be permitted to perform the simplest service without undergoing an examination and obtaining a diploma or certificate of fitness from some guild or organised trade? It will require vigilance on the part of those responsible for legislation if we are to preserve a reasonable share of that freedom of contract which was supposed to have been one of the fruits of modern progress.

R. W. S.

NOTES.

In an article entitled "A Chapter on Accidents," in volume 39 of The Law Quarterly Review, the author deals with one phase of the operation of the Workmens' Compensation Act, 1906 (Imp.) and incidentally gives it as his opinion that "in all the Acts of all the Parliaments of the United Kingdom no one enactment has imposed a more copious demand upon the interpretative function of the judicatures of these islands than that brief clause which is the first subsection of the first section of the Workmen's Compensation Act, 1906."

The first subsection of the first section of the Act to which reference is made reads as follows:

"1. If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act."

The essential condition here prescribed has been generally adopted in the provinces of Canada, and has been here as fertile a source of litigation as in England, even in those Provinces in which by legislation most classes of workmen have been removed from its operation. There has been, too, as might have been expected, a great divergence of opinion as to the principles to be applied in interpreting the language of the statute. Well might one of our judges echo the language of Lord Wrenbury: "My lords, the language of the Act of Parliament and the decisions upon it are such that I have long since abandoned the hope of deciding any case upon the words 'out of and in the course of' upon grounds satisfactory to myself or convincing to others."

Nevertheless certain tests are emerging from the decisions by which to determine whether the accident before the court in any particular case arose "out of and in the course of" the employment.

In *Mackenzie* v. *G. T. P. Railway Co.*,[1] the facts were that a mechanic employed at a railway company's round-house, having finished his shift, was proceeding to his home by a route which led across the railway tracks belonging to and controlled by his employer, the railway company. This was the customary route followed by himself and his fellow-workers and there was no prohibition against its use. On one of the tracks, the lead track, which he had to cross in following this route, a freight train was standing, and he endeavoured to climb and pass through between two adjoining cars. As he was about to do so the train moved, presumably without any signal, and he was permanently injured in one of his feet. There was another route by which he could have gone home but it was much longer and also necessitated the crossing of the lead track, and there was no evidence of a workman ever going that way.

Held, that while the injury occurred in the course of the plaintiff's employment it could not be said to have arisen "out of" such employment in the absence of evidence that the defendants acquiesced in the dangerous practice which led to the accident, and leave was given to furnish evidence upon that point by affidavit, subject to cross examination.

The judgments contain an interesting discussion of the most important recent cases upon the subject, among others *Gane* v. *Norton Hill Colliery Co.*[2] and *Lancashire and Yorkshire Ry.* v. *Highley*[3].

In the *Cane* case the plaintiff was injured while crawling under the cars on his way home, but the evidence showed that this method of getting out of the pit was the usual method and was "recognised and tacitly authorised by the employers." The accident was held to have arisen out of and in the course of the employment.

In the *Highley* case the deceased was killed by the train moving while he was crawling under the cars. It was pointed out as a fact that it was no part of his duty to cross the tracks in that manner, and there was a rule of the company forbidding it. Their Lordships were of opinion that the accident did not arise out of the employment.

Among the rules to be deduced from the mass of authorities Lamont, J.A., finds one to be "once an employer acquiesces in his workmen performing their duty in a way fraught with special danger, he makes that special danger an incident of the employment." Again, the same judge asks "What then is the test by which to determine whether the danger incurred is a risk incident to the employment or

[1] (1925) 1 W. W. R. 136.
[2] (1909) 2 K. B. 539. 78 L. J. K. B. 921 (C. A.).
[3] (1917) A. C. 352, 86 L. J. K. B., 715 (H. L.).

a new peril outside of the employment? To my mind it is the simple formula so often laid down: Was it a danger which the parties should reasonably have contemplated the employee would incur in the performance of his duty?

Since the acquiescence of the employer in a dangerous practice may imply an authority to the workmen to follow that practice and may thus add to the dangers which, otherwise, the parties should reasonably have had in mind at the beginning of the contract of service, it is obvious that each case must be considered on a careful examination of its own proper circumstances. Perhaps, if this be done many of the apparently discrepant judgments may be reconciled.

R. W. S.

* * *

STOLEN MONEY—FRAUD OF AGENT—ACTION AGAINST BANK.—An important judgment has just been rendered in Montreal by Mr. Justice Duclos, in an action by the Corporation Agencies, Ltd., against the defunct Home Bank of Canada, in which the principles laid down by Lord Darling in the recent famous "Mr. A." case were adopted and applied.

In 1918 Mr. C. H. Cahan, K.C., who was the President of the above named Company, on the eve of his departure for Europe gave his son a power of attorney to sign cheques during his absence. By means of this authority, the son drew from various banks, large sums of money which were on deposit in his father's name. The cheques were cashed in the ordinary way by the Home Bank for the son, and were duly honored by the banks on which they were drawn. The son lost the money in gambling speculations, and on the father's return the above action was brought. On February 11th, 1921, a judgment was given by Mr. Justice Maclennan, in favour of the plaintiffs. This judgment was set aside and a new trial ordered. The action was then retried, and was standing for judgment when the Home Bank failed. An order was thereupon obtained by the plaintiffs that the case should be proceeded with to judgment.

