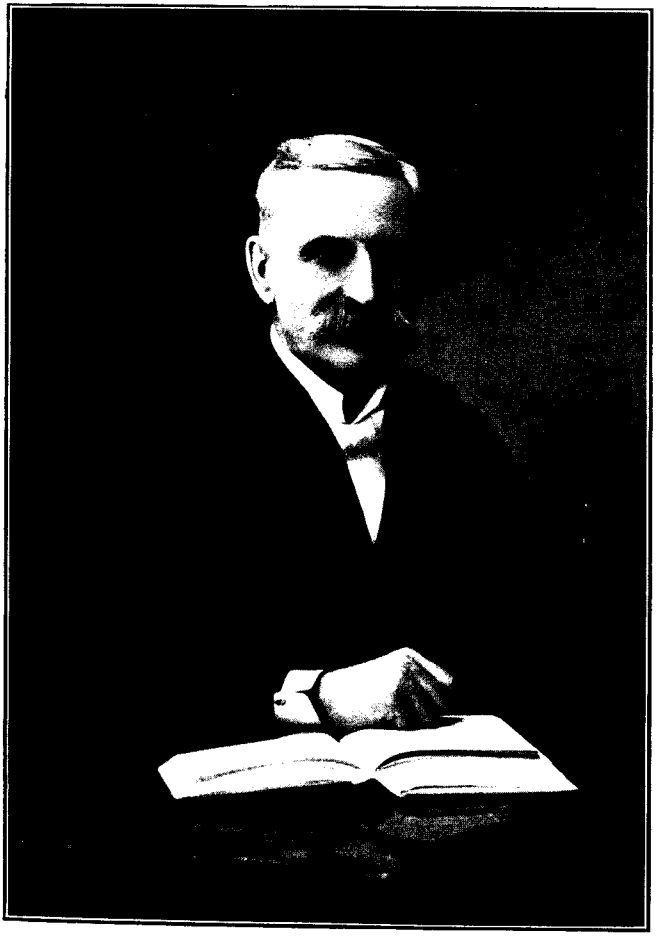

JAMES MUIR, K.C.,

OF THE CALGARY BAR

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JAMES MUIR, K.C.

Mr. James Muir, whose likeness appears on the page opposite, is a native of Quebec, having been born of Scotch parents in the county of Chateaugay, P.Q., in 1842. He graduated in Arts at Queen's College at Kingston in 1861, and soon after entered into articles as a student-at-law with Hon. James Maclennan, who has recently retired from the Supreme Court of Canada. He was called to the Bar of Ontario in 1872 and for nineteen years practised his profession in the county of Wellington in that province. He was created a Queen's Counsel by the Dominion Government on December 2nd, 1889.

In the following year Mr. Muir removed to Calgary in the then District of Alberta and was admitted to the Bar of the North-West Territories. He has practised continuously in that city ever since, at first alone, but since 1893 in association with J. I. J. Jephson, the firm of Muir & Jephson thus being the oldest as well as one of the best known firms in the Western city. He is now senior member of the firm of Muir, Jephson & Adams. In June, 1899, Mr. Muir was elected a Bencher of the Law Society of the North-West Territories and served as such till the dissolution of that Society and the creation of the Law Society of Alberta. At the first election of Benchers for Alberta in October, 1907, he was again elected a Bencher, and at the first meeting of the Benchers was elected the Society's first President, which office he still holds. Since 1901 he has also been President of the Calgary Bar Association, and is generally regarded as the doyen of the Alberta Bar.

Besides holding a foremost place in his profession Mr. Muir has been prominent in educational matters, being for three years chairman of the Calgary Public School Board and President of Western Canada College since its organization in 1903. His reputation as a counsel and a sound erudite lawyer in every sense is well known throughout both the Provinces of Alberta and Saskatchewan.

THE KINRADE CASE.

The inquiry recently held in Hamilton as to the death of Ethel Kinrade has given rise to much comment both as to the mysterious circumstances of the case and the manner in which the inquest was conducted. The only feature of it which has come before the courts arose on the refusal of two of the principal witnesses to attend the second time on the coroner's summons, giving rise to an application to the Divisional Court (see ante p. 330) which, though unsuccessful in its immediate object, had the effect of eliciting from the court the opinion that a coroner has merely local jurisdiction and therefore that neither his summons nor a warrant issued to compel the attendance of witnesses could be enforced when the witnesses are outside of his territorial jurisdiction. The difficulty was, however, met by the issue of a subpœna from the Crown office, which these witnesses obeyed.

According to the ancient method of such inquiries, the coroner, who held the inquest himself, also conducted the examination of witnesses; and when he had asked all questions which to him seemed necessary, he would put any others that the jury might suggest, if he thought them proper and relevant. Under the Ontario Act (R.S.O., c. 97, s. 5), the Crown Attorney is to be notified of any inquest, and, if he thinks fit, may attend and examine the witnesses.

This right was claimed and exercised, not only by the Crown Attorney, but an eminent counsel was also called in to assist him. The section in question does not expressly provide for such aid, but it was not objected to, and similar practice has often prevailed in other cases.

The primâ facie aspect of the case was, in view of the evidence of the sister of the deceased, most mysterious. She was in the house at the time; but her explanation of the circumstances attending the tragedy were so unsatisfactory, her statements so incoherent, so many contradictions, such apparent impossibilities related as facts, her actions at the time and subsequent to the tragedy so inconsistent with her stories and with what might have been expected from a girl who had just seen her sister done

to death—that many have come to the conclusion that this witness was in some way or other personally implicated in the crime.

On the other hand there are not wanting those who have refused to entertain a suspicion so revolting as that one sister could murder another, and, their sympathies being thus aroused, have expressed opinions to the effect that the witness in question was harshly dealt with by the counsel for the Crown. Others have said that the inquiry savoured too much of the French system, which is repugnant to their ideas of British fair play. But there remains the ghastly fact of a cold-blooded murder, and the suspicion will not down that this sister knows more than she has told, or that she has told untruths to shield the murderer, whoever that may be.

This suspicion has been largely strengthened by the undoubted fact that speaking generally the evidence of this girl has been shewn to be absolutely unreliable. She has stated as facts things which never occurred, and has calmly admitted that she has perjured herself. These untruths may either have been wilful, or may have been the result of a diseased imagination or of some mental derangement or hallucination. Her statement as to the man whom, she says, she saw in the house at the time of the murder may be as much a matter of imagination or hallucination as the rest of her stories. We are therefore without any explanation of any value from the only eye-witness who could speak with any definiteness of the facts connected with the murder.

Under such circumstances it can scarcely be said with fairness that the counsel for the Crown was not justified in endeavouring to probe the mystery, and get at the truth by a lengthened examination, and so sift the evidence that the jury might if possible find out what was fact and what was fiction. Indeed, in the light of what is known now, but which was then only known to him, Mr. Blackstock seems to have acted with judicial fairness, and so saved the family from further unpleasant revelations.

The nature and object of a coroner's inquest must not be forgotten in this discussion. As to evidence on such an inquiry it

is laid down in Jervis on Coroners, p. 34: "Evidence ought never to be excluded on the ground that it may criminate a witness. The proper course is to tell him that he is not bound to criminate himself and to allow him to make any statement he may wish. *Wakley* v. *Cooke*, 4 Ex. 511."

As to the latter part of the above quotation the warning was, we understand, duly given, and counsel for the Crown on several occasions invited the principal witness to make any explanation she desired, so as to clear up any doubtful points, and, if possible, remove any suspicion.

It would seem that those who have had charge of this inquiry have industriously followed up all clues and suggestions, some of which came from the members of the afflicted family, and neither time nor trouble has been spared to investigate all incidents collateral to, or which could in any way be said have any connection with this dreadful tragedy. But nothing has been elicited which in the slightest degree points to any one as being the person who is said by Florence Kinrade to have been the criminal, and all suspicion as to all those who were spoken of as possible participants has been dissipated; so that after a fruitless search the detectives came back as wise as they went, having ascertained nothing of value, except information which shews that the statements made by the principal witness were largely fabrications or hallucinations.

This last word is suggestive. May it not point to a solution of the mysterious part of this ghastly tragedy? It has been suggested that the explanation of these apparently mysterious features may be found in the theory that the crime was committed by some one with a diseased brain, and therefore possibly not responsible as a criminal. This theory grows upon one and seems to solve many difficulties.

One of the facts of the case is that Florence Kinrade has been under the surveillance of specialists for the purpose of forming an opinion as to her mental condition, and further that their report to the authorities is unhesitatingly that she is afflicted with some species of dementia which might bring on paroxysms of violence.

Under these circumstances, and if, as has been alleged, this report was sufficiently definite and positive to warrant prompt action, what was the duty of those responsible for the administration of justice in this province,

This matter surely should not have been permitted to end in the present unsatisfactory condition. The blood of the murdered girl still "cries from the ground." It was due to justice, it was due to the witness, who is necessarily under a certain amount of suspicion, and it was due to the protection of the public, and possibly of the girl herself, that some definite action should have been taken.

