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KING'S COUNSEL IN ONTARIO.

One of the responsibilities which Ministers of the Crown have to assume, is that of making recommendations to the Crown and its representative as to the bestowal of honours; and it is not too much to expect that the advisers of His Majesty, or of his representatives, in making recommendations for the bestowal of honours by the Crown, will take care that what is intended as a honour, and a public recognition of merit, shall not, by reason of its broadcast and indiscriminate distribution, cease to fulfil the sole purpose for which it exists.

To be named to be of counsel for His Majesty, either in the Dominion or Provincial Courts, ought to be no mean honour; and if due regard were to be had to the professional merits of those on whom the honour is conferred it would fulfil a perfectly legitimate object, and constitute a mark of professional distinction to which lawyers might reasonably aspire.

But if in making such appointments, professional standing is lost sight of by the advisers of the Crown, and the bestowal of what ought to be a mark of professional merit is made the vehicle of rewarding partisan services in the political arena, then, what ought to be an honourable distinction conferred for strictly professional merit ceases to be so, and an injustice is done, not only to the Crown, but also to the profession in thus prostituting its honours to alien purposes.

The list of those who have recently been appointed by the Government of Ontario as King's Counsel includes 188 members of the profession. A long and laboured semi-official memorandum is published accounting for, or rather excusing, this wholesale manufacture of "silk," and the proverb seems to apply—"Qui s'excuse, s'accuse."

It is needless to say that the announcement was received with

surprise by the profession in Ontario; firstly, because of the magnitude of the list, and secondly, because of some names being included which ought to have been omitted, and the marked absence of others which might reasonably be expected to have been included.

The memorandum, as well as the list itself, indicates that the foundation of the list is political. Former lists have been so framed for many years past. A few members of the profession who do not belong to the party in power have (as usual) been inserted to give the list a semblance of impartiality. We regret that the present Provincial Government should have followed the bad example set by its predecessors.

The list makes a total of 354 appointments since 1900; not speaking of those who had previously enjoyed the honour. As the making a barrister a K.C. is presumably a recognition of a distinguished position at the Bar, the public of Ontario will be gratified to learn what a very distinguished Bar it possesses.

We do not propose to criticise the list individually, but it may be said in general terms that, to some of those who have been appointed, that they should have been appointed long ago; they were left out of former lists, however, possibly for political reasons, as several have been left out on this occasion, whom the profession know to be more entitled to the distinction than the majority of those who have received it. A few more are certainly worthy recipients; others again can scarcely be said to practice at the Bar, being really solicitors, though nominally barristers, and some few can scarcely be said to do any legal business of any kind.

In fact, for those who care to study it, it is a Chinese puzzle to know how, on any ground of merit, or on what principle, if any, the list was made up. To illustrate:—The fact of a barrister having been elected a Bencher is prima facie evidence of his standing at the Bar. Now there were four Benchers who were not K.C.'s before this batch were appointed; but of these only two have been (and very properly so) given this right of precedence, the other two, equally eligible, being left at the outer

Bar. Again, the qualification of seniority seems to be of no account in this list—not that that in itself is a qualification—but some juniors in a firm are appointed over their seniors of at least equal capacity and standing. The key to the puzzle, if there is a key, must be party politics, and a most unpleasant and inappropriate one it is.

Long ago the profession had almost come to the conclusion that "silk" had ceased to be an honour, and this list confirms that conclusion. Those who are responsible for the appointments have again belittled what was, many years ago, regarded as a very honourable distinction. Better that the farce should cease and the position be abolished. To be made one of a herd of nobodies is no compliment to men of real merit, and it brings into ridicule those whom the whole profession know have received the honour for no other reason than political support of the party in power.

One of the appointees, we understand, has declined the honour, whether from motives of modesty or contempt we are unable to say. It is not very complimentary to the Crown when its honours are thus declined.

There is another cognate matter to which attention should be called. There are some gentlemen at the Bar who hold patents of the Dominion Government appointing them King's Counsel. One at least of these gentlemen, and there may be more, considers that this gives him no right to appear in silk in the Provincial Courts. The recent appointments by the Provincial Government do not, we believe, include any of these gentlemen, although some of them are eminently worthy of the distinction. It would seem odd to see, in an Ontario Court, well-recognized leaders of the Bar in "stuff" when some junior non-entity appears in silk and takes precedence. The question arises, ought the appointment by the Dominion Government of a gentleman as a K.C. to be regarded as a bar to his appointment as a K.C. by the Provincial Government. We should say it ought not, but we fear it is so considered, if this phase of the subject has been considered at all.

CHANGES IN RAILWAY LEGISLATION.