In delivering judgment, Mr. Justice Duclos quoted the following extract from the judgment of Lord Darling in the case above mentioned:—"This money was stolen from an Indian gentleman. If it were stolen from him, it remained his still, and nobody could give anybody else a title to it, no matter what transactions were gone through. The property was Mr. A.'s, and it remained his. Whatever Mr. A.'s rights against the bank or other people were, there was no law in England which would entitle me to order that the money shall

be given to the plaintiff." He then concludes as follows: "In my opinion, the principles laid down in that case decide the present action. To decide otherwise would enable the company plaintiff to collect from various banking institutions a sum of over $600,000, which never belonged to it, and which, therefore, it did not lose, in order to recoup its president of a loss of $160,000, a loss which arose in part several years previous, through the defalcation of his son. A principle which leads to such a conclusion cannot be sound in law."

M. J. G.

* * *

DUTY OF OCCUPIER OF PREMISES TOWARDS INVITEE—KNOWLEDGE OF LATTER OF DANGER.—In the case of *Ottawa Electric Railway Co.* v. *Letang*,[1] the Supreme Court of Canada (Idington, J., dissenting) decided that a plaintiff who had full knowledge gained from daily use of the icy and dangerous condition of a stairway on the defendant's land and leading to its railway station could not recover even though she stood in the position of an invitee in respect of such premises.

Anglin, J., at p. 476 stated the law to be: "The duty of the 'invitor' to the 'invitee' is either to have the premises free from any concealed danger in the nature of a trap, or, if such a danger exists and he knows or should have known of it, to give clear and sufficient warning of it. Where the danger is obvious, as the evidence shows it to have been in the case at bar, it does not call for a warning and an essential condition of liability is lacking."

This case would seem to resolve for Canada at least the uncertainty in the law which is pointed out by Sir John Salmond in the 6th Edition of the Law of Torts at pp. 445 et seq. He states the problem as follows: "Is the duty of an occupier to an invitee a duty to use care to make the premises reasonably safe, or is it merely a duty to use care to ascertain the existence of dangers and either to remove them or give the invitee due warning of their existence? If the latter alternative is correct, the fact that the danger is actually known to the invitee is an absolute bar to any action by him; for if the duty of the occupier is merely one of warning, he owes no duty at all in respect of dangers already known by the invitee. If, on the other hand, the duty of the occupier is the higher duty of taking care to make the premises safe, he commits a breach of this duty when he invites persons to enter premises which he knows or ought to know to be dangerous, even though those persons are themselves aware of

[1] (1924) S. C. R. 470.

the danger. In such a case, the plaintiff's knowledge of the danger is not in itself an absolute bar, but operates, if at all, only as evidence of contributory negligence or of an agreement to waive fulfilment of the occupier's duty—save indeed in those cases in which the danger is of such a nature that it ceases to be a danger at all to those who know of its existence."

The Supreme Court, as above noted, have adopted the more restricted view of the duty of an occupier of premises to an invitee following the case of *Brackley* v. *Midland Railway Co.*,[2] rather than the apparently inconsistent decision in *Norman* v. *Great Western Railway*[3]. Under this view of the law it is difficult to see as Salmond points out at p. 448 of his work, wherein the duty of an occupier to an invitee rests upon any different footing or is in any practical sense wider than his duty to a licensee as defined in the leading case of *Fairman* v. *Perpetual Investment Building Society*[4].

I. S. F.

* * *

In *Re Stone*[1] one of the questions before the Supreme Court was the succession to lands of the deceased who was an illegitimate child, and who died intestate and unmarried. His mother, who had given birth to another illegitimate child and to several legitimate children, had predeceased him.

The Devolution of Estates Act of Saskatchewan, which applied to the case, contains the following sections:

"45. Illegitimate children shall inherit from the mother, as if they were legitimate, and through the mother, if dead, any real or personal property which she would, if living, have taken by purchase, gift, demise or descent from any other person.

"46. If an intestate, being an illegitimate child, dies leaving no widow or husband or issue, the whole of such intestate's property, real and personal, shall go to his or her mother."

Counsel for the Dominion Government argued that these sections are ultra vires in so far as they purport to add to the persons who at common law are entitled to claim the estate of an intestate in the province, thus defeating the right of escheat to the Crown in the right of the Dominion; and, accordingly, that the lands in question did so escheat under section 21 of the Saskatchewan Act which reserves to the Dominion "all crown lands, mines, minerals and royalties incident thereto," escheat being a "royalty" incident to land.

[2] 85 L. J. K. B. 1596.
[3] 1915, 1 K. B. 584.
[4] (1923) A. C. 74.
[1] (1925) 1 D. L. R. 60.