It is impossible to suppose that those responsible for the administration of justice have not been kept advised of, at least, all information that has become public property; and now the difficulties of the case are largely increased by the fact that the principal witness—the only witness who was in the house at the time of the murder, and who was in the mental condition spoken of by the specialists—has been permitted to leave the country.

Even if we assume that the Crown has not lost sight of the wanderer and she is being shadowed, is that sufficient? Is this the action that should have been taken? How long is this to go on? It is quite possible that at any moment the shadower might be outwitted, or that some catastrophe might occur.

It is not right that the innocent should be kept under suspicion; it is not right that the guilty should go unpunished, and it is not right, if the theory above referred to be correct, that a dangerous lunatic should be at large. The responsibility does not now rest on those who had charge of the inquest, but on those who are responsible for the administration of justice in this province. There may be some good reason for the inaction of the government, but if so the public would like to know it. If there is no good reason, this inaction is surprising and most reprehensible.

"LITTLE ENGLAN

Some people appear to think that the political opinions which are known as "Little Englandism" are confined to certain inhabitants of the British Isles. This is a mistake. The same kind of idea exists in Canada.

The root of "Little Englandism" is the incapacity of those who hold that form of political opinion to look beyond the borders of their own land. "Little Englanders" think that if England were to cut the connection between herself and the "oversea dominions" of the Crown and confine herself to the British Isles she could do so without loss of prestige. At present she is taking an active part not only in the government of the British Isles but also in the government of a considerable part of the globe besides. To concentrate all the attention of her statesmen and people on the affairs of the British Isles would, it is thought, by such people, be more conducive to the real interests of the inhabitants of those Isles, than to be acting the part of a policeman and upholding law and order in other countries, to say nothing of the cause of freedom. But it is the effective discharge of the policeman's duty which enables us to dwell in safety, and carry on our business unmolested. This spirit of "Little Englandism" is by no means uncommon. It is found in many religious congregations, some of whom think that their energies first and last ought to be confined to their own congregational interests. It is found in the village, and in the town, and in the city, and it all arises from an inability to look beyond the narrow confines and interests of one's own immediate surroundings.

It invades our provincial politics, and our Dominion politics. To the "Little Englander" the Province, or the Dominion, as the case may be, is the limit of his political horizon. If he is a strong provincial, the province ought in his eyes to be absolutely self-contained. An effusive townsman of a certain western town is said once to have proudly boasted that "the day will come when the town of ——— will take its place among the other great nations of the earth." So with the province, in

the eyes of such men it ought to be a sort of pocket nation, and to think that the judgments of its courts should not be final and conclusive seems a matter of reproach to its self-sufficiency.

Other men carry the same idea into their Dominion politics, and in their eyes the Dominion is in some way at a disadvantage if it is not supreme and self-contained in all things, and by such men the possibility of an appeal from the Supreme Court of Canada is regarded as something to be ashamed of, and an illustration of our supposed political inferiority.

No Canadian would for a moment wish to belittle Canada. We are all proud of our land, and with good reason; but let us not forget that our chief glory and pride is not that we are Canadians, but that we are also the citizens of a world-wide Empire, and that our position in the world at large, and our personal freedom, not only in our own land, but in all lands to which we may choose to go, is not secured to us by Canadian power and Canadian ability to protect us, but by reason of the Imperial power of the British Empire, of which Canada is only a part. Let us never forget Magdala, and that a costly war was undertaken to vindicate the rights of a single British subject.

What should we think if the State of New York were to get up an agitation within its borders to prohibit all appeals to the Supreme Court of the United States; or to claim to make treaties for itself, or to be constantly putting the stars and stripes in the background, and putting the state flag of New York in the foreground, and trying to make the people of that state think more of the flag of the state, than of the flag of the Union?

We should think the people of that state who resorted to any such proceedings were playing a rather absurd and ridiculous part. But there seems to be a disposition in some quarters in Canada to do the same sort of thing.

The flag of the Empire, that great symbol of liberty, is not, forsooth, good enough! There must be a state flag for Canada. Resort must not be had to His Majesty in Council, because it is supposed in some way to be derogatory to our independence, as

if His Majesty were not our Sovereign just every bit as much as he is the Sovereign of Great Britain and Ireland. Why Canadians should think it derogatory to them to appeal to their Sovereign in Council in common with all others of their fellow-subjects beyond the seas it is difficult to understand, and their efforts to deprive the people of Ontario of that right must surely make us appear ridiculous in the eyes of other nations.

But this right of appeal is not a mere question of sentiment. It is a great unifying force which the lay mind utterly fails to appreciate and realize. This right of appeal to one final court common to all the "oversea dominions," (it would be better still if it could be said to be the final court of the whole Empire), helps to keep the divers systems of law throughout the Empire in harmony, and true to the great foundation principles of justice, which ought to be common to them all.

It gives confidence to the commercial community to know that their rights throughout the Empire are in the last resort safeguarded by this right of appeal; and surely that is a matter not lightly to be disregarded. But for this final Court of Appeal, common to all the "oversea dominions," there would be an inevitable tendency to drift away from a common standard of legal principles, which may well be illustrated by what actually happened on the breaking up of the Roman Empire. So long as the Empire was united and the ultimate right of appeal lay from all parts of the Empire to one fountain head of justice, the unity of law throughout the Empire was promoted, but as soon as the Eastern and Western parts of the Empire became disunited, then, although both parts started with the same code of law, it was not long before the law in the two parts become wholly different.

Is this fundamental unity of law throughout the British Empire to be imperilled and possibly sacrificed by the "Little Englandism" of Canadians? We should hope not.

Courts in times of passion and excitement have not always been true to the great fundamental principles of justice, even the English courts upheld the lawfulness of ship money and

it is of the utmost importance both in the interests of freedom and justice, and as a safeguard against any such aberrations, that the right of every British subject, no matter in what quarter of the Empire he may be, to carry his appeal to the fountain head should be jealously maintained and preserved. It may be a labour union to-day, or the employers of labour to-morrow, whose rights may be invaded. It may be the liberty of the press, or the rights of individuals, which have been jeopardized, under the forms of law; but whatever may be the nature of the rights which are threatened, let us always remember that one of the great means by which such rights may be safeguarded is this ultimate right of appeal to our King in his Privy Council.

This jeopardy is so real that one is amazed that the great majority of newspaper writers seem unable to appreciate it; and scarcely a voice among them is raised against doing away with what may prove to be as useful a safeguard to labour as to capital.

It is true that if the decisions of courts are thought to be inimical to justice or the public interests, there is always the legislature to fall back upon, but according to our method of legislation, it is not customary, or in accordance with constitutional principles, to reverse judicial decisions so as to restore to a defeated litigant his rights, no matter how erroneous the decision may be thought to be; that can only be done by the process of appeal. And recent legislation in Ontario has shewn that in that Province at least the legislature is not to be trusted to do justice, but rather the reverse.

We have no hesitation in saying that the recent proposals of the present Government of Ontario to attempt further to restrict the right of appeal to the Privy Council were ill-advised, and though we do not suggest that that Government is tainted with "Little Englandism," we fear it has shewn a disposition to pander to those who are. We are inclined to think that the prerogative right which it was proposed to restrict is one that cannot constitutionally be abrogated or interfered with in any way by a provincial legislature. It is not a prerogative inherent in the Crown as represented by His Honour the Lieutenant-Governor, it is a right inherent in His Majesty's own proper person, and

which cannot be delegated, and which we are inclined to think only the Imperial Parliament can effectually abrogate or restrict. And in view of the late decisions of the Privy Council and the Supreme Court there is ground for believing that all provincial attempts to abrogate the royal prerogative to entertain appeals would be nugatory. If there is power in provincial legislatures to restrict the right to appeal to His Majesty in Council, then there would be a right to abolish it in toto, and thus a provincial legislature might be able to take away important rights not only of the people within its borders, but also of people of other parts of the Empire who had occasion to seek the aid of, or who might be sued in, the courts of this province.

Before such legislation is passed we ought to be quite certain of its constitutionality. If unconstitutional, it can have no other effect than to create disaffection, whenever His Majesty in his Privy Council, in exercise of his constitutional rights and duty, shall see fit to give leave to appeal, notwithstanding provincial legislation to the contrary. It has been decided by both the Supreme Court of Canada and the Privy Council that a provincial Act purporting to take away a right of appeal to the Supreme Court which is allowed by the Supreme Court Act, is nugatory: *Crown Grain Co.* v. *Day* (1908) A.C. 504; 99 L.T. 746; and applying a similar principle to appeals to His Majesty in Council, must we not come to the conclusion that the Act of a provincial legislature is inoperative to affect any of the prerogatives of the Crown, which are not exercisable by the Lieutenant-Governor. His Honour can validly consent to the abrogation of any of the Royal prerogatives which he himself may exercise, but how can he validly consent to the abrogation of a Royal prerogative over which he has no power or control?

