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SUCCESSION DUTIES AND OTHER ILLUSIONS.

There is no method of raising a revenue so attractive as that known as the succession duties, first introduced in England by Sir William Harcourt, Chancellor of the Exchequer under Mr. Gladstone; adopted in this country by the Government of the Hon., now Sir, George Ross; violently opposed by the Conservative opposition of that day, but continued by them when their turn came to provide for the provincial expenditure. This particular form of taxation appeals to the Socialist because it is an attack upon property, specially aimed at the rich minority for the benefit of the poor majority. It appeals to the Finance Minister because it brings large sums into the exchequer; can be easily collected, and, affecting only a fraction of the population, does not give rise to any disquieting agitation; and it appeals to the public at large because the benefit which accrues to the revenue falls as a burden upon only a few, and those best able to bear it.

One of the distinctive features of this tax is that it is levied upon capital as distinguished from income, and it is this feature which is, from any sound view of political economy, liable to the most serious objection. All other assessed taxes, whether upon realty or personalty, are paid out of income, do not impair the capital, and bear equally upon all. The succession duties are not only a direct tax upon capital, but are most unfair in their application. One estate may escape the burden for a whole generation, while another may, during the same period, have to contribute several times over, each time upon a reduced capital. The writer knows of one estate in Scotland which during the last ten years has been thrice depleted by the operation of this impost.

Apart from specific objections to this form of taxation, we find in it the germ of the socialistic doctrine of the equal distribution of wealth, to be brought about in the end by making the State the foundation from which every man should receive his share of the general revenue. From this it logically follows that all men must be placed upon an equality, no matter how much they may differ in character or capacity. This idea the trade unions have carried out in practice, the many not only asserting the right to control the wills of individuals, but also to rob them of their property—that is the results of their labour—which they effectually do when, by reducing all to a dead level of earning power, they do away with all freedom of contract. The efficient workman cannot get the full value of his work because the employer must pay to the inefficient more than he is capable of earning.

Thus with the caucus in politics, combination in trade, and unionism in labour, a man can neither vote, trade, nor work, except as his masters tell him. This is the freedom of the twentieth century which we are told belongs to Canada. Inter arma silentur leges! Equally mute is the voice of law when all these influences combine to thwart its power, and deaden its influence.

Our great illusion is that we are living under the rule of a democracy. We fondly suppose that we are governed, or govern ourselves, through the free voice of a free people. There may be freedom of thought, but there is no freedom of expression. The man in political life who utters an opinion not in accordance with the policy laid down in caucus, and carried out by the executive, will soon find it best to hide his head in obscurity. The man who sells a pound of sugar, or a yard of cotton, at rates different from those laid down by the guilds which regulate those trades, may as well put up his shutters. And the workman who tries to make his own bargain for the price of his labour will be lucky if he escapes with a broken head from the peaceful picketers of a trades union. Thus freedom begets tyranny, and tyranny is the mother of anarchy.

Interference with personal liberty takes away the chief motive for industry and enterprise, and therefore tends to pro-

duce and perpetuate poverty—the very thing which our social reformers are trying to get rid of. The workman who is not allowed to make the best use of his ability will soon lose the desire to better himself, and will sink to the level of mediocrity, if not below it, and the work he might have done if allowed the free use of his powers will be lost. But there is danger of a greater loss even than this—the loss of the sense of personal responsibility. In the words of a well-known writer:—

"The principle of personal responsibility is the necessary counterpart of the principle of personal liberty. Both are essential to social progress and human happiness. We cannot hope to preserve the one if the other be destroyed. Unless a man has liberty to give effect to his own judgment, he speedily ceases to feel any sense of moral responsibility. The destruction of individual liberty involves also the destruction of that moral sense which makes social life possible."

Our limits will not allow us to pursue this subject further, but observers cannot fail to see the tendencies to which we have referred going on around us, and producing their inevitable results. Evils great and many there are to be combatted, and schemes for reform are put forward with confidence. That any of them will succeed which do away with personal liberty and personal responsibility we do not believe.

There is one scheme older and from higher authority than any which our social reformers have yet propounded. It is the golden rule laid down long ago, so simple and yet so profound—that we should do to others as we would they should do to us. If this rule were adopted and acted upon, the setting of class against class would cease, both strikers and strike breakers would cease to trouble us, the secret of a living wage would be found, the agitator would find his vocation gone, and to democracy we might submit without fear of suffering either in our self-respect, our purses, or our persons.

IMPLIED WARRANTY OF AUTHORITY BY AGENT.

In an earlier article in this journal (40 C.L.J. 685) the writer discussed the leading case on this subject, *Collen* v. *Wright* (1857), 8 E. & B. 647, and the later cases in which the principle laid down in that case was considered and extended. The latest case referred to in that article was *Starkey* v. *Bank of England* (1903), A.C. 114.

The result of *Collen* v. *Wright* as stated by Willes, J., was: "A person professing to contract as agent for another, impliedly, if not expressly, undertakes to, or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does, in point of fact, exist."

In the case in the House of Lords it was held that the rule in *Collen* v. *Wright* was "a separate and independent rule of law," and that "as a separate and independent rule of law it is not confined to the bare case where the transaction is simply one of contract, but it extends to every transaction of business into which a third party is induced to enter by a representation that the person with whom he is doing business has the authority of some other person" (pp. 118, 119).

This case was followed in *Sheffield Corporation* v. *Barclay* (1905), A.C. 392, where a banker in good faith sent to a corporation a transfer of corporation stock which subsequently proved to be a forgery. It was held by the House of Lords that both parties having acted bonâ fide and without negligence, the banker was bound to indemnify the corporation against their liability to the person whose name had been forged, upon the ground that there was an implied contract that the transfer was genuine.

Lord Halsbury, L.C., in his judgment (p. 397) adopts the following as an accurate expression of the law: "It is a general principle of law that when an act is done by one person at the request of another, which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it

is entitled to an indemnity from him who requested that it should be done." See also *Bank of England* v. *Cutler* (1908), 2 K.B. 208.

Two very recent cases have been decided in which the above principles have been followed. These decisions are of great practical importance to solicitors, and do not seem to have attracted, in Ontario at any rate, the attention which they should receive. They are *Yonge* v. *Toynbee* (1910), 1 K.B. 215, and *Simmons* v. *"Liberal Opinion"* (*Re Dunn*) (1911), 1 K.B. 966, 27 T.L.R. 278.

But before considering these, we must notice the old case of *Smout* v. *Ilbery* (1842), 10 M. & W. 1, 12 L.J. Ex. 357, 62 R.R. 510. The defendant was a widow whose husband had gone to China and there died. The plaintiff was a tradesman who had previously supplied goods to the defendant on the credit of the husband and had been paid for them by him, the husband to the knowledge of the defendant being resident abroad. It was not until a year after the departure of the defendant's husband that she learned that he had died some six months previously. In the meantime, both parties being ignorant of the death of the husband, the defendant ordered necessaries from the plaintiff which he had supplied to her. The action was brought to recover the value of the goods supplied to the defendant from the date of her husband's death up to the time she knew of it. *Held*, that the circumstances being equally within the knowledge of both parties, and the widow not having omitted to state any fact known to her which was relevant to the existence or continuance of her authority, she was not liable for the price of the necessaries.

The law in such a case was thus stated by Sir W. Anson: "The death of the principal determines at once the authority of the agent, leaving the third party without remedy upon contracts entered into by the agent when ignorant of the death of his principal. The agent is not personally liable, as in *Kelner* v. *Baxter*, L.R. 2 C.P. 174, as having contracted on behalf of a non-existent principal; for the agent had once received an authority

to contract. Nor is he liable on a warranty of authority as in *Collen* v. *Wright;* for he had no means of knowing that his authority had determined. Nor is the estate of the deceased liable; for the authority was given for the purpose of representing the principal and not his estate. The case seems a hard one, but so the law stands at present." Anson's Law of Contract (1906), 11th ed., p. 386.

The facts in *Yonge* v. *Toynbee*, supra, were shortly as follows: Before the commencement of this action, which was then threatened, the defendant had instructed a firm of solicitors to act for him, and had subsequently become, and was certified as being, of unsound mind. This fact was not known to the solicitors. After the issue of the writ the solicitors undertook to enter, and in due course did enter, an appearance for the defendant, acting on the original instructions received from him.

Pleadings were delivered and various interlocutory steps were taken in the action. After notice of trial had been given, the solicitors for the first time discovered that the defendant had become of unsound mind, and they immediately informed the plaintiff's solicitors of the fact. An application was then made on behalf of the plaintiff for an order that the appearance and all subsequent proceedings in the action should be struck out, and that the solicitors who had assumed to act for the defendant should be ordered personally to pay the plaintiff's costs of the action up to date, on the ground that they had so acted without authority.

