ought to be, is responsible for the public outside Manitoba not knowing of the existence of this court. They all seem to be "hustlers" in the west, but those of Alberta apparently owe an apology to their brethren in modest Manitoba.

By some carelessness on the part of the printer or proof reader the word "not" was omitted before "operate" in the eighth line of p. 521.

At p. 596, 13th line from bottom for Triboniau read Tribonian; 14th line from bottom for Otalari's read Ortalan's.