In the case of *Cuvillier* v. *Aylwin*, 2 Knapp. P.C. 72, it seems to have been thought that a Provincial Act might abrogate this prerogative, but that case was afterwards practically overruled in *Johnston* v. *St. Andrews*, 3 App. Cas. 159, and see *Cushing* v. *Dupuy*, 5 A.C. 409. In the more recent case, *In re Will of Wi Matua* (1908) A.C. 448, it seems to be suggested, though not actually decided, that a provincial Act by express words may

abrogate this prerogative. The legal effect of provincial legislation of this kind cannot, therefore, be said to be very easily determined; it may be effectual to prevent appeals as of right, but not appeals as of grace; but before venturing on the path it would be well to be certain of the real effect of what is being done, and not pass laws which say one thing, and may be found to mean something else.

Some such reflections may possibly have led to the abandonment of the Government's original proposal to restrict the right of appeal to His Majesty in Council which we are glad to see was ultimately dropped.

RECENT MOTOR-CAR DECISIONS.

In Aug., 1906, on the publication of the report of the Royal Commission as to motor-cars, the London *Law Times* laid before its readers a summary of the cases which had been decided under the Locomotives on Highways Act, 1906, and the Motor Car Act, 1903, and in a recent issue says:—"We now propose to summarize shortly the cases which have been before the courts during the past two and a half years. Although they have not been numerous, some interesting decisions have been given on the smoke question, on the application of the speed limit created by the Parks Regulation Act, 1872, to motor-cars, and on how far a motor-car liable to skid is a nuisance.

With regard to smoke, the question has generally arisen where the driver of the motor-car has been summoned under the provisions of the Highways and Locomotives Amendment Act, 1878, the contention of the prosecution being that the exemption granted by the Locomotives on Highways Act, 1896, to motor-cars, could not under the circumstances be relied upon. By s. 30 of the Act of 1878, every locomotive used on any highway must be constructed on the principle of consuming its own smoke, and any person using any locomotive not so constructed or not consuming, so far as practicable, its own smoke, is to be liable to a fine. It is to be noticed that two things are required under

this section—first, smoke-consuming construction; and, secondly, consumption, so far as practicable, of the smoke. By the Act of 1896, locomotives under a certain weight, and not drawing more than one vehicle, were exempted from s. 30 of the Act of 1878, provided that the locomotive was "so constructed that no smoke or visible vapour is emitted therefrom, except from any temporary or accidental cause," and it is to be noticed that this section only applies to construction, so far as those motor vehicles that otherwise complied with the section are concerned. The first case that arose under these sections was *ex* v. *Wilbraham; Ex parte Rowcliffe* (96 L.T. Rep. 712; 21 Cox C.C. 441). In that case the owner of a motor-car had been convicted for using on a highway his motor-car which did not consume, so far as practicable, its own smoke, contrary to the Act of 1878. The motor-car came within the provisions of the Act of 1896, and the emission of smoke was due to the negligence of the driver, and it was held that, as this emission of smoke was due to a temporary cause, no offence had been committed, and the conviction must be quashed. The next case also arose on a summons under s. 30 of the Act of 1878 (*Starr Omnibus Company* v. *Tagg*, 97 L.T. Rep. 481; 21 Cox C.C. 519). The offending vehicle was a motor omnibus, and it was there found that the engine was a smokeless engine and that the smoke emitted was caused through the negligence of the driver applying an excessive quantity of lubricating oil. The court was of opinion that, as the engine was so constructed that no smoke was emitted except by the driver's negligence, the Act of 1896 applied, and so exempted the vehicle from the provisions of the Act of 1878. It was further of opinion that even if the earlier Act applied, that statute did not cover the case of supplying an excessive quantity of lubricating oil to the machinery of a properly constructed engine which consumed its own smoke. The last case on this question, and the one which really points out the true meaning of these sections, was *Hindle* v. *Noblett* (99 L.T. Rep. 26). In that case the summons was under s. 30 of the Act of 1878, and evidence was given of the emission of an excessive quantity of smoke on a highway. Uncontradicted evidence was called that the engine was con-

structed so that no smoke or visible vapour was emitted therefrom, except from some temporary or accidental cause. The justices found that the emission of smoke was not only due to the negligence of the driver, but also to the fact that the engine did not consume, so far as practicable, its own smoke, and they were not satisfied that the emission was due to any temporary or accidental cause. On these findings the Divisional Court was of opinion that a conviction under s. 30 of the Act of 1878 was right, Mr. Justice Darling pointing out that the engine really did that which it was designed not to do.

The law on this point seems to be as follows—namely, that a motor-car, to claim the exemption given by the Act of 1896, from the Act of 1878, must, in addition to the earlier requirements of s. 1 of the Act of 1896, be shewn to the justices to be so constructed that no smoke or visible vapour is emitted therefrom, except from any temporary or accidental cause, and the fact that smoke is emitted is evidence upon which they may find as a fact that the provisions of the Act of 1896 are not complied with. If that is found by the justices, then s. 30 of the Act of 1878, applies, and, in order to avoid a conviction under that section, it must be shewn that the motor-car is constructed on the principle of consuming its smoke *and* that in fact it does consume, so far as practicable, its own smoke, although a conviction may follow if either of these conditions are not complied with.

Turning now to the Parks Regulation Act, 1872, a speed limit of ten miles an hour is imposed on motor-cars by a regulation made thereunder in April, 1904, and there have been several decisions as to the indorsement of licenses when a conviction has followed for exceeding such limit. In *Musgrave* v. *Kennison* (92 L.T. Rep. 865; 20 Cox C.C. 874), a case which we dealt with in our former article, it was held that the regulation of 1904 was a good one, and we pointed out that it appeared that, if any a good one, and we pointed out that it appeared that, if any conviction took place for exceeding that speed limit, indorsement of the license under s. 4 of the Motor Car Act, 1903, appeared to be

compulsory, as the offence was not an offence against exceeding the speed limit imposed by the Act of 1903. That, however, has been held not to be the law, for in *Rex* v. *Marsham; Ex parte Chamberlain* (97 L.T. Rep. 396; 21 Cox C.C. 510) it was held that the offence of exceeding this speed limit imposed by the regulations made under the powers of the Parks Regulation Act, 1872, stood in the same position with regard to the indorsement of the license as an offence against the speed limit fixed by s. 9 of the Motor Car Act, 1903, and that therefore there was no power to endorse for a first or second conviction of exceeding the speed limit. Although, no doubt, this decision was just and equitable, it seems somewhat straining the words in the section of 1903, "any offence in connection with the driving of a motor-car, other than a first or second offence, consisting solely of exceeding any limit of speed fixed under this Act." The necessary corollary of these cases was *Rex* v. *Plowden; Ex parte Braithwaite* (126 L.T. Jour. 524), where the applicant had been convicted under s. 4(2) of the Act of 1903, for not producing his license for indorsement. It appeared that he had been convicted of exceeding the speed limit in a park, and, having been twice previously convicted of a similar offence in a park, was ordered to produce his license for indorsement, but failed to do so. It was contended that, as at the date the Act of 1903 came into operation—namely, the 1st Jan., 1904—the regulation of April, 1904, imposing the speed limit had not been made, the words in s. 4(1), "any offence in connection with the driving of the motor-car," did not apply, as they must be understood as being limited to offences existing on the 1st Jan., 1904. It is needless to say this contention was not upheld, and the conviction was held to be good.

So far as skidding is concerned, in *Gibbons* v. *Vanguard Motor Bus Company, Limited* (25 Times L.R. Rep. 13), a lamp erected on the pavement was knocked down by a motor bus skidding on to it, the road being greasy. The County Court judge found that the motor bus was duly licensed, and that the driver was guilty of no personal negligence, but he was of opinion that it was well known that under certain circumstances these vehicles

were liable to skid, and, if they did skid, it was impossible to control them, and so the motor bus company were liable for placing a nuisance on and for negligently using the highway. On these findings the Divisional Court held that they could not interfere. In *Walton* v. *Vanguard Motor Bus Company, Limited* (25 Times L. Rep. 13), the court pointed out that where a vehicle which should be in the roadway knocked down a permanent structure on the pavement that is *evidence* of negligence on the part of the driver. The last decision on this question was *Parker* v. *London General Omnibus Company, Limited* (100 L.T. Rep. 409), where the Divisional Court laid it down that the skidding of a motor bus on a greasy road, where there is no negligence on the part of the driver, and the skidding is due to the precautions taken by the driver to avoid an accident, is no evidence that the particular vehicle is a nuisance for the placing of which on the highway the owners are responsible. This last decision has been taken to the Court of Appeal, so some definite pronouncement may be expected as to how far a skidding motor is a nuisance, for the cases hitherto decided have depended largely on special facts or findings.