It was held by the Court of Appeal that the solicitors who had taken on themselves to act for the defendant in the action had thereby impliedly warranted that they had authority to do so, and therefore were liable personally to pay the plaintiff's costs of the action. It was argued on behalf of the solicitors that the only cases in which solicitors had been ordered by the court in the exercise of its disciplinary jurisdiction, to pay the opposite party's costs in an action, on the ground of having acted without authority, were cases where the solicitors had acted wrongfully as between themselves and their clients, and where,

therefore, they might, as between themselves and their clients, have been ordered to bear these costs. That there was only a very imperfect analogy between the case of solicitor and client, and that of an ordinary agent and his principal, which is the kind of case to which *Collen* v. *Wright* (supra), applies. The solicitor retained to defend an action is not like an agent employed to sell goods. He is a legal expert and officer of the court, and he is bound to go on taking the necessary steps in the conduct of the defence until he has notice of the revocation or determination of his retainer. The solicitors here only did what was their duty, and did nothing either legally or morally wrong, in taking the steps which they took.

Smout v. *Ilbery* (supra), and *Salton* v. *New Beeston Cycle Co.* (1900), 1 Chy. 43, were relied on. The Court of Appeal, however, were of opinion that the particular nature of the agency was not very material (p. 228), that the true principle as deduced from the authorities rests not upon wrong or omission of right on the part of the agent, but upon an implied contract. Referring to the argument based upon the special character of the agency of solicitors, it was said by Swinfen Eady, J.: "It is, in my opinion, essential to the proper conduct of legal business that a solicitor should be held to warrant the authority which he claims of representing the client; if it were not so, no one would be safe in assuming that his opponent's solicitor was duly authorized in what he said or did, and it would be impossible to conduct legal business upon the footing now existing; and whatever the legal liability may be, the court, in exercising the authority which it possesses over its own officers, ought to proceed upon the footing that a solicitor assuming to act, in an action, for one of the parties to the action warrants his authority" (p. 234).

The result of this case would seem to be that *Smout* v. *Ilbery* is overruled. "The agent is liable whether he represents himself as having an authority which he has never possessed, or as having an authority which has determined without his knowledge, even though he had no means of finding it out."

"It seems also no longer open to doubt since the recent case of *Yonge* v. *Toynbee,* that insanity annuls an authority properly created while the principal was sane" (Anson (1910), 12th ed., p. 391).

"*Smout* v. *Ilbery,* which has so long held the position of a leading case, passes into the lumber room of the overruled" (35 Law Magazine, p. 341).

Simmons v. "*Liberal Opinion*" (*Limited*), supra, is another case of great importance to solicitors. The plaintiff brought an action claiming damages for libel contained in a paper purporting to be published by *Liberal Opinion* (*Limited*). An appearance was entered for the defendants by one D., a solicitor who continued to act for the defence in the action. The action came on for trial, and it was then discovered that there was no such limited company either under the Companies Act or under the Industrial and Provident Societies Act. The jury gave a verdict for the plaintiff for £5,000 damages. An application was then made on behalf of the plaintiff that the solicitors for the defendant should be made personally responsible for the plaintiff's costs, on the ground that the defendants were not a limited company as stated in the pleadings, and that, therefore, the solicitors had improperly accepted instructions to appear for them in that capacity. Mr. Justice Darling came to the conclusion that D. had authority to act for certain persons who carried on business under the style of *Liberal Opinion* (*Limited*), and it could not, therefore, be said that he had no clients. He, therefore, refused the application.

The Court of Appeal, however, held that the proceedings in the action had been futile and the costs incurred by the plaintiff had been absolutely thrown away by reason of the appearance entered for a non-existing corporation, and referred to the well-established principle that a solicitor must be held to warrant the authority which he claims as representing his client. They were consequently of the opinion that they had jurisdiction to order the defendant's solicitors to pay the plaintiff's costs of the action and that they ought to exercise this jurisdiction.

"The decision, hard though it may be on a solicitor who has acted in good faith, seems to us to be covered by the judgment in *Yonge* v. *Toynebee*. It exemplifies the principle on which the warranty of authority is founded, viz., that if one of two innocent parties must suffer it should be the one who has induced the other to act to his prejudice by an unqualified assertion of an existing authority" (46 Law Journal, p. 116).

These two cases were no doubt special in their character, but they very forcibly illustrate the responsibility resting upon solicitors in assuming to act for clients and the need of careful enquiry into the position and capacity of the clients.

N. W. HOYLES.

THE VALUE AND ADMISSIBILITY OF PHOTOGRAPHS AS EVIDENCE.

In early times, photographs, as is matter of common knowledge, were unknown. The discovery and development of the photographic art being of comparatively recent achievement. Like many other industries, this has developed from a very crude and somewhat clumsy state into a well-perfected science. The great progress which has been made in the perfection and simplicity of photography has rendered this science and its achievements a useful adjunct in trials. It often happens that a photograph of some object or locality is of the greatest service and assistance in determining controverted issues of fact. There can be no question but that a photograph of an object, locality, etc., is always admissible in evidence when it is a correct reproduction of the appearance of the object or place and such a reproduction is necessary in order to assist the jury to better understand and weigh the facts in any case. Of course, in order to be proper as evidence, the photograph must shew the object as it existed at the time of the controversy or at the time when the thing photographed had the same appearance as it had at such time. Thus the photograph of the scene of a railway

accident at the time or so soon thereafter that no change in appearance had taken place, would be admissible; but it is also competent to shew that the object or scene had changed at the time the photograph was made. Thus, where a hole which is alleged to have caused an accident and injury, a photograph of it after it had been filled and its appearance thus materially changed from the time of the injury, would not be proper. A photograph taken three months after an accident is not admissible to shew the appearance of the premises unless it be affirmatively shewn that the appearance at the time of the accident and of taking was the same. In an action against a city for damages for negligently locating and constructing a sewer, it has been held that stereoscopic views from a photo of the locality taken the day after a heavy rain, are admissible. A photograph of the locality of a murder taken soon after the crime and before any material change in the surroundings has taken place, is competent. Where a murder had been committed in a saloon and a photograph of the interior had been taken before any change in the arrangement of the furniture, etc., and which shewed the figures as nearly as could be, and shewn to have been a correct representation of the situation, it was held proper evidence. It is also proper to shew by photographs the appearance of certain real property as a result of grading or other injury thereto, to aid the jury in ascertaining the nature, effect and extent of the injury. Of course, a photograph cannot be properly received in evidence until it be shewn affirmatively that the thing or locality photographed has some connection with or bearing on some fact in controversy. Where some right is asserted or denied by reason of a wrecked building, a photograph thereof taken immediately thereafter is proper. The courts admit that by this method of bringing the condition of things before the jury, they are enabled to draw a more correct conclusion than from a mere verbal description by the witnesses. The fact that a photograph of a locality is taken at a different season of the year from the time of the matter in issue does not render the same inadmissible. The difference in the appearance

by reason of the season can be explained. Photographs of a train wreck have been admitted to shew the nature and extent of the wreck. Such a photograph has been held admissible even where a wrecking train had partly changed the appearance of the wreck, the photo being introduced only to shew the force of the impact and enough of the wreck being still intact to shew this. The aid of a photograph is often resorted to with the approval of the courts to shew or disprove identity in various cases. But the identity cannot be established by proving that the picture offered in evidence is that of the person in dispute. It must be first duly verified as that of the person in question. Then when the disputed person is before the court, it is for the jury to determine whether he is the same person that the photograph shews. A photograph is competent to shew the personal appearance of one accused of crime at a certain time to assist the jury in arriving at a correct conclusion as to the identity. Thus, where a witness had testified that the defendant had not worn sidewhiskers, and that witness had known him since the spring of 1887, it was correctly held that a photograph taken in July, 1887, shewing the defendant with sidewhiskers, and proven to be a correct likeness, was competent evidence in contradiction of the testimony to the contrary. Upon the same principle, it is, of course, competent to introduce properly verified photographs to assist in ascertaining the identity of a person found dead. In an action for damages growing out of an unlawful assault and battery, or other personal injury, a ferrotype of the person injured taken shortly after the injury, is admissible to shew the nature and the extent thereof. And this is true even though the plaintiff's person is exhibited to the jury, but after the appearance of the injury had been changed by the process of healing. They may be used to shew the appearance of the body just before and after an injury as illustrating the nature of the injury. Likewise, upon a plea of self-defence it is competent to shew the physical condition and appearance of the defendant. They may be used to shew the appearance and condition of a child at different

times, who is alleged to have been neglected and injured in health in violation of a penal law by one having his care and custody. Similarly, it is held where one is charged with having deprived domestic animals in his custody of substance in violation of law, he may introduce photographs of the animals shewn to have been taken at the time of the alleged neglect. A photo has been permitted in evidence after the death of the person in controversy to establish the paternity of a child by permitting the jury to compare the alleged picture of the alleged father with the appearance of the child exhibited to the jury. Where a person is accused of a crime it is proper to introduce a photo of him though it shews the person without glasses, where the accused refuses to remove his glasses for the observation of the jury. The weight of the picture as evidence, of course, being for the jury. In a murder case where the throat of the deceased was cut, and the character and extent of the wound being important in developing the facts, the Supreme Court of Georgia, in sustaining the admissibility of a photograph, said: "A photograph of the wound of deceased was admitted as evidence over the objection of the defendant; the character of the wound was important to lucidate the issue; the man was killed and buried, and a discription of the cut by witnesses must have been resorted to. We cannot conceive a more impartial and truthful witness than the sun, as its light stamps and seals the similitude of the wound on the photograph put before the jury; it would be more accurate than the memory of witnesses, and as the object of all evidence is to shew the truth, why should not this dumb witness shew it?" In an action against a railway company by a servant for injuries resulting from an unblocked frog it has been held proper to introduce in evidence a photograph of the frog taken the morning after shewing the frog unblocked to contradict a witness who testified that all frogs were thus provided. But in cases like this, the fact that the block may have been removed after the injury and before the taking of the photograph would make the question of weight to be given the photograph one for the jury.