In the year 1906 when the general revision of the Canadian Statutes took place, numerous and drastic changes were made in the Railway Act of 1903; its sections were, to a very great extent, re-arranged and the phraseology and effect of them, in many instances, altered. It has, therefore, become apparent that a new annotated edition of MacMurchy & Denison's Railway Act, similar in form to the previous work, will soon be required.

The time, however, is scarcely ripe yet for bringing out a new edition, partly because of the existing agitation to increase the powers of the Board of Railway Commissioners, and partly because of proposals to make other general changes in the statutes. No legislation of this character has yet been passed, but already some bills have been introduced proposing to limit the rate of speed in cities and dealing with placing wires across the railway and with the law of expropriation.

The proposed increase in the powers of the Board of Railway Commissioners will, very likely, be of an important character, and the sections of the Act bearing upon this matter may be largely changed. This coupled with the fact that litigation is now pending which may have an important bearing upon some of the sections of the Railway Act of 1906 would make it difficult, if not impossible, to bring out a work at the present moment, which would have a permanent value.

It is, therefore, felt that the new edition should be postponed for a few months until the new legislation, which is to be passed, is made public, and until litigation now pending is decided, after which it will be possible to annotate the more important sections of the Act in the hope that railway legislation will retain its present form for some time to come.

Meanwhile in order to facilitate a reference to the sections of the earlier Act a table of the former legislation in the Railway Act of 1903, and the corresponding sections of the Act of 1906, has been prepared and appears as Appendix II., to Volume VI.

of the Canadian Railway Cases. With this table it is possible, without much trouble, to find in the Annotated Statute the notes bearing upon the re-arranged sections of the Act of 1906.

SUNDAYS AND NON-JURIDICAL DAYS.

A question may, it is thought, well be raised as to the legality of voting on by-laws for the creating of a debt on New Year's Day. The effect of section 203, of The Consolidated Municipal Act, 1903, is, in the writer's opinion, to preclude any voting on such by-laws on Sunday "or any day set apart by any Act of lawful authority for a public holiday, fast or thanksgiving."

The words enclosed in inverted commas are, it will be observed, taken from the first clause of the section, which deals with the matter of reckoning time, but the clause immediately following extends the operation of the section to anything required by this Act to be done on a day which falls on any of such days, afterwards providing that such thing, whatever it may be, may be performed on the next juridical day. It would seem, then, beyond dispute that other public holidays stand on precisely the same footing as Sundays, and so do not come under the term "juridical day."

If anything further were needed to demonstrate this it would be supplied by the final clause of the section, by which it was designed to save the nomination or election of candidates to fill municipal offices from the prohibition created. It has to be remembered, when seeking to bring the question of a voting on a by-law within the mischief of the section, that such a proceeding has been expressly comprehended by section 351, which incorporates the section alluded to, with others antecedent and subsequent, covering all which appoint the machinery for taking a vote.

In the *West Toronto Election Case*, 5 P.R. 436, the question of reckoning time dealt with by a similarly worded enactment came up for determination, and the case appears to be an authority for the position here contended for.

Regina v. *Murray*, 28 O.R. 549, brought up the point as to the validity of a trial by a judge under the Speedy Trials Act, conducted on the first day of July being Dominion Day, and equally with New Year's Day, a public holiday. Mr. Justice MacMahon there decided that the only day upon which other than judicial acts could not be performed was Sunday, and that the act under review was not of that description. But it can be of little consequence to inquire whether the act of taking a vote on a by-law be a judicial act or not, for it is unmistakably something required to be done by the Municipal Act, and must fall within the proscription. However, it would obviously be such an act, returning and deputy returning officers being judicial as well as ministerial officers.

A third case, the history of which happens to be well known to the writer, as being connected therewith, is *Re Brunker* and *Mariposa*, 22 O.R. 120. The point there was regarding the publication in a newspaper of some by-law on Good Friday, and the judge (Mr. Justice MacMahon), while laying it down that judicial acts alone were subject to the common law rule, considered that this was not one. The fact really was, as he held, that the newspaper had been published the day previously. Whilst this case is not directly in point it is of interest in the discussion.

J. B. MACKENZIE.

BENCH AND BAR.

The appointment of John Donald Cameron, Attorney-General of Manitoba, in the Greenway Government, to be a puisne judge of the Court of King's Bench of that Province, is one that will be welcomed by the Bar and the people generally. His personal qualities and legal attainments eminently qualify him for that high position. He is a distinguished graduate of Toronto University and has successfully practiced his profession for many years in Manitoba. It is noteworthy that so many of the judges of that province were never invested with the dignified title of K.C., in fact the Government has never

made use of its prerogative in that respect, all the gentlemen entitled to wear silk in Manitoba having been appointed by the Dominion Government prior to the decision of the Privy Council that the provinces had jurisdiction to make such appointments.