There have been a few other decisions which should be borne in mind. In *Bastable* v. *Little* (96 L.T. Rep. 115; 21 Cox C.C. 354), an information was laid against the respondent, under s. 2 of the Prevention of Crimes Amendment Act, 1885, for wilfully obstructing the police in the execution of their duty, he having warned motor-car drivers of the existence of a police trap. It was found by the justices that the drivers of the cars might have been enabled to avoid travelling at an illegal speed in consequence of the respondent's warnings, but it was not found that the motor-cars were in fact exceeding the speed limit at any time, or that he was acting in concert with any of the drivers. The Divisional Court held that the justices, under the circumstances, were right in dismissing the information, but they pointed out that obstruction may exist within s. 2 of the Act of 1885, without physical obstruction. On this point it would appear that if the warning is to prevent a breach of the law, it would not be

obstruction; but that if the warning is to prevent a person who has broken the law being made responsible for his acts, that might be within the section. Another interesting decision was *Du Cros* v. *Lambourne* (95 L.T. Rep. 782; 21 Cox C.C. 301), where it was held that a person who aids and abets another driving at a speed dangerous to the public may be convicted as a principal under s. 1(1) of the Motor Car Act, 1903, as in offences less than felony the law treats all as principals. With regard to the words "any offence in connection with the driving of a motor-car," in s. 4(1) of the Act of 1903, it was held in *Rex* v. *Lyndon; Ex parte Moffat* (72 J.P. 227) that they did not include obstructing a highway within the Highway Act, 1835, by leaving a motor-car thereon; and in *Jessopp* v. *Clarke* (99 L.T. Rep. 28), it was laid down that where a constable, who had stopped a car, informed the driver that he thought he was exceeding the speed limit, but that if, after he had compared the time with another constable, it appeared that he had not done so, and in such a case he would hear nothing further about it, this was sufficient warning of an intended prosecution within s. 9(2) of the Motor Car Act, 1903.

Two other cases with reference to driving are worthy of notice. In *Welton* v. *Taneborne* (99 L.T. Rep. 668), the driver of a motor-car was convicted under s. 1 of the Act of 1903 of driving in a manner which was dangerous to the public. Evidence was given as to speed, and the question of speed was taken into consideration on such conviction. The prosecution then desired to proceed on a summons under s. 9 for exceeding the speed limit, but the magistrate refused to hear it, on the ground that the defendant could plead autrefois convict, and in this the Divisional Court held he was right. The other case was *Burton* v. *Nicholson* (100 L.T. Rep. 344), in which it was held that the driver of a motor-car when overtaking a tramcar proceeding in the same direction was bound to pass the tramcar on the right or off side, apart altogether from the question of danger to the public or to persons getting on or off the tramcar. This decision, however, is not of much value, inasmuch as art. 4(3) of the

Motor Cars (Use and Construction) Order, 1904, under which the proceedings were taken, has been amended in consequence of the judgments in that case.

It will be seen that since the Act of 1903 was placed on the statute-book a fair number of important decisions have been given both with regard to its provisions and those of the earlier Act of 1896. We do not suppose that under these statutes many more difficult questions will arise in the future, inasmuch as most debateable points have already been considered. No doubt the time is approaching when fresh legislation with regard to mechanically propelled vehicles will be introduced; and for ourselves we should prefer to see the abolition of the artificial speed limit, and dangerous and reckless driving dealt with by provisions akin to—or even stronger, if need be, than the existing s. 1 of the Motor Car Act, 1903."

In commenting last week upon recent decisions with regard to motor-cars, we omitted to call attention to the case of *Wing* v. *London General Omnibus Co., Limited* (100 L.T. Rep. 301). That case, which had reference to the skidding of a motor omnibus, is of undoubted importance so far as passengers in such a vehicle are concerned. It was laid down in *Redhead* v. *Midland Railway Company* (16 L.T. Rep. 485) that it was the duty of a carrier of passengers to take every precaution to procure a vehicle reasonably sufficient for the journey it is to assist in performing, and *Brenner* v. *Williams* (1 C. & P. 414), seems to shew that the duty is to supply a vehicle not only reasonably fit, but absolutely fit. In the present case the plaintiff, a passenger in a motor omnibus, sustained injuries by reason of an omnibus skidding and running into an electric light standard. The jury found that the defendants were negligent in allowing their motor omnibus to run when the road was in a slippery state, such vehicle being liable to become uncontrollable through skidding, and the court held that under such circumstances the plaintiff was entitled to succeed in the absence of proof by the defendants that when the passenger entered the omnibus she was aware that

such vehicles had a tendency to skid and voluntarily accepted the risk. This last point is somewhat important for passengers, but it appears from the judgment of Mr. Justice Walton that it must be shewn that the passenger knows that motor omnibuses will skid, notwithstanding every precaution and everything that can be done.—*Law Times.*

RECTIFICATION OF DEEDS.

The jurisdiction exercised by the court in reference to rectifying some mistake is obviously one to be handled with jealous care. In all such claims it is necessary to satisfy a somewhat reluctant court by means of very plain evidence that there has been a mistake at the time when the instrument was made, and that it is not a mere matter of the instrument in question operating in some way quite unexpected by the parties concerned. Here and there cases are to be found where the court has acted on some unchallenged parol evidence of the plaintiff only, but as a rule, there are produced various documents, such as drafts or letters to solicitors or counsel, to prove to the court the real intention of the parties.

A very recent accession to the authorities on this subject may be found in *Lady Hood of Avalon* v. *Mackinnon* (100 L.T. Rep. 330), where Mr. Justice Eve had to deal with a rather curious case. A certain marriage settlement in 1855 had settled some personal property on certain trusts during the joint lives of Lord Hood of Avalon and the plaintiff. After the death of either of them there was a trust for the survivor for life, and thereafter in trust for such issue of the marriage as Lord Hood and the plaintiff should by deed or will appoint. Mrs. M. and Mrs. A. were the issue of the marriage in question. In 1888 Lord Hood and the plaintiff irrevocably appointed one-half of the trust funds for Mrs. M. absolutely, and Mrs. M. settled this one-half upon certain trusts with a covenant as to after-acquired property. Lord Hood afterwards died. The plaintiff in 1902 by a deed-poll appointed, subject, however, to her life

interest, £1,600 to Mrs. A., and in 1904 again appointed to her £7,000. Shortly after so doing, the plaintiff appointed to Mrs. M., subject as above, £8,600. It was now urged that this appointment to Mrs. M. was executed under a mistake. The plaintiff stated that she was aiming at equality between Mrs. M. and Mrs. A., and that she had totally forgotten the deed of 1888. It was only in 1908 that the deed of 1888 was recalled to her mind by her solicitors, and the action was subsequently brought to have the matter adjusted. Mrs. M.'s trustees argued that forgetfulness was not good ground for the interference of the court, and that, while a mistake might be a ground for rectification, it would not support a rescission of a deed. Mr. Justice Eve accepted the plea of a desire to effect equality between the plaintiff's daughters. The learned judge found that all parties had acted in ignorance of the facts, and that the donee of the fund had actually appointed sums exceeding by a large sum the amount of the trust fund. Mr. Justice Eve came to the conclusion that the deed-poll was executed under a mistake, and an order for rescission was granted.

Here, then, we have a plain authority that it does not matter much in a case of this description whether the error is due to wrong information or a defect of memory. The question whether forgetfulness could be a "mistake" was raised in *Barrow* v. *Isaacs* (64 L.T. Rep. 686; (1891) 1 Q.B. 417), decided by the Court of Appeal. There the dispute was as to a relief from forfeiture caused by breach of a covenant by a lessee not to underlet without license. At p. 688 Lord Esher says: "Is mere forgetfulness mistake? Using the word 'mistake' in its ordinary meaning in the English language, I think that forgetfulness is not mistake. Forgetfulness is not the thinking that one thing is in existence when in fact something else is. It is the absence of thought as to the thing—the mental state in which the particular thing has passed out of mind altogether." Lord Justice Kay read a judgment differing from the view expounded in the leading judgment, and in so doing had the support of Lord Justice Lopes. Lord Justice Kay observes at p. 689: "Very

wisely, as I presume to think, the courts have abstained from giving any general definition of what amounts to mistake. It is an easily arguable question whether mere forgetfulness of such a covenant—even if not negligent—can properly be called a mistake. The case of *Kelly* v. *Solari* (9 M. & W. 54), however, and the observations of Lord Blackburn in the House of Lords in *Brownlie* v. *Campbell* (L. Rep. 5 A.C. 952) establish that, in an action to recover money paid by mistake, it is sufficient to prove that at the time of the payment the person paying was actually ignorant that the money was not due, although he had the means of knowledge, and it was owing to his own carelessness or forgetfulness that he was in fact ignorant. There undoubtedly forgetfulness of the previous payment is treated as a mistake. . . . I feel great difficulty in saying that if this is a mistake at law it would not be considered a mistake in equity."

It is rather important to note that in these cases of claims for rectification on the ground of mistake, the error must be one of fact and not of law, nor, as a rule, on a point of construction, but see, as to the latter, a case where the mistake arose in the construction of a doubtful instrument of title. *Earl Beauchamp* v. *Winn* (31 L.T. Rep. 253; L. Rep. 6 H.L. 223) raised this point, and, moreover, decided that the court will not intervene unless the parties can be put back into what was substantially their earlier relative positions, and the mistake must be such as goes to the essence of the whole affair. On this subject as to the class of the mistake we may usefully refer readers to vol. 3, p. 2304, of Seton's Forms of Judgments and Orders (6th edit.), where there will be found a valuable summary of many of the earlier decisions. In general, the rule Ignorantia juris excusat is inapplicable to those questions of mixed law and fact which are so difficult to define, or to matters of mistake in respect of private rights.