It has been sometimes claimed that the introduction of photographs in evidence transgresses the rule against secondary evidence. But this is not necessarily true. In Wisconsin it is practically held that a photograph of an injured limb cannot be admitted over objection if the original could with reasonableness and propriety be produced in court for the inspection of the jury. And there would be much force in this contention if the appearance of the limb at the time of exhibition and when the photo was taken was the same. The learned court also held, however, that photographs "may be used to identify persons, places and things, to exhibit particular locations or objects where it is important that the jury should have a clear idea of the same, and the photographs will better shew the situation than the testimony of witnesses and where the testimony of witnesses will be better understood by the use of photographs, and to detect forgeries and to prove documents in cases where originals cannot be readily procured." While a photograph is in a sense secondary evidence it is nevertheless admissible in all cases where the object or thing shewn thereby cannot with reasonable convenience be produced in court. Though a photograph is competent evidence under the restrictions shewn, the use of such evidence must be confined to cases where it will serve to illustrate articles, objects, scenes and localities, the importance of which may arise from any issue of fact and where it is not practicable to bring these things into court or have them viewed by the jury. A photograph, in other words, can be used in evidence only where it serves the purpose of the best evidence reasonably to be had under the circumstances. Upon this salient principle it is correctly held that a photograph of a letter or other document cannot be admitted in evidence if the original can be produced, for to permit this would be a clear violation of the rule that the best evidence must be offered, and the photograph is the best evidence only when better cannot be reasonably had. It has been held, however, that photographic copies of a note admitted to be genuine and of an alleged forged note are admissible for comparison when shewn to be correct representa-

tions. But this would not ordinarily be correct if the forged and genuine instrument could be introduced, though doubtless enlarged photographs of each in such cases might be proper, as this would necessarily bring out more visibly and clearly any resemblance or lack of same.

One of the unusual facilities afforded by the science of photography for investigation of what would be otherwise hidden is the X-ray photograph. As is now matter of common knowledge, by reason of these rays it is possible to photograph into and through the body and locate and shew the condition of the bones or any solid body. So, when these photographs are shewn to be correct representations of the condition of a bone or any metallic substance in the body, they may be introduced in evidence to shew the condition thereof. "It is not to be understood, however, that every photograph taken by the Cathode or X-ray process would be admissible. Its competency, to be first determined by the trial judge, depends upon the science, skill and intelligence of the party taking the picture and testifying with regard to it, and that lacking these important qualifications, it should not be admitted. It is not conclusive upon the triers of fact, but is to be weighed like other competent evidence." In the nature of things, it is both necessary and proper to require due caution in admitting photographs of this character. This is true because the process is so complicated and difficult and affords such a limited means of proper identification and verification by reason of the very nature and limits of the process. It is a comparatively easy matter to identify an ordinary photograph because witnesses can usually be produced in abundance to testify as to the correctness of the likeness. But in case of the X-ray process, only those, ordinarily, could produce such testimony as operated the instrument in making the exposure or who were present and saw the status of the otherwise hidden objects by means of this same process.

The ordinary methods of photographic reproduction are now so well and generally known and understood that courts do not hesitate to take judicial notice of the fact that correct photographs of any object are easily made and that, as a gen-

eral rule, the camera does not reveal a false likeness. Where an X-ray photograph is offered in evidence and conclusively proven to be correct, the trial court cannot arbitrarily exclude it and to do so is reversible error.

It is in all cases and without exception, a photograph must be shewn to correctly reflect the appearance of the thing photographed, otherwise it would be a rank violation of the fundamental rules against hearsay and secondary evidence to permit such evidence to be considered. Of course, there must be some means of deciding when a photograph is shewn to be sufficiently correct to be admissible. This, necessarily, is a preliminary question for the court to decide in all cases. The ruling of the trial court on this question is practically as effective and conclusive on appeal as the verdict of a jury. When the photograph is thus admitted by the trial court its weight and force as evidence then become questions for the jury. In determining whether the accuracy of an ordinary photograph offered in evidence is sufficiently shewn, it is not necessary that the person who made the picture be produced as a witness. This fact may, ordinarily, be shewn by any one who is familiar with the object or thing photographed to the extent that he can say, as a witness, that the photograph is a correct likeness. Of course, if the accuracy of the photograph should become an issue by reason of conflicting evidence, the issue on this point would be for the jury. It may be shewn by the photographer taking the picture that he retouched the negative in order to more clearly bring out some object shewn thereby. It is very clear that it would be reversible error to permit a photograph to be introduced in evidence without some evidence of its correctness. Photographs are admitted in evidence upon the same principle that maps, diagrams, etc., are admissible. Properly and sufficiently identified and proven correct by witnesses and circumscribed within due bounds by the court in admitting them, photographs furnish a most convenient, reliable and satisfactory agency in elucidating an issue of fact and they are increasing in this usefulness constantly.—*Central Law Journal.*

According to modern usage, a declaration of war not being necessary, nations generally content themselves with a proclamation to their own citizens of the existence of war and a formal notice to neutral States. In a civil war there is never a formal declaration of war. It has been held that the great civil conflict in the United States began with the President's proclamation of blockade of the 27th April, 1861. The United States did declare war against Great Britain in 1812 and against Spain on the 25th April, 1898; but in the first instance the United States began active hostilities before the news could cross the ocean, and, in the second, the declaration recognized that war had existed since the 21st April. England captured New York, in 1664, before declaring war against Holland, and, before the Seven Years' War was declared, captured hundreds of ships and thousands of prisoners from France. Since the peace of 1763 the European practice has been even more irregular, and the necessity of a declaration is generally denied. In 1870, the representatives of France at Berlin handed the German Government a note simply declaring that "le gouvernement de S.M. Imp. se considère dès à présent comme étant en état de guerre avec la Prusse," and in 1877 a dispatch to the same effect was delivered to the representative of Turkey at St. Petersburg. Such are the survivals of the mediæval practice according to which knightly honour forbade an attack until after full notice.—*Law Times.*

At the meeting of the English Law Society held at Nottingham, the President, in his address dealt exhaustively with the subject of land transfer in England. This matter is attracting much attention at the present time; and the legal profession, have, as usual, come to the front in a further effort for a reformation in the mode of facilitating and cheapening transfer of land and the removal of technicalities. We, in this country, with comparatively short and simple titles, can scarcely appreciate the immense difficulties that lie in the way of their effort.

At the banquet of the Law Society in Nottingham which followed these meetings, Sir Edward Fraser expressed as his opinion something which we have already voiced in these columns. He said, "If the solicitors of England, in the exercise of their just rights, and for the maintenance of their just powers, will act coherently and solidly together, we are of all sections the most powerful in the country." We wish our brethren at the Bar would take these pertinent remarks to heart. Did they realise their power, they might have the wisdom to use it to place the profession in a sounder and safer position so far as it is affected by the depredations of unlearned and unlicensed pirates. The medical profession, and other classes of less note, seem to receive an attention at the hands of the legislature which is denied to lawyers, simply because the latter do not work together in claiming their just rights and a reasonable protection.

The most recent move in England in the direction of the adjustment of differences between labour and capital—between employers and workmen, has been the institution of an Industrial Council, intended to be representative of both classes. The object, of course, is the establishment of a Board which would deal on an equitable basis between contending parties, and, so far as possible, prevent these industrial trade and labour disputes which so seriously affect the welfare of the country. The usefulness of such a body would, in the first place, depend largely upon its personnel, and, after that, upon the wisdom, fairness and firmness of its members. It is said that the Council about to be chosen is to be presided over by Sir George Askwith, K.C.