The court, however, affirmed the judgment of the Saskatchewan Court of Appeal,[2] holding that it is competent for the provincial legislature to amend the law of descent or distribution so as to decrease the occasions of escheat which otherwise would have arisen under the law as it stood at the date of the establishment of the province, the devolution of estates being a matter coming within the subject of "property and civil rights in the province," and one which under sec. 92(13) of the B. N. A. Act is a subject of exclusive provincial legislation.

In *Trusts and Guarantee Co.* v. *Rex*,[3] the court was called upon to consider the validity of an Act of the Alberta legislature, 1915, ch. 5. This Act contained a provision in the following terms:

"1. When any person dies intestate owning any real or personal property and without leaving any next-of-kin or other person entitled thereto by the law of Alberta, such property shall immediately on his death vest in His Majesty in his right of Alberta, and the Attorney-General may cause possession thereof to be taken in the name of His Majesty in his said right; or if possession is withheld may cause an action to be brought in the Supreme Court of Alberta for the recovery thereof."

The Act was held to be ultra vires. Sir Charles Fitzpatrick saying in the course of his judgment: "Lands escheat to the Crown for defect of heirs, and this has nothing to do with the question who are a people's heirs. But altering the law of inheritance is one thing and appropriating the right of the Dominion on failure of heirs is quite another thing. This is what has been done by the Alberta Statute.

The scope of provincial authority in this regard has come up more than once. Thus, in *Atty.-Gen. for Quebec* v. *Atty.-Gen. for Canada*,[4] 3 Cartwright's Cases on the B. N. A. Act, 100, Tessier, J., said: "The legislature of Quebec has exclusive power to make laws in regard to the degree and mode of succession, so that there would be nothing to prevent it from passing an Act to extend the right of succession to illegitimate children or relatives, or even to such institutions as may undertake the bringing up of illegitimate children."

But why should the legislative power of the province be restricted to "such institutions as may undertake the bringing up of illegitimate children?" Alberta has acted on the assumption that there is no such restriction. In 1921 it passed an Act declaring the University of Alberta to be the ultimate heir and next of kin of any person dying intestate and otherwise without heirs or next of kin. The statute

[2] (1920) 1 W. W. R. 563.
[3] 54 S. C. R. 107; (1917) 1 W. W. R. 358.
[4] 2 Q. L. R. 236.

declares that in such case the intestate shall be deemed to have made a duly executed and entirely valid will, devising or bequeathing his land, moveable property or choses in action to the University, and also declaring, as above mentioned, that the University shall be the ultimate heir and next of kin of the deceased.

If the provinces possess authority "as plenary and ample within the limits prescribed by section 92 (of the B. N. A. Act) as the Imperial parliament, in the plenitude of its power, possessed and could bestow," if they are supreme within their own sphere, then it would seem that, as long as they remain within that sphere and are not in reality dealing with a subject assigned to the Dominion,[5] and *Atty.-Genl. for Quebec* v. *Queens Ins. Co.*. neither the motive of the legislation nor its incidental consequences are open to examination.

R. W. S.

[5] ((1878) 3 A. C. 1090).

MEETING OF THE COUNCIL OF THE CANADIAN BAR ASSOCIATION.

The mid-winter meeting of the Council of The Canadian Bar Association was held at Ottawa on Saturday, the 7th of February, when the following members were present: His Honour Sir James Aikins, K.C. (President); Hon. Chief Justice Martin (Dominion Vice-President); Hon. Wallace Nesbitt, K.C. (Vice-President for Ontario); Hon. R. B. Bennett, K.C. (Vice-President for Alberta); Mr. E. Lafleur, K.C. (Vice-President for Quebec); Mr. C. F. Sanford, K.C. (Vice-President for New Brunswick); Hon. Mr. Justice Surveyer (Honorary Secretary); Col. W. N. Ponton, K.C. (Registrar), Hon. Mr. Justice Mignault, Hon. Mr. Justice Maclennan, Hon. Mr. Justice Orde, Mr. A. A. McGillivray, K.C., Mr. Edward Anderson, K.C., Mr. Hugh Phillipps, K.C., Mr. L. P. D. Tilley, K.C., Mr. S. A. M. Skinner, Mr. M. N. Cockburn, K.C., Mr. G. F. Henderson, K.C., Mr. T. A. Beament, K.C., Mr. F. D. Kerr, K.C., Mr. William R. White, K.C., Mr. F. M. Field, K.C., Hon. N. W. Rowell, K.C., Mr. Angus MacMurchy, K.C., Mr. W. J. McWhinney, K.C., Mr. S. W. Jacobs, K.C., M.P., Mr. Henry J. Elliott, K.C., Mr. Adolphe Mailhiot, K.C., Mr. Leon Faribault, K.C., and Mr. E. H. Coleman (Secretary-Treasurer). Mr. O. M. Biggar, K.C. Convenor of the Committee on International Law, Mr. H. J. Symington, K.C., Mr. H. P. O. Savary, K.C.,