Whilst regretting the illness of the Hon. Mr. Justice Burbidge, which for the present incapacitates him from attending to his duties as judge of the Exchequer Court of Canada, we are glad to notice that his place will, during his absence, be filled by Hon. Sir Thomas Wardlaw Taylor, Kt. formerly Chief Justice of Manitoba. The excellent judicial work of Sir Thomas Taylor in the past is a promise of continuous usefulness in the important position which he will now fill; though, we trust, the reason for the occupancy of the seat will not long continue.

Mr. Justice Barker, judge of the Court of Equity in New Brunswick, has been appointed Chief Justice of the Supreme Court of that province in place of Chief Justice Tuck, who was recently superannuated. The Hon. A. S. White, formerly Attorney-General of the province, has been appointed to succeed Mr. Justice Barker. It is presumed that in view of this re-organization of the Courts, a proclamation will be issued bringing into force the changes recently made in the practice and procedure of the Courts in New Brunswick, which will largely bring them into harmony with that prevailing in the Courts of the English speaking provinces of the Dominion.

The above appointments are most unexceptionable and will meet with the approval of the Bar.

The *Law Times* gives prominence to some thoughtful utterances of a well-known speaker in England in reference to modern journalism which it would be well to lay to heart even though no remedy is in sight.

"A restless superficiality and reckless love of pleasure make

the citizen a supple tool in the hands of the clever rogues of a corrupt Press, and a gullible victim of the 'Limerick craze.' The most menacing portent of the year is that the newspaper in its popular form is ceasing to be a factor in the education and uplifting of the masses of the people and becoming more and more an organ of enfeebling excitement and corrupting pleasure. It has become pictorial and not illuminating, photographic and mercenary, superficial and not instructive. A more lamentable set of facts than those associated with the 'Yellow Press' the year does not contain, except that the British and American people have not the sense and the courage to boycott, once and for all, the whole guilty tribe. Morality, patriotism, humanitarianism ought to force us all to take that course, and to take it at once."

A writer in the lay press calls attention to a matter which, not unnaturally, strikes him as having an element of unfairness in it. A certain learned judge recently struck a case off the list because the counsel for the plaintiff was not present. The writer takes exception to this as follows:—

"When lawyers are paid by clients to be present in Court, the fact that they are not there is a matter of personal negligence for which the clients are in no way responsible. For a judge to strike a case off the list simply visits the negligence of the lawyers upon their innocent clients. Not only will the trial of the case be delayed till the spring assizes, to the detriment of the litigants' interests, but they will have the doubtful pleasure of paying the additional costs of having the case brought down a second time to trial."

This mode of dealing with what may be, but is not always, carelessness of counsel is so common as not to be much thought of by a lawyer, but there is much force in what the layman says about it, and should make a judge think twice before he gives a litigant a fair fling at the way justice is sometimes administered. In saying this we assume of course that the facts of the case have been correctly stated.

REVIEW OF CURRENT ENGLISH CASES.

SHIP—MORTGAGE ON SHIP—RIGHT OF MORTGAGEE TO POSSESSION —MORTGAGOR IMPERILLING SECURITY OF MORTGAGE.

In *The Manor* (1907) P. 339 the Court of Appeal (Lord Alverstone, C.J., and Moulton, and Kennedy, L.JJ.) overruling Deane, J., held that where a mortgagor of a ship is imperilling the sufficiency of the mortgage security by sending the ship on a long voyage unprovided with sufficient funds, and even though the mortgage is not in default, the mortgagee may, nevertheless, take possession of the vessel.

SOLICITOR—CHARGING ORDER—FORM.

In re Turner, Wood v. *Turner* (1907) 2 Ch. 539. The form of the order made in this case noted ante, vol. 43, p. 644, is here given.

COMPANY—DEBENTURES ISSUED AS SECURITY FOR DEBT—PAYMENT OF DEBT FOR WHICH DEBENTURES HELD—RE-ISSUE OF SATISFIED DEBENTURES.

In re Russian Petroleum & L. F. Co., London Investment Trust v. *Russian Petroleum & L. F. Co.* (1907) 2 Ch. 540. A similar question came up in this case to that which was determined in *Re Tasker* (1905) 2 Ch. 587, noted ante, vol. 42, p. 178. In this case a limited company had issued a series of debentures as floating securities on the terms that the company should not, without the consent of the debenture holders, create any charge on the mortgaged assets ranking pari passu with, or in priority to, the charge created by the debentures. The company deposited £100,000 of these debentures with a bank as collateral security for a credit of £150,000, by the terms of which the bank was to accept the company's drafts. This credit was not a current account, nor was anything advanced by the bank which was strictly speaking a loan. After this arrangement had been in force some time the amount due to the bank on the credit was paid off by the company. Immediately before the repayment the bank advanced £500 to the company in order to prevent the deposited debentures from being freed from all charges in favour

of the bank; and the debentures were not given back to the company. The other debenture holders claimed that the debentures deposited with the bank were satisfied by the payment of the credit, and could not be re-charged with the £500 or any other sum. Warrington, J., so held, and the Court of Appeal (Cozens-Hardy, M.R., and Barnes, P.P.D., and Kennedy, L.J.) affirmed his decision.