REVIEW OF CURRENT ENGLISH CASES.

SALE OF GOODS—C.F.I. CONTRACT—POLICY HANDED OVER WITH GOODS—HONOUR POLICY EFFECTED BY SELLER ON INCREASED VALUE—RIGHT OF BUYER TO HONOUR POLICY—MONEY HAD AND RECEIVED.

Strass v. *Spillers* (1911) 2 K.B. 759. The facts of this case though somewhat complicated involve after all a very simple question of law. The plaintiffs who were grain dealers, on 2nd February, purchased from Allatini a cargo of wheat subject to a term that the sellers should insure it for 2 per cent. over the invoice price (37s. 1½d. per 480 lbs.) and in accordance with the contract received from Allatini a policy for £21,300. The market price of wheat rose and on February 9th the plaintiffs effected a policy on increased value for £2,000 with the London Assurance Corporation, and another for £2,000 with the British and Foreign Marine Insurance Co. On March 16th the plaintiffs resold the cargo to Allatini for 39s. 6d. per 480 lbs., and on similar terms as to insurance; the plaintiff returned the policy received from Allatini and in order to meet the additional insurance required by reason of the increased price, viz., £1,508, they divided one of the £2,000 policies into two policies for £1,508, and £492, respectively. The £1,508 policy was handed over to Allatini, and the two policies for £2,000 and £492 were retained by the plaintiffs. The cargo was sold under similar terms as to insurance to different parties, and the defendants ultimately became the buyers on those terms; while they were the owners a loss occurred, and an adjustment of the loss was made, whereupon the plaintiffs claimed to be entitled to recover on the £2,000 and £492 policies and they sent the policies to Allatini with a request that they should be forwarded to the receiver of the cargo, in order that the plaintiffs claim thereunder might be adjusted, and that the amount due to them might be collected. Allatini and the other sub-purchasers forwarded them from one to the other with this request, until they reached the defendant's hands, who forwarded them to the receiver and collected the amount payable thereunder which, however, the defendants then claimed to retain for their own use; but Hamilton, J., who tried the action held that the policies in question were honour policies effected by the plaintiffs for their own benefit, and that the defendants had no claim thereon by virtue of the subsequent transfers of the cargo, and

were therefore liable to the plaintiffs for the proceeds, as money had and received to their use.

NEGLIGENCE—ELEMENTARY SCHOOL—EDUCATION AUTHORITY—NEGLIGENT ACT OF TEACHER—INJURY TO SCHOLAR—MASTER AND SERVANT—LIABILITY OF EDUCATION AUTHORITY FOR NEGLIGENCE OF TEACHER.

Smith v. *Martin* (1911) 2 K.B. 775. This was an action by the pupil of a public elementary school to recover damages against a teacher and the municipal corporation having the control of the school in which the teacher was employed, for injuries sustained by the plaintiff, by reason of the negligence of the teacher. The plaintiff was a girl of nearly fourteen, she had had two courses of lessons in cookery, and was taking a third course, and had also two courses of lessons in laundry work. The negligence assigned consisted in the fact that the teacher of the class of which the plaintiff was a member had told the plaintiff to go to an adjoining room and poke the fire and pull out the damper of a stove. In performing this apparently simple operation the plaintiff's pinafore caught fire and she was injured. The jury found that in giving the order the teacher had been guilty of negligence and they gave a verdict for the plaintiff for £300. Laurance, J., who tried the action gave judgment against the teacher for that sum, but dismissed the action as against the municipal corporation. On appeal, however, his decision as to the corporation was reversed; the Court of Appeal (Williams, Moulton, and Farwell, L.JJ.), holding that the order of the teacher was given in the course of her employment, and that the relationship of master and servant existed between the teacher and the municipality, and consequently the latter were liable for the negligence of the teacher. It is somewhat hard to understand, from the facts as given in the report, on what ground the jury based the finding of negligence.

DAMAGES—MEASURE OF DAMAGES—BREACH OF CONTRACT EXCLUDING FROM COMPETITION—REMOTENESS.

Chaplin v. *Hicks* (1911) 2 K.B. 786 was a somewhat unusual case. The defendant advertised that if ladies wishing to become actresses would send him their photographs he would publish them, and call for a public ballot from the readers of the newspapers in which the portraits were published, as to which was considered the most beautiful, and that the fifty who should receive the most ballots would be seen by the defendant

by appointment, and from them he, defendant, would select twelve who were to receive engagements for three years as follows: the first four at £5 a week, and the second four at £4 per week, and the third four at £3 per week. The plaintiff sent in her portrait to the defendant which was published and she received sufficient ballots to entitle her to a place among the fifty. The defendant on the 4th January, by letter, made an appointment to meet the plaintiff and the forty-nine others who had received the most ballots in London on 6th January. This letter was delivered at the plaintiff's address in London on the 5th January and was forwarded to the plaintiff who was then in Dundee, and the notice did not reach her until the 6th January, too late to enable her to be present on the 6th January. The other 49 ladies attended on the 6th January and from them defendant made his final selection of the twelve. The plaintiff made subsequent ineffectual attempts to obtain another appointment. The jury found, in answer to a question put to them by the court, that the defendant did not take reasonable means to give the plaintiff an opportunity of presenting herself for selection, and assessed the damages of the plaintiff at £100 for which amount Pickford, J., who tried the action gave judgment in favour of the plaintiff. This judgment the Court of Appeal (Williams, Moulton, and Farwell, L.JJ.), declined to disturb though conceding that in the circumstances it was hard to find any specific measure of damages, They, however, held that the breach involved a monetary loss and that it was a matter for the jury to assess the damages as best they could, and Farwell, L.J., says if the jury had given only 1s. the court could not have interfered.

ALIMONY—MISCONDUCT OF WIFE.

Leslie v. *Leslie* (1911) P. 203. In this case a decree had been pronounced for restitution of conjugal rights which the husband had disobeyed whereupon the wife applied for an order for permanent alimony. The defendant resisted the application on the ground that the wife had been guilty of fraud for which she had suffered imprisonment and that she had been guilty of fraud before marriage which had greatly disappointed his expectations and that by her fraud after marriage he had been involved in heavy losses. It appeared that the wife had no means of support and that the husband had an income of £1,500 a year. The President remarks that the origin of the wife's right to alimony was the right which the husband had upon the marriage to all the property of the wife, and that the legislation of the last

generation has deprived the husband of his complete rights to his wife's property; but that his obligation to provide for her maintenance in proportion to his ability to do so remains upon grounds which are broader and deeper. He, therefore, held that the wife was entitled to alimony notwithstanding her bad conduct and on a reference it was fixed at £3 per week.

CONFLICT OF LAWS—POWER OF APPOINTMENT—GENERAL POWER UNDER ENGLISH SETTLEMENT—DONEE OF POWER DOMICILED DUTCHWOMAN—WILL IN DUTCH FORM—LIMITED POWER—ENGLISH LAW—DUTCH LAW—EFFECT OF EXERCISE OF POWER BY DUTCHWOMAN.

In re Pryce, Lawford v. *Pryce* (1911) 2 Ch. 286. In this case an English lady under the will of her father had a general power of appointment over funds in England. She married a Dutchman and acquired a Dutch domicile. According to Dutch law she had only a right to make an absolute disposition of seven-eighths of her property, her mother, in the events which had happened, being entitled to the remaining one-eighth as her "legitimate portion." In exercise of the power, the lady made a will in Dutch form which was admitted to probate in England, whereby she appointed her husband sole executor and bequeathed to him as her sole heir the whole of her estate of which the law in force at the time of her death allowed her to dispose of in his favour. According to Dutch law the exercise of the power had the effect of making the appointed property her assets for all purposes. Parker, J., in these circumstances held that by English law also the exercise of the power had made the appointed property assets of the testatrix for all purposes; but that her power of disposition of that property was no greater than it was over property to which she was absolutely entitled; and consequently that the husband was only beneficially entitled to seven-eighths of the appointed property, and the Court of Appeal (Cozens-Hardy, M.R., and Buckley, and Kennedy, L.JJ.), affirmed his decision.

MORTGAGOR AND MORTGAGEE—NOTICE BY MORTGAGEE TO PAY OFF—FAILURE TO PAY ON DATE NAMED—SUBSEQUENT TENDER IMPROPERLY REFUSED—MORTGAGEE'S RIGHT TO SIX MONTHS' NOTICE OR SIX MONTHS' INTEREST—INTEREST SUBSEQUENT TO TENDER.