The most common class of disputes as to rectification is in reference to marriage settlements. So anxious is equity to effect substantial justice that extrinsic evidence is admissible to modify

the construction of general words where the court suspects that they were not intended to convey their prima facie meaning. In regard to marriage settlements, it is sometimes discovered that the finally executed document does not tally with the preliminary articles. There are some golden rules set out in Smith's Principles of Equity (3rd edit.), p. 223, which are worth keeping in mind. Put into briefer form, they are as follows: Where articles and settlement were executed before the marriage, the settlement will be preferred, unless the settlement purports to be in pursuance of the articles, when the discrepancy will be considered due to inadvertance and will be rectified. This assumption need not appear on the face of the settlement, but can be shewn by extrinsic evidence. Should the marriage precede the settlement, but be subsequent to the articles, then equity will prefer the articles as expressive of the true agreement between the parties and will rectify the settlement conformably therewith. A case to refer to on these points may be mentioned in *Legg* v. *Goldwire* (1 L.C. Eq. 17, and the notes at pp. 41 et seq.). In conclusion, it is important for the legal advisers of persons interested in some question of rectification to see to it that no unnecessary delay is allowed to supervene. This is eminently a jurisdiction to which, as a rule, the courts are apt to apply the doctrine of Vigilantibus, non dormientibus, leges subveniunt. —*Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

INSURANCE (LIFE)—HUSBAND AND WIFE—INSURANCE BY HUSBAND AND WIFE OF EACH OTHER'S LIVES FOR BENEFIT OF SURVIVOR—INSURABLE INTEREST—14 GEO. III. C. 48, SS. 1, 3—(R.S.O. C. 339, SS. 1, 3).

Griffiths v. *Fleming* (1909) 1 K.B. 805. This was an action by a husband on a policy of insurance effected in the following circumstances. The husband and wife obtained from the defendants a policy of insurance, in consideration of a premium of which each paid part, whereby a sum of money was made payable upon the death of whichever of them should die first, to the survivor. The wife having died the husband claimed to recover the amount of the policy. The defendants resisted payment on the ground that a husband has no insurable interest in the life of his wife, and therefore that the policy was void under 14 Geo. III. c. 48, ss. 1, 3, (R.S.O. c. 339, ss. 1, 3). Pickford, J., who tried the action held that the plaintiff by reason of the services performed by his deceased wife had an insurable interest in her life, and gave judgment for the plaintiff. This judgment was affirmed by the Court of Appeal (Williams, Buckley and Kennedy, L.JJ.) but not on the same grounds. Williams, L.J., putting his judgment on the ground that by the English Married Women's Property Act, 1882, s. 11, a married woman is expressly empowered to insure her own life and that of her husband, and that the policy in question might be treated as a policy effected by the wife under that section on her own life. Buckley and Kennedy, L.JJ., on the other hand, put their judgment on the broader ground that insurances by husband and wife on each other's lives are not within the mischief of the statute and each must be presumed, apart altogether of any proof of services or pecuniary benefit, to have an insurable interest in each other's lives. This had been so held in Scotland, where the 14 Geo. III. c. 48 is also in force, and these learned judges thought the Act must receive the same construction in England, and therefore the plaintiff was entitled to recover on his own contract and not on that of his wife, and no administration to her estate would be necessary.

HUSBAND AND WIFE—TORT COMMITTED BY WIFE DURING COVERTURE—LIABILITY OF HUSBAND FOR WIFE'S TORT—MARRIED WOMEN'S PROPERTY ACT, 1882 (45-46 VICT. C. 75) S. 1(2)—R.S.O. C. 163, S. 3(2), 17).

Cuenod v. *Leslie* (1909) 1 K.B. 880 was an action against husband and wife to recover damages for fraudulent representations made by the wife during coverture. Pending the action the husband had obtained a judicial separation which it was held entitled him to have the action as against him dismissed; but the case is noteworthy for the observations of the judges of the Court of Appeal on the general question of the liability of a husband for his wife's post nuptial torts, inasmuch as they hold that the English Act of 1882 has made no difference and a husband remains liable as at common law. In Ontario the husband's liability is limited to the amount of property he has acquired through his wife except as to men married prior to 1884 who remain liable as at common law. Moulton, L.J., thinks under s. 1(2) of the English Act of 1882 (R.S.O. c. 163, s. 3(2)) it is clear that the husband is intended to be no longer liable for his wife's post nuptial torts and he thinks *Seroka* v. *Kattenburg* 17 Q.B.D. 177 and *Earle* v. *Kingscote* (1900) 2 Ch. 535 were wrongly decided, though binding on the Court of Appeal. The other members of the court do not think it proper to criticize those cases.

CRIMINAL LAW — HOMICIDE BY DRUNKARD — MURDER — MANSLAUGHTER—DRUNKENNESS.

The King v. *Meade* (1909) 1 K.B. 895. This was an appeal from a conviction for murder. The prisoner was indicted for murder of a woman, and it appeared that the deceased died from injuries inflicted on her by the prisoner while in a state of drunkenness. Coleridge, J., who tried the prisoner directed the jury: "That everyone is presumed to know the consequences of his acts. If he be insane that knowledge is not presumed. Insanity is not pleaded here, but where it is part of the essence of a crime that a motive, a particular motive shall exist in the mind of the man who does the act, the law declares this—that if the mind at that time is so obscure by drink, if the reason is dethroned and the man is incapable therefore of forming that intent, it justifies the reduction of the charge from murder to manslaughter." The prisoner objected to this charge on the ground that it might mislead the jury into thinking they could

not acquit the prisoner unless they found him to have been insane; and that it ought to have been left to the jury to say whether the prisoner in fact had no intention of doing grievous bodily harm. The Court of Criminal Appeal (Darling, Walton and Pickford, JJ.) thought that the rule in such cases is this—that the presumption that everyone intends the natural consequences of his acts may be rebutted by shewing the mind of the accused to have been so affected by drink that he was incapable of knowing that what he was doing was dangerous, *i.e.*, likely to inflict serious injury—and that the charge of Coleridge, J., was substantially in accordance with that rule. The appeal was therefore dismissed.

TRADE UNION — RESTRAINT OF TRADE — ACTION BY MEMBER AGAINST UNION—STRIKE PAY — DECLARATORY JUDGMENT — TRADE UNION ACT, 1871 (34-35 VICT. C. 31) S. 4—39-40 VICT. C. 22, S. 6—(R.S.C. C. 125, SS. 2, 4(i)).

Gozney v. *Bristol Trade & P. Society* (1909) 1 K.B. 901. This was an action brought against a trade union by a member of the society for a declaratory judgment and to recover the sum of 2s. 6d. alleged to have been improperly withheld from the plaintiff by the defendants. Although the amount at stake was trifling the principle involved was important. The plaintiff was in receipt of sick pay and was subjected to a deduction of 2s. 6d. for breach of the rules of the society. The action was to obtain a declaration that he had not broken the rules, and to compel payment of the 2s. 6d. The society was registered under the Act as a trade union. Its rules among other things provided for the payment of sick pay to members, and also for the payment of "strike pay" in case of strikes. The County Court judge who tried the action thought that some of the purposes of the society were in restraint of trade and therefore the court was precluded by the Trade Union Act, 1871, s. 4, (R.S.C. c. 125, s. 4) from entertaining jurisdiction and his opinion was affirmed by the Divisional Court (Channell and Sutton, JJ.); but the Court of Appeal (Cozens-Hardy, M.R. and Moulton and Buckley, L.JJ.) came to a different conclusion on the ground that a trade union per se may be lawful altogether apart from the Trade Union Act, and such the Court of Appeal held the union in question to be, and which as far as the sick benefits were concerned, was in the nature of a friendly society, and on that ground the plaintiff was entitled to relief. The fact that the rules provided for "strike pay," was held to involve no illegality; a strike not being

of itself unlawful, notwithstanding in some cases it may be attended by circumstances such as breach of contract, and intimidation, which would be illegal. Moulton, L.J., seems to be of the opinion that but for the amendment effected by 39-40 Vict. c. 22, s. 6, in the definition of a trade union the action would not lie, and in considering the effect of this case in Canada, it must be remembered that the amendment in question has not been adopted here. At the same time, if a trade union in Canada must be a combination which but for the Trade Union Act would be an unlawful combination, then it would seem to follow from this case that a union of the like character to that of the defendants in this case would not be "a trade union" within the Act, though called a trade union and therefore a similar action to this might be maintained in Canada notwithstanding R.S.C. c. 125, s. 4(1) which of course only applies to trade unions coming within the definition of s. 2.

PROMISSORY NOTE—COMPANY—SIGNATURE BY MANAGING DIRECTOR —PERSONAL LIABILITY.