Edmondson v. *Copland* (1911) 2 Ch. 301. This was a redemption action. The mortgagee gave notice to the mortgagor

to pay off the mortgage debt and that in default of payment within three months the mortgagee would proceed to sell the property. Before the expiration of the three months some correspondence took place as to the execution of the reconveyance and the matter was not completed before the expiration of the three months, but a week later the mortgagor tendered the money which the mortgagee refused to accept claiming either six months' notice of payment, or six months' interest. The mortgagor then commenced the present proceedings for redemption and a reference to take the account was ordered. The Master certified the amount due at the date of the tender and that the tender was sufficient and had been improperly refused, and he therefore disallowed interest subsequent to the tender. On appeal from his ruling, Joyce, J., held that the tender was good, and that the mortgagee, in the circumstances, was entitled neither to six months' notice or six months' interest in lieu of notice, but inasmuch as it was not affirmatively shewn that the money, after the tender, was lying idle, the mortgagor, notwithstanding the tender, was liable to pay interest up to the date of payment, as during the meantime he had had the use of the money.

SOLICITOR—COSTS—CHARGING ORDER—PROPERTY RECOVERED OR PRESERVED—SOLICITORS' ACT, 1860 (23-24 VICT. C. 127) S. 28—R.S.O. C. 324, S. 21).

In re Cockrell's Estate (1911), 2 Ch. 318. In this case, which was for administration, a sale of part of the estate had been conducted by the defendants under the order of the court and £400 realised. On further consideration it had been ordered that the sum of £64 due by the defendants should be set off pro tanto against their costs and that the residue of their costs should be paid out of the estate. The defendant was in poor circumstances and unable to pay any costs, and his solicitor now applied for a charging order on the £400 for the costs incurred in realizing that fund (see R.S.O. c. 324, s. 21) but Neville, J., while conceding that the rights of a solicitor to a lien for costs are not in all cases necessarily merely co-extensive with the rights of his client, considered that the granting of a charging order is discretionary, and that it would not be a proper exercise of discretion to grant it in the present instance, as the costs in question had by the direction for set off already, in effect, been ordered to be paid out of the fund, and that it would not be

proper to order payment of the same costs twice out of the same fund. He therefore refused the application.

TRADE UNION—OBJECTS OF TRADE UNION—RULES—COMPULSORY LEVIES ON MEMBERS OF UNION TO OBTAIN REPRESENTATION ON MUNICIPAL COUNCILS—ULTRA VIRES.

Wilson v. *Amalgamated Society of Engineers* (1911) 2 Ch. 324. This was an action by the member of a trade union to restrain the union from making compulsory levies on the members for funds wherewith to secure representation on municipal councils. Parker, J., who tried the action came to the conclusion that the decision in *Amalgamated Society of Railway Servants* v. *Osborne* (1910) A.C. 87 where the House of Lords held that such levies could not be lawfully made for securing representation in Parliament, applied, and he therefore granted an injunction as prayed, and the rules of the union authorizing such levies were declared to be *ultra vires* of the union.

WILL—CONSTRUCTION—GIFT TO SUPPOSED WIFE DURING HER WIDOWHOOD—BIGAMOUS MARRIAGE.

In re Hammond, Burniston v. *White* (1911) 2 Ch. 342 is a case involving a peculiar state of facts. The plaintiff Burniston's husband disappeared in 1894 and was supposed to have been drowned, though it was impossible to trace him. In the year 1900 she married John Hammond who was informed of the disappearance of her husband, and both believed that they were lawfully married, and they lived together as man and wife until 1906, when Hammond died and by his will gave his household effects to his "wife" "during her widowhood and after her decease or second marriage" he gave them to his daughters. He also gave his wife the use of a house, and an annuity on the same terms. After the testator's death the plaintiff lived in the house and received the annuity until 1910, when it was discovered that her husband Burniston was alive. In these circumstances, she brought the present action for a declaration that she was the person described in Hammond's will as his wife, and was entitled to all the rights and benefits given by the will to his wife. Parker, J., who tried the action gave judgment in her favour holding that the words "during widowhood" did not import a condition, but simply pointed out the time within which the gift was to be enjoyed, and he held that during widowhood meant until the donee died or married again.

REPORTS AND NOTES OF CASES.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Viscount Haldane, Lords Macnaghten, Mersey and Robson.] [May 23.

ATTORNEY-GENERAL FOR CANADA *v.* STANDARD TRUST COMPANY OF NEW YORK.

Company—Directors—Sale by, to company—Directors the only persons interested—Fiduciary position.

This was an appeal by special leave from the judgment of the Supreme Court of Canada (IDINGTON, J., dissenting), from the Exchequer Court. The respondent company was the assignee of the syndicate referred to in the judgment. All the shares in the company belonged to the directors, there being no outside shareholders. The directors made a sale of property without obtaining the approval of the transaction by the shareholders.

Held, that this sale, not being in itself ultra vires, should not be set aside on the ground that the directors held a fiduciary position and that the transaction was not approved at a general meeting, the directors themselves being the only persons interested.

Hon. F. Russell, K.C., and *A. Geoffrion*, K.C., of Quebec Bar, for the appellants. *Buckmaster*, K.C., *Martin*, K.C., of Quebec Bar, and *Hon. M. Macnaghten*, for the respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Boyd, C.] KENNEDY *v.* SPENCE. [Sept. 29.

Vendor and purchaser—Contract—Vendor only able to convey one-half—Specific performance—Husband and wife.

Action for specific performance of a contract for the sale and purchase of land. The contract was made by the husband for

the sale of a parcel of land of which he owned one-half, and his wife the other half. The wife refused to convey her portion and the action was brought by the purchaser against the husband, the vendor, to enforce the sale of the whole property. The purchaser was not aware, till late in the proceedings, the condition of things, but he was then willing to accept all the vendor could give with a corresponding abatement in price. The defence was that the vendor could convey only one-half the land.

Held, that the purchaser was entitled to the conveyance of the portion that the defendant could give him, the price to be abated accordingly.

R. H. Greer, for plaintiff. C. A. Moss, for defendant.

Boyd, C.] [Sept. 29.

TORONTO AND NIAGARA POWER CO. *v.* TOWN OF NORTH TORONTO.

Municipal corporations—Electric power company—Authority to erect poles and wires in streets of town without permission—Construction of statutes—"Enter"—"Incommode"—Application to Dominion railway board—Necessity for depositing plan and book of reference—Condition precedent.

Action to restrain the defendants from interfering with the plaintiffs' operations in erecting poles and transmission wires in the town of North Toronto, and for damages.

The plaintiffs claimed to have a free hand to erect a line for the transmission of high electric power along the streets of North Toronto, without the sanction or supervision of any municipal or other body. The defendants contended: (1) that there was no power whatever conferred by the plaintiffs' charter to enter and break ground in the street; (2) that, if there was such power, it cannot be exercised without the permission of the municipality; and (3) that the exercise of such power of construction should be supervised by some competent authority outside of the company, in the interests of public safety, and in order to avert probable injury to life and property. . . .

BOYD, C.:—After speaking of the corporate power under the Act, the Chancellor referred to other legislation: the Dominion Telegraph Company's Act of 1871, 34 Vict. c. 52, s. 4; Bell Telephone Company's Act of 1880, 43 Vict. c. 67, s. 3; Montreal Telegraph Company's Act of 1882, 45 Vict. c. 93, s. 3 and continued:

In the Act incorporating the plaintiffs, 2 Edw. VII. c. 107, the collocation of words as to the powers of the company is different, but not less comprehensive: thus (sec. 12), the company may construct, maintain, and operate works for the . . . distribution of electricity and power . . . and may construct, maintain, and operate lines of wire, poles, tunnels, and other works, in the manner and to the extent required for the corporate purposes, and may with such lines of wire, poles, etc., conduct, convey . . . such electricity . . . through, over, along or across any public highway . . . and may enter upon any lands on either side of such lines and fell and remove any trees . . . or other obstructions. . . . And the company may enter upon private property and survey and set off such parts as are necessary (making compensation therefor) under the provisions of the Railway Act of 1888, thereinafter referred to. And by section 13, the company may erect poles, construct trenches, and do all other work for the transmission of power, provided the same are so constructed as not to incommode the public use of the streets or to impede access to houses in the vicinity.

Under the words of the Bell Telephone Act it was held by the highest court that the power existed and was exercisable without the sanction of the municipal bodies in whom the highways were vested: *City of Toronto* v. *Bell Telephone Co.*, [1905] A.C. 52. The words of the Bell Telephone Company's Act, "construct, erect, and maintain" are equipollent with these of present Act, which are: "Construct, maintain, and operate" lines of wire and poles and therewith convey power through, over, along, or across any public highway.

The words "enter" is used in these empowering Acts uniformly, so far as I can see, with reference to an entry on private lands, whereas "construct" is used as to the operation on public places. In the absence of words of restriction, the meaning is to give absolute power to go upon the highway for the purposes of their undertaking without permission from the municipality. The words used as to the powers of the company are to be read giving them their fair and ordinary meaning; and my conclusion is that the only condition imposed by this charter is, that the work of construction shall be so conducted as not to incommode the public use of the streets or to impede access to buildings close-by the streets.

"Incommode" is a limited word and does not appear to have

reference to the dangers arising from the subsequent transmission of the power, but to inconveniences in the actual placing of the plant on the public sites. That is a matter to be adjusted pending construction, and is fully met in this case by the undertaking given that the line shall be put up under the supervision and with the approbation of the Dominion Railway Board (a body not in existence when the charter was obtained . Parliament). That Board will also, doubtless, have careful regard to the element of danger to life and property liable to arise from the stringing overhead of high voltage transmission wires.

In the next place, the company also claim the right to proceed without filing plans and surveys of the proposed route. Of this I have more doubt. The Act, sec. 18, provides that the company may take and make surveys and levels of the lands through which the works are to pass or to be operated, and of the course and direction of the works and of the lands intended to be passed through "as far as then ascertained," and also the book of reference for the works, and deposit the same as required by the Railway Act (1888) with respect to plans and surveys of a section of the works . . . and upon such deposit of the map or plan and book of reference of any such portion, all the sections of the said Railway Act applicable thereto shall apply.

Though this reads that the company "may" do this, it means that they shall do so in order to bring their corporate powers into proper activity and efficiency. And when one needs the interpretation to be given to the word "lands" as meaning or including "privilege or easement" (s. 21 of the charter, sub-s. (c)), it appears to me to extend the provision as to maps and book of reference to this passage of the line along the highway in question. The statute itself concedes or grants the easement or privilege of passing "through, over, along, or across any highway:" this work is intended to pass "through" the highway (on its surface, that is), and the propriety of plans, surveys, and the like seems as great for this method of construction as if private lands were alone in question.

The special Act (s. 21) incorporates s. 90 of the general Railway Act, 51 Vict. c. 19. That section provides (a) that the company may enter into or upon any lands of Her Majesty without any previous license therefor . . . and make surveys and examinations and ascertain such parts as are necessary and proper for the line. It may be that this can be read as applicable to highways which are vested in the Crown as to the freehold;

and, if so, the language is pertinent to both aspects of the case in hand, i.e., the company can enter without getting leave, but it is not absolved from preparing proper plans for public notification of what is being proposed to be done.

Sec. 145 of the general Act (also incorporated) enacts that the deposit of map, plan, and book of reference shall be deemed a general notice to all parties of the lands (i.e., privilege or easement) which will be required for the line.

The sections of the Railway Act of 1888 applicable to maps and plans are also in general terms incorporated with the special Act (s. 18). These sections are from 123 to 131, as now important. By s. 124, the map, plan, and book of reference are to be deposited at the Department of Railways and are to be examined and certified by the Minister and transmitted to the different localities interested; any person may resort to and take copies of these documents (s. 126); and, by s. 134, till such original documents have been so deposited, the construction of the line shall not be proceeded with.

Had this public notice been given, it would have been open for the authorities of the defendants to have intervened before the Minister or otherwise, and have pointed out the obvious dangers likely to arise from the proposed method of construction over the local electric lines of the defendants. At present, without some safeguard of preliminary character, the company assert the right to go off-hand on the ground, place the poles over the line of the defendants without notification or supervision of any kind, public or private. The Bell Telephone Act provides for the sanction of the municipal authorities in cities, towns, and villages as to the height of the poles and the affixing of the wires, as to the number of lines of poles along the streets of a town, and as to not duplicating poles along the same side of a street, and the like safeguards, which are conspicuously omitted from the Act of 1902. It cannot be because the danger of electrical transmission is being lessened by the efflux of time, but perhaps because there was not sufficient vigilance exercised during the passage of this Act in the interests of public safety.

According to the best opinion I can form, the law requires the deposit of plan and book of reference as a condition precedent to the beginning of construction: that this being done, there is no permission required for the occupation of the public streets. It may be that the municipality will waive the deposit of plans, on the undertaking of the company to have the method

of construction approved of by the Railway Board; and in that case the deposit may be made nunc pro tunc and the prosecution of the work not unduly delayed. For this reason, also, I have perhaps expedited overmuch the giving of judgment, but it is best for both parties to know where they are as soon as possible.

D. L. McCarthy, K.C., for plaintiffs. *T. A. Gibson*, for defendants.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] [Sept. 25.

HILL *v.* WINNIPEG ELECTRIC RY. CO.

Negligence—Accident caused by negligence of servant of defendants—Common carriers—Duty to carry passengers safely.

While the plaintiff was being conveyed as a passenger on a car of the defendants, he was injured in consequence of the car being run into from behind by another car on the same track. The motorman and conductor of the other car had, contrary to the express rules of the company, exchanged places, and the conductor in operating the car, either through negligence or incompetence, allowed the collision to take place.

Held, that the negligence of the motorman in abandoning his post to the conductor was the effective cause of the accident, and that the defendants were liable in damages for the injury to the plaintiff, although the conductor, whose act was the immediate cause of the accident, was not acting within the scope of his employment at the time.

Englehart v. *Farrant*, [1897] 1 Q.B. 240, followed. *Gwilliam* v. *Twist*, [1895] 2 Q.B. 84; *Beard* v. *London*, [1900] 2 Q.B. 530; *Harris* v. *Fiat*, 22 T.L.R. 556 and 23 T.L.R. 504, distinguished.

Held, also, *per* PERDUE, J.A., that in order to make the defendants as carriers of passengers by railway liable to the plaintiff, it was enough to shew that the negligence or omission which caused the accident was that of the defendants' servants then in actual charge of the car.

Wright v. *Midland Ry. Co.*, L.R. 8 Ex. 137; *Thomas* v. *Rhymney Ry. Co.*, L.R. 6 Q.B. 266, and *Taylor* v. *Manchester*,

etc., Ry. Co., [1895] 1 Q.B. 134, followed. *Vance* v. *G.T.P. Ry. Co.*, 17 O.W.R. 1000, distinguished.

Cohen, for plaintiff. *Anderson*, K.C., and *Guy*, for defendants.

Full Court.] BUCHANAN *v.* WINNIPEG. [Oct. 9.

Costs—Reference to Master and further directions.

The limitation of costs provided for by s. 1 of c. 12 of 7 & 8 Edw. VII. applies to all costs up to and inclusive of the final determination of the action in the Court of King's Bench, and, although there has been an expensive trial followed by a reference to the Master and a hearing on further directions, the costs of all of which were given to the plaintiff and, as ordinarily taxable, would largely exceed said limit, the taxing officer could not, without such a certificate from the trial Judge as that section requires, allow the plaintiff in all more than $300 and disbursements.

Deacon, for plaintiff. *Blanchard*, for defendants.

Full Court.] [Oct. 10.

HANNESCHOTTIR *v.* BIFROST.

Taxes—Unpatented land—Sale of land after issue of patent for taxes imposed before issue.

Appeal from judgment of METCALFE, J., noted ante p. 314, dismissed with costs.

Full Court.] [Oct. 10.

BANK OF MONTREAL *v.* TUDHOPE.

Bank Act. R.S.C. 1906, c. 29, ss. 86-88—*Sale of goods by pledgor in ordinary course of business — Assignment of chose in action—Set off.*

Appeal from judgment of ROBSON, J., noted ante p. 279, dismissed with costs.

Full Court.] [Oct. 10.

GRACE *v.* OSLER.

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

Appeal by plaintiff from the judgment of MATHERS, C.J. K.B., noted ante, p. 237.

Held, 1. The defendants, by requiring a complete change in the character of a portion of the work, by ordering a number of important extras after the time fixed for completion, by great delays on the part of their architect in furnishing drawings and specifications of required changes and in other ways disentitled themselves to claim anything whatever against the plaintiffs for damages for delays in completion.

2. The defendants could not recover anything in respect of the floors having been left uneven by the plaintiffs because they chose to complete the building without restoring the level as they might have done; although, if they had restored the level, they might have recovered the cost of the work from the plaintiffs.

In other respects, the decision of the trial judge was affirmed.

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

Full Court.] McKENTY *v.* VANHORENBACK. [Oct. 10.

Bills of exchange and promissory notes—Issue and delivery of —Stolen cheque—Holder in due course.

Delivery or issue, intending it to be used, of a cheque on a bank for a sum of money payable to A. B. or bearer, although signed by the drawer and complete in form, is, under ss. 39, 40 (2) and sub-s. (*f*) and (*i*) of s. 2 of the Bills of Exchange Act, R.S.C. 1906, c. 119, an essential element in the liability of the drawer to one who afterwards cashes it. Defendant had signed such a cheque and left it in his desk from which it was stolen.

Held, that he was not liable upon it to the plaintiff who had cashed it.