In *Chapman* v. *Smethurst* (1909) 1 K.B. 927, the Court of Appeal (Williams and Kennedy, L.JJ. and Joyce, J.) have been unable to agree with the decision of Channell, J. (1909) 1 K.B. 73 (noted ante, p. 125). It may be remembered that the managing director of a company had signed a promissory note beginning "Six months after date I promise to pay, etc., as follows: "I. H. Smethurst's Laundry & Dye Works, Limited, I. H. Smethurst, managing director." Channell, J., held that he had thereby made himself personally liable, but the Court of Appeal held that he did not, and that it was simply the note of the company.

PRACTICE—SHIP—SUBJECT MATTER OF ACTION—PRESERVATION—ORDER TO BRING SUBJECT OF ACTION WITHIN JURISDICTION—RULE 659—(ONT. RULE 1096).

Steamship New Orleans Co. v. *London P. M. & G. Ins. Co.* (1909) 1 K.B. 943. This was an action on a policy of marine insurance as for a total loss of the vessel insured. The vessel in question was lying in Singapore harbour. The defendants applied under Rule 659 (Ont. Rule 1096) for leave at their own risk and expense to bring the vessel to England. Bray, J., was of the opinion that he had no jurisdiction to make such an order, but the Court of Appeal (Farwell and Kennedy, L.JJ.) held that the order should be made both for the "preservation" and "inspection" of the property in question in the action.

SHIP—CHARTER-PARTY—DEMURRAGE PAYABLE DAY BY DAY—LIEN FOR DEMURRAGE.

Rederiactieselskabet "Superior" v. *Dewar* (1909) 1 K.B. 948. This case is chiefly remarkable for the plaintiff's name; the legal points decided by Bray, J., are (1) that where a charter-party provides that demurrage shall be payable at a specified rate "day by day" and also provides that the owner shall have a lien upon cargo for "all freight demurrage and all other charges whatsoever," these provisions are not inconsistent, and the owner is entitled to a lien for demurrage notwithstanding it is stipulated that it shall be paid "day by day"; (2) he also held that "charges" did not include "dead freight" i.e., freight payable in respect of unused space.

EMPLOYERS' LIABILITY — WORKMAN — COMPENSATION NOTICE OF ACCIDENT—ONUS OF PROOF—FAILURE TO GIVE NOTICE.

Hughes v. *The Coed Talon Colliery Co.* (1909) 1 K.B. 957 was an action by a workman against his employers to recover compensation for an injury sustained in the course of his employment. No notice in writing of the alleged accident had been given to the defendants who set up this as a defence. The County Court judge who tried the action gave judgment for the plaintiff. The Court of Appeal (Cozens-Hardy, M.R. and Moulton and Farwell, L.JJ.) reversed his decision, holding that the onus was on the plaintiff to shew that the defendants had not been prejudiced by the neglect to give the notice, and that such onus had not been discharged.

Correspondence.

THE GOVERNMENT DISCREDITING THE BANKS.

To the Editor, CANADA LAW JOURNAL:

DEAR SIR,—The legal profession can properly claim credit for being reformers of the best and most useful type inasmuch as they approach a subject with more caution than those who have not had their training. This applies not merely to the improvements in the administration of justice, but also in matters connected with business and development of the country at large. The reason for this is that their habits of mind are formed largely by their looking to precedents, the necessity for careful study and the endeavour to look into the future as to results. This also makes them more conservative in their views. They may therefore be more safely trusted than those devoid of such training.

Lawyers may by reason of all this naturally occupy many positions of responsibility to the public and therefore owe a duty to give wise advice when the occasion arises by expressing their views on subjects affecting the preservation and well-being of the institutions of the country. Such an occasion has lately arisen by reason of an incident which may more or less seriously affect one of the most important of these institutions namely, our banking system.

It is needless to say that anything which tends to lessen the usefulness or decay the credit of our chartered banks would be harmful and might be disastrous. The statement has been made in the press that the Treasurer of the Province of Ontario has publicly expressed the opinion that the double liability of holders of bank stock has proved such a hardship, and such a dangerous element from an investment point of view, that those who seek to take care of their families would do well to buy provincial bonds instead. Whilst there might possibly be, in the opinion of some, as an abstract proposition, a measure of wisdom in such advice the spectacle of a Treasurer of a Pro-

vince, seeking to find a market for provincial securities, decrying the credit of the banks of the country is certainly not an edifying one; and such remarks reflect no credit either upon the wisdom or patriotism of the Government of which he is a member.

It is surely not necessary to say that there is nothing more sensitive to adverse criticism than the credit of banks, which are largely the depositories of the money of many who are unthinking people and ignorant of business; nor is it necessary to say that Canada is a borrowing country and that money for public purposes should be sought for abroad.

No Government should descend to such means to sell its bonds. It is unwise, unfair, undignified, and ought to be unnecessary.

A. B. C.

["Quem deus vult perdere prius dementat."—Ed. C.L.J.]

MURDER AND ITS PUNISHMENT.

To the Editor, CANADA LAW JOURNAL:

DEAR SIR,—The case of the murderer Blythe has been the subject of much comment and is an illustration of the peculiarities of human nature. The brutality of the crime at first horrified the public and they thirsted for his blood. Then some one started the idea that this convict was not so bad after all, and that he ought to have a new trial. It was only his wife he killed, and being a drunkard as well as a ruffian and a coward, and had developed nervous prostration, his sentence should be changed to imprisonment. This idea took hold of some people given to maudlin sentiment, and hysterical appeals for mercy were made for a brute who never had any mercy upon the woman he swore to love and cherish. Now the tide has again turned and the public is beginning to come to its senses, and to ask if there is any reason why the law of the land should not be enforced in this very plain case. Hanging a man is a serious business; but allowing a brutal murderer to escape the punishment due to his crime is still more serious.

COMMON LAW.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] [May 4.

SEDGEWICK *v.* MONTREAL LIGHT, HEAT & POWER CO.

Appeal—Court of Review—Appeal to Privy Council—Appealable amount—Amendment to statute—Application—Notice of appeal—New trial—Marine insurance—Constructive total loss—Trial by jury—Misdirection.

An appeal lies to the Supreme Court of Canada from a judgment of the Court of Review which is not appealable to the Court of King's Bench, but is susceptible of appeal to His Majesty in Council. By 8 Edw. VII. c. 75(Que.) the amount required to permit of an appeal to His Majesty in Council was fixed at $5,000 instead of £500 as before.

Held, that said Act did not govern a case in which the judgment of the Court of Review was pronounced before it came into force.

By s. 70 of the Supreme Court Act, notice must be given of an appeal from the judgment inter alia "upon a motion for a new trial."

Held, that such provision only applies when the motion is made for a new trial and nothing else and notice is not necessary where the proposed appeal is from the judgment on a motion for judgment non obstante or, in the alternative, for a new trial.

In order to determine whether or not a ship is a constructive total loss under a policy of marine insurance, the value of the hull when broken up should be added to the cost of repairs; and where at the trial on such a policy the jury were not instructed to fix such value, and, therefore, made no finding in respect to it, and were misdirected as to the meaning of a total loss (art. 2522, C.C.) the Supreme Court reversed the judgment of the Court of Review affirming the verdict for the plaintiffs and ordered a new trial.

Appeal allowed with costs.

Lafleur, K.C., and *Pope*, for appellants. *R. C. Smith*, K.C., and *Montgomery*, for respondents.

Man.] BUTLER *v.* MURPHY. [May 4.

Principal and agent—Broker selling on Grain Exchange—Contract by broker in his own name—Liability of principal—"Futures"—"Options"—"Margins"—Board rules.

On 14th August, 1[illegible]7, the defendant, who resided in the state of Nebraska, wrote the following letter to the plaintiffs, grain dealers at Winnipeg, Man.: "Yours of recent date enclosing market report received. I shall be north in about four weeks to look after the new crop and, if you can sell No. 2 oats for 37c. or better, in store Fort William, you had better sell 4,000 bus. for me, and I will be up at Snowflake then so I can look after the loading of them, and I will send the old oats then." The plaintiffs, who were also brokers on the Winnipeg Grain Exchange, sold the oats at 38½ cents on the "Board," without disclosing the name of their principal, for October delivery, becoming personally liable for the performance of the contract according to the rules of the Exchange. Upon defendant refusing to deliver the oats, the plaintiffs purchased the quantity of oats so sold at an advance in price in order to make the delivery and brought the action to recover the amount of their loss thus sustained.

Held, reversing the judgment appealed from (18 Man. R. 111), that the authority so given did not authorize the plaintiffs to make a sale under the Grain Exchange rules binding upon their principal and, consequently, that he was not liable to indemnify them for any loss sustained by reason of their contract. Appeal allowed with costs.

Haydon, for appellant. *Ewart*, K.C., and *Noble*, for respondents.

Dom. Arb.] [May 28.

PROVINCE OF QUEBEC *v.* PROVINCE OF ONTARIO.

Arbitration — Statutory arbitrators — Jurisdiction — Awards "from time to time"—Res judicata.

The statutes authorizing the appointment of arbitrators to settle accounts between the Dominion and the Provinces of Ontario and Quebec and between the two provinces, provided for submission of questions by agreement among the governments interested; for the making of awards from time to time; and that subject to appeal, the award of the arbitrators in writing should be binding on the parties to the submission.