Arnold v. *Cheque Bank*, 1 C.P.D. 584; *Baxendale* v. *Bennett*, 3 Q.B.D. 531, and *Smith* v. *Prosser* (1907), 2 K.B. 735, followed. *Ingham* v. *Primrose*, 7 C.B.N.S. 82, not followed.

Deacon, for plaintiff. *H. V. Hudson*, for defendant.

Full Court.] AFFLECK *v.* MASON. [Oct. 10.

Practice—Interrogatories—Relevancy of—King's Bench Act, Rule 407B and 5 & 6 Edw. VII. c. 17.

The pleadings in this case raised an issue whether or not the plaintiff, in order to induce the defendant to enter into the

agreement sued on, falsely represented to them that, by virtue of his own interest and the interest of others represented by him, he controlled a certain company and could determine whether the company would accept the defendants' offer or not. A letter had been written by the plaintiff to one of the defendants before the acceptance of the offer in which he spoke of other parties as interested in the sale and holding out for a larger sum.

Held, RICHARDS, J.A., dissenting, that interrogatories put by the defendants to the plaintiff, under Rule 407B added to the King's Bench Act by 5 & 6 Edw. VII. c. 17, s. 2, asking for information as to the names of the other parties referred to, and as to all communications between them and the plaintiff relating to the proposed sale, were relevant to the issue and should be fully answered.

A. B. Hudson, for plaintiff. *Wilson*, K.C., and *W. C. Hamilton*, for defendants.

Full Court.] DAVIS *v.* WRIGHT. [Oct. 23.

Verdict of jury—Costs—New trial.

The jury at the trial of an action has nothing to do with costs and if they bring in an verdict clearly stated to be for damages and costs, which is accepted and acted upon by the judge, the judgment should be set aside and a new trial ordered. *Poole* v. *Whitcomb*, 12 C.B.N.S. 770, and *Kelly* v. *Sherlock*, L.R. 1 Q.B. at p. 691, followed.

Costs are now entirely in the discretion of the trial judge, no matter what is the amount of the verdict for the plaintiff. *Shillinglaw* v. *Whillier*, 19 M.R. 149, followed.

Wilton and *Davidson*, for plaintiff. *Blackwood* and *Tench*, for defendant.

Full Court.] KING *v.* BOND. [Oct. 23.

Criminal law—Criminal Code, s. 793—Summary trial of indictable offence—Taking the evidence in shorthand—Certiorari.

Held, 1. The Criminal Code contains no provision as to how the evidence of witnesses at the summary trial of an indictable offence shall be taken down, and a conviction entered by

the magistrate will not be quashed on certiorari, because the evidence was taken down by a shorthand reporter.

2. Sec. 793, providing that the magistrate shall transmit the depositions of the witnesses to the proper officer, does not by inference require that the depositions must be taken in longhand by the magistrate himself.

P. E. Hagel, for prisoner. *Graham,* D.A.G., for the Crown.

Full Court.] [Oct. 23.

WATERLOO MANUFACTURING CO. v. KIRK.

Chose in action—Assignment of—Money received by defendant for the use of plaintiff.

A directed B, his debtor, in writing to pay the money to C, and directed C. to pay the money when collected to his creditor D. C. undertook to do so and received the money from B, and informed D. that he had collected a sum of money for him, although the sum he mentioned was not the full amount which he had actually collected.

Held, that there was a complete assignment in equity by A. to D. of the money actually collected from B. to C., and that D. could recover the full amount in an action directly against C. *Morrell* v. *Wootten,* 16 Beav. 197, and *Lilly* v. *Hayes,* 5 A. & E. 548, followed. *Williams* v. *Everett,* 14 East 582, distinguished.

Foley, for plaintiff. *McLeod,* for defendant.

Full Court.] GRAVES v. TENTLER. [Oct. 23.

Arbitration and award—Finality of award—Reservation of matter for subsequent adjudication by arbitrator—Award good in part and bad in part—Jurisdiction—Enforcing award against non-resident—Service of notice of motion out of jurisdiction.

Appeal from decision of PRENDERGAST, J. noted ante, p. 152, allowed on the ground that there was no finality in the award, the arbitrator having reserved the right to himself to allow the plaintiff a further sum of $800 at the expiration of

thirty days, unless the defendant should within that time produce satisfactory evidence against it. An award which is bad in part, can only be held good as to the remainder of it when the bad part is clearly separable from the good: Russell, pp. 214, 216; *Stone* v. *Phillips*, 4 Bing. N.C. 87.

Fullerton and *Foley*, for plaintiff. *Affleck*, for defendant.

KING'S BENCH.

Robson, J.] [Oct. 2.

EMPIRE SASH COMPANY *v.* MARANDA.

Fraudulent preference—Insolvency, what constitutes—Security valid as regards fresh advances, though void as regards existing debt—Pressure by creditor—Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, *c.* 11—*Pleading—Chattel Mortgage—Simple contract creditor.*

Held, 1. A debtor should be held to be "in insolvent circumstances" within the meaning of s. 40 of the Assignments Act, R.S.M. 1902, c. 8, if he does not pay his way and is unable to meet the current demands of his creditors and if he has not the means of paying them in full out of his assets realized upon a sale for cash or its equivalent, or when he is not in a condition to pay his debts in the ordinary course as persons carrying on trade usually do. *Warnock* v. *Kloepfer*, 14 O.R. 288, 15 A.R. 324, 18 S.C.R. 701, and *Shone* v. *Lucas*, 3 D. & R. 218, followed.

2. Under s. 42 of the Act, a security for a debt given to a creditor which has the effect of giving him an advantage over other creditors will be declared void, notwithstanding that it has been secured by pressure on the part of the creditor and whether or not the creditor knew of the debtor's insolvency.

3. Under s. 44 of the Act, a chattel mortgage security given to a creditor for an existing debt and also to cover fresh advances, although void as to the existing debt as being a fraudulent preference, should be held good as regards any fresh advances made to the debtor on the strength of it. *Mader* v. *McKinnon*, 21 S.C.R. 645, and *Goulding* v. *Deeming*, 15 O.R. 201, followed.

4. A simple contract creditor cannot make an attack upon a chattel mortgage under the Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, c. 11, although his action is brought on behalf of himself and all other creditors, one of whom may be an execution creditor. *Parks* v. *St. George,* 10 A.R. 496, and *Hyman* v. *Cuthbertson,* 10 O.R. 443, followed.

5. When the plaintiff's statement of claim is based entirely upon the provisions of the Assignments Act, it is a departure in pleading to set up in the reply a case based upon the Bills of Sale and Chattel Mortgage Act and such case should not be recognized: Odger on Pleading, 6th ed., 249, 250.

Haffner, for plaintiff. *Dennistoun,* K.C., and *Locke,* for defendants.

Mathers, C.J.] [Oct. 4.

STRATHCLAIR *v.* CANADIAN NORTHERN RY. CO.

Railway Commissioners for Canada, Board of—Making order of, a rule of court—Vagueness and uncertainty in language of order.

An order of the Board of Railway Commissioners for Canada requiring a railway company to put a highway "in satisfactory shape for public travel" should not be made a rule of this court under section 46 of the Railway Act, R.S.C. 1906, c. 37, on the application of the municipality interested, because the wording of it is too vague and uncertain to permit of its enforcement afterwards if made such a rule. A court of equity would not decree specific performance of an agreement couched in such vague terms and the cases are analogous.

Taylor v. *Partington,* 7 DeG. M. & G., referred to.

A. B. Hudson, for applicants. *Clark,* K.C., for the railway company.

Macdonald, J.] [Oct. 5.

GAS POWER AGE *v.* CENTRAL GARAGE COMPANY ET AL.

Pleading—Joinder of defendants—Joinder of cause of action arising out of tort with one arising out of contract.

A plaintiff may, under the present system of pleading, proceed in the same action against one defendant for a breach of a contract and against other defendants for maliciously and wrongfully procuring and inducing the breach, there being such

a unity in the matters complained of as entitles the plaintiff to join all the defendants. *Kent Coal Exploration Co.* v. *Martin*, 16 T.L.R. 486, and *Evans* v. *Jaffray*, 1 O.L.R. 614, followed. *Sadler* v. *Great Western Ry. Co.*, [1896] A.C. 450; *Gower* v. *Couldridge et al.*, [1898] 1 Q.B. 348, and *Thompson* v. *London County Council*, [1899] 1 Q.B. 840, distinguished.

Burbidge, for plaintiff. *Armstrong*, for defendants.

Mathers, C.J.] GRIFFIN *v.* BLAKE. [Oct. 18.

Practice—Substitutional service—Publication of notice by advertisement—Motion for final judgment.

Held, 1. Substituted service by publication of notice by advertisement of a statement of claim, especially in an action in which the plaintiff seeks to deprive the defendant of a possible interest in land, should not be ordered, under Rules 182 and 183 of The King's Bench Act, except upon affidavit shewing a reasonable probability that the advertisement will come to the knowledge of the defendant. *Hope* v. *Hope*, 4 De. G. M. & G. 328; *Furber* v. *King*, 29 W.R. 534; *Alexander* v. *Alexander*, 1 O.L.R. p. 43, and *Howard* v. *Lawson*, 19 M.R. 223, followed.

2. The court will not pronounce final judgment in such a case, notwithstanding that the Referee has made an order not appealed from permitting the plaintiff to sign interlocutory judgment after publication of notice, unless, upon an examination of the material filed, it appears that the order had been properly made: *Howard* v. *Lawson*, supra.

Deacon, for plaintiff.

Bench and Bar.

JUDICIAL APPOINTMENTS.

John Malcolm McDougall, K.C., of the city of Hull, Province of Quebec, to be puisne judge of the Superior Court in the Province of Quebec, in the room of Hon. Mr. Justice Champagne, deceased.

Book Reviews.

Leake on Contracts. Sixth edition, with Canadian Notes. By The Hon. Mr. Justice Russell. London: Stevens & Sons, Limited. Toronto: Canada Law Book Company, Limited.

The perusal of an advanced copy of this new edition of the standard work on the Law of Contracts shews that the English and Canadian cases have been carefully brought up to date, the former by Mr. A. E. Randall, of the English Bar, and the latter by the Hon. Mr. Justice Russell, of Halifax, whose previous legal compilations have been favourably received by the Canadian Bar.

The first edition of Leake on Contracts appeared in 1867, and such has been the demand for the book that, notwithstanding the issue of large editions from time to time, the five editions which had previously been issued in England had become exhausted. The inclusion of Canadian Notes in the present edition adds much to its value in Canada, and makes it the first Canadian edition of any work on the law of Contracts having the scope of this book.

The usual subdivisions of the subject are followed and include the Formation of Contract, the Consideration, the Parties, the Promise, the Statute of Frauds, Contracts under Seal, Oral Contracts, Contracts in Writing, Breach of Contract, Assignment, Discharge and Performance. Under these general headings are included the principles as to Accounts stated, Acknowledgment of debt, Arbitration, Auctions, Bailment, Building Contracts, Carrier's liability, Company's shares, Capacity of corporations, Covenants running with the land, Measure of damages, Misrepresentation and Fraud, Insurance, Limitations of actions, Contracts for personal service, Partnership, Suretyship, Agency, and Sale of Goods and of Lands.

This edition includes, without any abridgment, the whole of the English edition of over nine hundred pages, and is particularly to be commended because the principles of contract law are set forth in the text without undue recital of the circumstantial details of the decisions from which the principle is extracted. At the same time ample references have been given in the footnotes to all of the leading cases which can be cited in support of the principles stated in the text. The year of the decision

appears with the name of the case throughout. We know of no better book on the Law of Contracts and can heartily recommend it to the profession in Canada.

Flotsam and Jetsam.

We copy from the *Law Notes* (U.S.) the following extracts from reports, which are rather amusing reading:—

IT MIGHT HAVE BEEN EXPECTED.—In Cottrell v. Fountain, (N.J.) 77 Atl. Rep. 465, an action for assault and battery, the plaintiff sued for damages because he had been soaked with water by the defendant, Asbury Fountain.

EVEN VIOLENCE COULDN'T MOVE THEM.—"Notwithstanding the earnest, almost violent, argument of learned counsel, we adhere to our former opinion," etc. *Per* Root, J., in Hall v. Baker Furniture Co., 86 Neb. 389.

HOW THEY SETTLE THE LAW IN INDIANA.—"It is settled law that securities held by a surety for the payment of a debt are held by him for the payment of the debt." *Per* Olds, C.J., in Huffmond v. Bence, 128 Ind. 136.

UNNECESSARY HOMICIDE.—In Texas, a man who kills his wife by shooting her three times with a double-barrelled shotgun is guilty of "a cruel and very unnecessary homicide." See Fletcher v. State, 138 S.W. 109.

THE RACE IS TO THE SWIFT.—The familiar Old Testament declaration (Ecclesiates ix. 11.) that "the race is not to the swift" meets with flat contradiction in the case of Strode v. Swim, 1 A.K. Marsh. (Ky.) 366. Strode won.

A NEW SUBJECT OF EXPERT DISAGREEMENT.—"Eminent lawyers have been called by both parties to testify as experts. But no two of them agree in their definition of privies." *Per* Rugg, J., in Old Dominion Copper Mining, etc., Co. v. Bigelow, (Mass.) 89 N.E. Rep. 217.

UNITED STATES AS PART OF NEW YORK.—In Wertheim v. Chicoutimi Pulp Co., [1911] A.C. at page 316, Lord Atkinson of the House of Lords observes: "On the authority of the three cases cited from the reports of the State of New York, namely, Grand Tower Co. v. Phillips, 90 U.S. 471," etc. Thus does the Empire State gain distinction abroad as well as at home.

CONFUSION!—In Oyster v. Oyster, 32 Mo. App. 270, it was held that an ouster of an Oyster who was the head of a family included an ouster of all the other Oysters in the family, and that if, after the Oysters had been ousted, any one of the ousted Oysters sowed crops on the land, such crops might be replevied from the ousted Oyster by the person who ousted the Oysters, and—well, what's the use?

ONOMASTIC REMARKS.—Some strange names of litigants appear in the federal reports of cases coming from the Philippine Islands. In 31 S. Ct. 423 we find "Go-Tiongco," and in 205 U.S. 403, "Go Tauco." We were about to suggest respectfully to our little brown brothers to whom we gave the Philippine Bill of Rights from our own revered Constitution that they keep Mr. "Go-Tohell" from shocking us in print, when it occurred to us that they might easily retaliate by introducing us to Mr. "Moose Dung" in 175 U.S., p. 3.

A MODEST WITNESS.—The lawyer had a somewhat difficult witness, says a writer in the Milwaukee *Journal*, and finally asked if he was acquainted with any of the men on the jury.

"Yes, sir," replied the witness, "more than half of them."

"Are you willing to swear that you know more than half of them?" demanded the lawyer.

"Why, if it comes to that, I'm willing to swear that I know more than all of them put together."

Many are the stories they tell at Manchester of Judge Parry, whose appointment to another court is much regretted. Perhaps the best of the bunch is the one which shews how his keen desire to do justice was appreciated by working men. One day, as he was going away from the court, he passed two men who were discussing, wholly unconscious of the fact that they were overheard, the decision he had just given against them. "Well, 'ow on earth 'e could do it I don't see, do you, Bill?" said one. "'E's a fool," said the other. "Yes, 'e's a fool, a —— fool, but 'e did 'is best." "Ay, I think 'e did 'is best."—*Law Notes.*

Counsel (to the jury): "The principal fault of the prisoner has been his unfortunate characteristic of putting faith in thieves and scoundrels of the basest description. I have no more to say. The unhappy man in the dock, gentlemen of the jury, puts implicit faith in you!" Old, we fear, but it bears repetition.—*Law Notes.*

EMPLOYERS' LIABILITY.—When a few years ago British employers became liable at law for injuries suffered by employees in the course of their work, says the New York *Sun*, cartoonists got busy depicting the hired girl gleefully tumbling down stairs with the tea tray or the coal box, secure in the prospect of a long rest and no loss of wages. Householders, of course, cover their risk by insuring each employee against accidents. English courts as a rule place a liberal construction on the word "accident," and accordingly on the books of the insurance companies may be found many odd claims. Here are a few:—

A cow whisking her tail caused injury to a milkmaid's eye.

A farm hand was stung by a bee.

A manservant sprained his leg through stamping on a rat.

A coachman coming out of a stable was struck on the face by his masters' boot, intended for a caterwauling cat.

A cook was breaking coal and a piece went down her throat.

A curate was scalded through stumbling while carrying a tea urn at a parochial gathering.

A servant was pricked by a rusty needle while sewing on a button on her employer's clothing.

It is somewhat difficult to imagine that success could attend claims like these:—

A servant received a shock through seeing a large Teddy bear when the room was only dimly lighted.

Another servant fetching coal out of a cellar collapsed from fright caused by the silent appearance of a washerwoman, and broke her arm.—*Case and Comment.*

It was the opinion of Sir James Fitzjames Stephen that criminals were excellent critics of sentences and could estimate accurately what was the appropriate punishment for their offence. Mr. Wallace, K.C., perhaps agrees. The other day he sentenced an old gaolbird, who had pleaded guilty to a burglary, to twenty-three months' imprisonment with hard labour. "I wish you'd make it three years' penal servitude," said the prisoner, and the learned judge did, no doubt thinking that the man's own estimate of the best treatment for his case was correct. Probably the "old hand" knew that the life in penal servitude is not so severe as that of a hard labour prisoner.—*Law Notes.*