The provinces submitted to the arbitrators for determination the amount of the principal of the Common School Fund to ascertain which they should consider not only the sum held by the Government of Canada but also "the amount for which Ontario is liable." In 1896 by award No. 2 the arbitrators determined that moneys remitted to purchasers of school lands unless made in fair and prudent administration, and uncollected purchase money of patented lands, unless good cause were shewn for non-collection should be deemed moneys received by Ontario, and in 1899 the amount of liability under these heads was fixed by award No. 4. In 1902 the Privy Council held that the arbitrators had no jurisdiction to entertain a claim by Quebec to have Ontario declared liable for the purchase money of school lands yet unpatented allowed to remain uncollected for many years. In making their final award in 1907, the arbitrators refused an application by Quebec for inclusion therein of the amounts found due from Ontario for remissions and non-collections and held that they had exceeded their jurisdiction in determining such liability. On appeal from this determination embodied in the final award:—

Held, FITZPATRICK, C.J., and DUFF, J., expressing no opinion, that the arbitrators had no jurisdiction to determine the liability of Ontario for moneys remitted or not collected. *Attorney-General of Ontario* v. *Attorney-General of Quebec* (1903) A.C. 39 followed.

Held, also, FITZPATRICK, C.J., and DUFF, J., dissenting, that awards Nos. 2 and 4 in so far as they determined this liability were absolutely null, and, therefore, not binding on Ontario.

Appeal dismissed.

Lafleur, K.C., and *Aimé Geoffrion*, K.C., for appellant. *Sir Æmilius Irving*, K.C., and *Shepley*, K.C., for respondent. *Hogg*, K.C., for Dominion.

Que.] [June 10.

COMPAGNIE D'AQUEDUC DE LE JEUNE-LORETTE *v.* VERRETT.

Appeal — Matter in controversy—Jurisdiction — Demolition of waterworks—Municipal franchise.

In an action for a declaration of the exclusive right to construct and operate waterworks, for an injunction against the construction and operation of such works by the defendants, an order for the demolition of other works constructed by the defendants, and $86 damages, an appeal will not lie to the Supreme

Court of Canada from a judgment maintaining the plaintiff's action. GIROUARD and IDINGTON, JJ., dissented. Appeal quashed with costs.

Flynn, K.C., for the motion. *C. E. Dorion*, K.C., contra.

Que.] QUEBEC WEST ELECTION. [June 10.

Controverted election—Preliminary objections—Cross-petition—Charge of corrupt acts—Particulars.

By a preliminary objection to an election petition it was claimed that the petitioner was not a person entitled to vote at the election and the next following objection charged that he had disqualified himself from voting by treating on polling day.

Held, that the second objection was not merely explanatory of the first but the two were separate and independent; that the second objection was properly dismissed as treating only disqualifies a voter after conviction and not ipso facto; and that the first objection should not have been dismissed, the respondent to the petition being entitled to give evidence as to the status of the petitioner.

The respondent by cross-petition alleged that the defeated candidate, personally and by agents "committed acts and the offence of undue influence."

Held, that it would have been better to state the facts relied on to establish the charge of undue influence, but as these facts could be obtained by a demand for particulars, a preliminary objection was properly dismissed.

Appeal allowed in part without costs; cross-appeal dismissed with costs.

Flynn, K.C., for appellant. *Dorion*, K.C., for respondent.

EXCHEQUER COURT.

Cassels, J.] GREENSPAN *v.* THE KING. [April 20.

Revenue law—Customs Act—Alleged breach—Importation of jewelry into Canada—Failure to prove attempt to evade Customs Act—Costs.

Where the customs authorities had seized certain articles of jewelry in the possession of a person claiming that he had brought them into Canada for the personal use of himself and his wife, and not for sale, and the court found that the evidence did not

sustain the charge of an attempt to evade the Customs Act, and ordered the money paid by the claimant to obtain release of the goods to be refunded to him, no costs were allowed to either party. *Smith* v. *The Queen*, 2 Ex. C.R. 417, and *Red Wing Sewer Pipe Co.* v. *The King* (unreported), followed.

R. H. Greer, for claimant. *Paterson*, K.C., for the Crown.

Cassels, J.] [May 10.

THE KING *v.* BURRARD POWER CO.

Constitutional law—Dominion lands—Railway belt in British Columbia—Provincial legislation respecting the same—Water record—Invalidity—Interference with navigation.

No rights adverse to the Dominion Government can be acquired under the British Columbia Water Clauses Consolidation Act (R.S.B.C. c. 190) in any waters within the territory known as the Railway Belt, granted to the Dominion Government by the Act 43 Vict. (B.C.), c. 11, as amended by 47 Vict. B.C., c. 14.

In view of the exclusive legislative authority of the Parliament of Canada under sub-s. 10 of s. 91, British North America Act, 1867, it is not within the power of a provincial legislature to authorize any diversion or other use of water in the upper reaches of a river which would have the effect of interfering with the navigation of a lower portion of such river.

Lafleur, K.C., and *Bowser*, K.C. (Atty.-Gen., B.C.), for defendant. *Newcombe*, K.C., for Dominion Government.

Cassels, J.] LAMONTAGNE *v.* THE KING. [May 12.

Dominion steamer—Negligence—Stoker undertaking to perform an engineer's duty at his request but contrary to chief engineer's instructions—Liability.

The suppliant was employed as a stoker on board the Dominion steamer "Montcalm." Instructions had been given by the chief engineer of the ship, and communicated to the suppliant, that "no employee on board, including stoker or 'graisseur,' was to touch the machinery without a special order from the chief engineer." On the evening before the accident to the suppliant, one of the engineers, who was ill, asked him if he was competent to start the machinery. The suppliant replied that he was, and the said engineer asked him to start the machinery

for him early the following morning. To oblige the latter, the suppliant undertook to do this. The machinery was in perfect order, but owing to the negligence or unskilfulness of the suppliant in handling a steam pump an accident happened by which he lost three fingers of his left hand.

Held, upon the facts, that the Crown was not liable under s. 20(c) of c. 140, R.S. 1906.

Deguise and *Grenier*, for suppliant. *Boisvin*, for the Crown.

Cassels, J.] THE KING *v.* CONDON. [May 17.

Expropriation—Compensation—Value of lands and premises taken—Market value—Good-will—Private way used in connection with business.

1. In addition to full and fair compensation for the value of lands and premises taken from the owner carrying on business there he is entitled to compensation for the good-will of such business.

2. The market price of lands taken ought to be regarded as the prima facie basis of valuation in awarding compensation for land expropriated. *Dodge* v. *The King*, 38 S.C.R. 149, followed.

3. In this case there was a passage from a street in the rear of the premises taken where one of the defendants carried on a licensed business, by which customers who desired to visit the bar without attracting notice could do so.

Held, that such passage enhanced the value of the property for the purposes of a bar, and constituted an element of compensation.

A. Lemieux, K.C., and *H. Fisher*, for defendants. *A. W. Fraser*, K.C., and *D. H. McLean*, for the Crown.

Cassels, J.] FULLUM *v.* WALDIE. [June 2.

Admiralty law—Tug and tow—Negligent navigation by tug—Damage to tow—Limited liability of owner—Statutes—Construction.

Appeal from Toronto Admiralty District. The owner of a tug navigated with such want of care or skill as to cause the stranding of her tow was held to be entitled to the benefit of the provisions of the Revised Statutes of Canada, 1896, s. 12, limiting the liability of ship-owners in certain cases of negligent or improper navigation to a specific amount per ton. *Sewell* v.

British Columbia Towing and Transportation Company, 9 S.C.R. 527 distinguished; *Wahlberg* v. *Young*, 24 W.R. 847; *The Warkworth*, L.R. 9 P.D. 20 and 147, and *The Obey*, L.R. 1 Ad. & Ecc. 102, referred to.

In revising and consolidating the Act 31 Vict., c. 58 the commission of revision in 1896 omitted a heading to s. 12 of such Act as originally passed, which was held per STRONG, J., in *Sewell* v. *British Columbia Towing and Transportation Co.*, 9 S.C.R. 527, to restrict the apparent generality of the terms of that section.

Held, that assuming that the omission of the heading was legislating so as to make the law in Canada harmonize with the English law, the action of the revisors in omitting such heading from the statute was validated by the provisions of c. 4 of 49 Vict., 1896, respecting the Revised Statutes.

A. Marsh, K.C., for appellants. *W. D. McPherson*, K.C., for respondents.

Province of Ontario.

HIGH COURT OF JUSTICE.

Riddell, J.—Trial.] [May 4.

SMITH *v.* CITY OF LONDON.

Constitutional law—Legislature staying all actions forever—Jurisdiction of provincial legislatures.

A by-law was submitted to the ratepayers of the city of London, which was duly passed by their vote Jan. 1, 1907. Under this by-law, so approved by the ratepayers, a contract was authorized for the supply of electrical energy by the Hydro-Electric Power Commission of Ontario, at the city limits, ready for distribution, at a certain price per horsepower per annum. Notwithstanding this authority the contract which was entered into between the Commission and the city bound the latter to take from the Commission electric energy at a certain price at Niagara Falls, the place of production, together with the cost of transmission to London and various other charges, all of an uncertain and unascertainable character and amount. This action was brought to declare this contract so entered into invalid as not being the one authorized by the ratepayers, as in fact it was held to be on two occasions (see vol. 44, p. 21 and ante, infra, p. 81).

The defendants in their statement of defence, asserted the validity of the contract claiming that it had been authorized by

7 Edw. VII. c. 19 (1907). The plaintiff replied that this Act was ultra vires. After evidence was taken the judge adjourned the argument to see what the legislature then sitting would do, though this was strongly objected to by counsel for the plaintiff. Shortly afterwards, 9 Edw. VII. c. 19 (1909) was passed. This declared the contract to be valid and binding according to the terms thereof, and was not to be called in question on any ground whatever by any court. Sec. 8 provided that "every action which has been heretofore brought, and is now pending wherein the validity of the said contract or any by-law passed or purporting to have been passed authorizing the execution thereof by any of the corporations hereinbefore mentioned is attacked or called in question, or calling in question the jurisdiction, power or authority of the Commission or of any municipal corporation or of the councils thereof or of any or either of them to exercise any power or to do any of the acts which the said recited Acts authorize to be exercised or done by the Commission or by a municipal corporation of by the council thereof, by whosoever such action is brought shall be and the same is hereby forever stayed." On the argument which afterwards took place the plaintiff contended that this legislation as well as 7 Edw. VII. c. 19 was ultra vires, and that the action was not thereby stayed.

Held, that the legislation above referred to was within the powers of a provincial legislature; and that, as the legislature had said the action should be stayed, it was the duty of the judge to obey such order, and that no judgment could be entered, except that the record might be endorsed with a declaration that the action was stayed by the legislation referred to; and further that no order could be made as to costs.

Johnston, K.C., and *McEvoy,* for plaintiff. *DuVernet,* K.C., and *Lefroy,* for city of London. *Cartwright,* K.C., for Attorney-General of Ontario.

Province of Manitoba.

KING'S BENCH.

Cameron, J.] BARRY *v.* STUART. [April 22.

Costs—Witness fees—Expenses of qualifying witnesses to give evidence.

The successful party in an action cannot have taxed to him under rules 963 and 964 of the King's Bench Act, R.S.M. 1902,

c. 40, as party and party costs, the expenses incurred in qualifying witnesses to give evidence at the trial.

Sub-sec. (s) of s. 39 of the Act, which provides that, when there is any conflict between the rules of equity and common law, the former shall prevail, refers to matters of substantive law and not to matters of mere practice, and the equity rule formerly in force in England under which such expenses might have been allowed is not in force here, for by rule 4 all practice inconsistent with the Act was abolished and, as to all matters not provided for, the practice is, as far as may be, to be regulated by analogy to the Act and rules.

J. Campbell, K.C., for plaintiff. *Hoskin*, for defendant.

Mathers, J.] RE DRYSDALE ESTATE. [April 22.

Life insurance—Benevolent society—Appropriation of insurance benefit by will.

The destination of a benefit in the nature of life insurance conferred by membership in a benevolent society is to be determined solely by a consideration of the rules and regulations of the society and, where such rules and regulations make full and explicit provisions as to the destination of such benefit, the insurance is not subject to the Life Insurance Act, R.S.M. 1902, c. 83. *Re Anderson*, 16 M.R. 177, followed.

The testator's beneficiary certificate in the Canadian Order of Chosen Friends was expressed to be payable to his wife in the manner and subject to the conditions set forth in the laws governing the life insurance fund. Those laws prevented a member diverting the benefit to any one not related to or dependent upon him unless there was no such person, and provided that, in case of the prior death of the beneficiary "and no further or other disposition be made thereof" the benefit should go to the surviving children of the deceased member in equal shares.

Held, that it was not competent to the testator to divert by his will the benefit to his executors as part of his estate although they were to take it in trust for the children, and that the proceeds should go to the children free from the claims of creditors of the deceased.

McKay, for executors. *Curran*, for creditors.

Province of British Columbia.

SUPREME COURT.

Clement, J.] REX *v.* TAYLOR. [May 8.

Certiorari—Obstructing thoroughfare—Nuisance—Municipal by-law dealing with—Validity—Quashing conviction.

The applicant was convicted on a charge of being one of a congregation of persons in a public place, and refusing to separate therefrom on the request of a constable, acting in pursuance of the provisions of a municipal by-law governing public places.

Held, 1. The applicant had been guilty of creating a nuisance, and that he had been properly convicted.

2. The trial having been had on the merits, s. 103 of the Summary Convictions Act, R.S.B.C. 1897, c. 176, as enacted by s. 4, of c. 69 of 1899, cured any defect in the original proceedings.

Bird, in support of the motion. *Kennedy*, for the municipality, contra.

Full Court.] [May 20.

CROMPTON *v.* BRITISH COLUMBIA ELECTRIC RY. CO.

Statute—Construction of—Statutory limitation of actions—Private legislation.

The statutory exemption as to limitation of actions, provided by s. 60 of the Consolidated Railway Company's Act, 1906, does not enure to the benefit of the British Columbia Electric Railway Company's operations in the city of Victoria.

The doctrine that private legislation must be strictly construed against the company or corporation obtaining the same, applied.

Aikman, for appellant. *A. E. McPhillips*, K.C., for respondent company.

Clement, J.] REX *v.* TAYLOR. [May 7.

Certiorari—Conviction—Motion to quash—City by-law—Public highway—Obstruction—Persons congregating in street.

Motion to quash conviction for obstructing public street.

Held, a city being given by the legislative power to prevent public nuisances, a by-law to prevent persons congregating on

street is valid, since such obstruction is a public nuisance at common law. To constitute the obstruction of a highway, it is not necessary that the whole of the highway be obstructed. *Horner v. Cadman* (1886), 55 L.J.M . 110 followed.

Bird, for applicant. *Kennedy*, contra.

Province of Saskatchewan.

POLICE COURT.

Grant, P.M.] REX *v.* PROSTERMAN. [June 1.

Peddler's license—Fish not "goods, wares or merchandise."

The defendant was summoned under a by-law of the city of Regina on a charge for peddling fish without a license. The section under which the charge was laid provides that a license shall be taken out by "all hawkers, petty chapmen, peddlers and other persons carrying on petty trades or to go from place to place or other men's houses on foot or with any animal bearing or drawing any goods, wares or merchandise for sale." The question was whether fish were included in the phrase "goods, wares and merchandise."

Held, that fish are not covered by the words "goods, wares or merchandise." Case dismissed.

United States Decisions.

FAILURE TO DESTROY CHEQUE ACCORDING TO AGREEMENT AS LARCENY.—In *People* v. *Shattuck*, 87 N.E. Rep. 775, the New York Court of Appeals passed upon the sufficiency of the evidence to sustain a conviction for larceny under the following facts: The defendant, a real estate agent, was paid a $200 cheque as commissions in a real estate transaction and gave a receipt therefor. The defendant and the drawer of the cheque then agreed to play a game of chance to decide which of them should pay for supper for those present, and the defendant got "stuck." He said he had no money and asked the drawer of the cheque for a loan and received twenty dollars in cash. He then said he would destroy the $200 cheque, and, pretending to do so, tore up something and threw it into the waste basket. He was then

given another cheque for $180. The $200 cheque was not destroyed but was duly presented at the bank and paid. On a prosecution for the larceny of that cheque it was held that while the defendant might have been guilty of the larceny of the $180 cheque as having obtained it by the false pretense of destroying the $200 cheque, he could not be guilty of the larceny of the cheque first given, as that was his own property.

LEAVING MOTOR TRUCK WITH POWER SHUT OFF AS NEGLIGENCE.—In *Vincent* v. *Crandell & Gadley Co.*, 115 N.Y. Supp. 600, the N.Y. Appellate Division Court of the Second Department holds that it is not negligence to leave an electric motor truck in a street, unattended, with the power shut off. The truck in question was in charge of a licensed chauffeur, who was engaged in the delivery of goods. He stopped the truck on a street in the city of Brooklyn in front of a store where he was delivering goods, and after disconnecting the power by throwing back the controller, and disconnecting the batteries, he left the machine, set the brakes, and went into the store to deliver the goods. He remained in the store ten or fifteen minutes, and while in there the machine was started by the wilful act of some mischievous boys who got upon the truck, and by moving the switch and controller caused it to run into the plaintiff's drug store, inflicting the damage for which recovery was sought. It appeared that the power was shut off in the usual way and that nothing more could have been done to render the machine inert short of dismantling it. It was held that the act of the boys, and not leaving the truck unattended on the street, was the proximate cause of the damage, and that the owner of the truck was not liable.

Bench and Bar.

JUDICIAL APPOINTMENTS.

John McKay, of the town of Sault Ste. Marie, Ontario, Barrister-at-law, to be Junior Judge of the District Court of the Provisional Judicial District of Thunder Bay. (June 12.)