INFANT—WARD OF COURT — RELIGIOUS EDUCATION OF WARD — WELFARE OF INFANT—INFANT'S CHOICE OF RELIGION—CHANGE OF RELIGIOUS EDUCATION AT REQUEST OF INFANT—DISCRETION OF COURT—FORM OF ORDER AS TO RELIGIOUS EDUCATION OF INFANT.

In *Re W. W. & M.* (1907) 2 Ch. 557, an application was made to the Court by the next friend of an infant for an order authorizing a change in the religious education of the infant in the following circumstances. The applicant was a youth of fourteen, and he and a sister who was about eleven, were the children of a Jewish father, both parents were dead, and the children were wards of Court. An order had been made in 1904 for the bringing up of both children in the Jewish faith. The boy had accordingly been placed with a Jewish schoolmaster, but had expressed a desire to be educated as a Christian. He and his sister were attached to each other, and Kekewich, J., after seeing the boy came to the conclusion that his wish should be gratified, and as he thought it would be detrimental to the affection between him and his sister that they should be educated in different faiths, he made an order that both should be brought up as Christians. The guardian of the infants appealed and the Court of Appeal (Cozens-Hardy, M.R. and Moulton and Farwell, L.JJ.), while upholding the order as being in the circumstances in the best interest of the boy, considered that there was no sufficient ground for making the order as to the girl, as to whom it was therefore rescinded.

COMPANY—DIRECTORS' LIABILITY FOR FALSE PROSPECTUS — CONTRIBUTION—DIRECTORS' LIABILITY ACT, 1890 (53-54 VICT. c. 64)—(R.S.O. c. 216, ss. 4-6.)

In *Shepheard* v. *Bray* (1907) 2 Ch. 571, the defendants appealed from the judgment of Warrington, J., (1906) 2 Ch. 235 (noted ante, vol. 42, p. 640) and after the case has been partially argued the judgment was reversed and action dismissed,

by consent of parties. The Court of Appeal in giving judgment in accordance with the consent, intimated that, after hearing the argument of counsel, they were not prepared to assent to all that Warrington, J., had decided.

WILL—CONSTRUCTION—NEXT OF KIN ACCORDING TO STATUTE—TIME FOR ASCERTAINING CLASS.

In re Wilson, Wilson v. *Batchelor* (1907) 2 Ch. 572. The Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Farwell, L.JJ.), have affirmed the decision of Parker, J., on the construction of the will in question. The testator died in 1884 and by his will gave a life interest in a fund to his nephew Samuel, and certain contingent interests to the children and issue of Samuel, and declared that if no child or issue of Samuel attained a vested interest the fund was to be held "for such person or persons as on the death of my said nephew Samuel will be entitled to (*sic*) as my next of kin under the statute." At the date of the testator's death Samuel was his sole next of kin. Samuel died in 1906 without issue, and made a will appointing executors. Parker, J., held that the date at which the testator's next of kin were to be ascertained was the time of his own death, and not the death of Samuel, and that the executors of Samuel were, therefore, entitled to the fund; and that the words "at the death of my nephew" merely referred to the time when the persons entitled would come into possession.

LETTERS OF DECEASED PERSON—BIOGRAPHY—USE OF INFORMATION CONTAINED IN LETTERS FOR WRITING BIOGRAPHY—INJUNCTION.

Philip v. *Pennell* (1907) 2 Ch. 577 was an action by the executor of the late J. A. M. Whistler, the celebrated artist, for an injunction to restrain the defendants Pennell from using, for the purpose of a biography they were writing of the late Mr. Whistler, and their co-defendants from printing and publishing information so derived. The plaintiff claimed that she had the sole right of publishing or permitting to be published any letters or other documents written by her testator, and claimed that the Pennells had applied to various friends of the deceased to procure letters or documents written by him being of a private or confidential nature, with a view to publishing

the same, or extracts therefrom. The Pennells set up by their defence that they were authorized by Mr. Whistler to write his biography, and for that purpose he gave them a large amount of information. They admitted the plaintiff's right to prevent the publication of private letters and documents written by Mr. Whistler. They admitted that they had procured copies of certain of his letters to various relations and friends, but, while they denied any intention of publishing them, they admitted that they intended to use for the biography information therein contained. Kekewich, J., who tried the action came to the conclusion that the Pennells though not entitled to publish the letters of the deceased or extracts or paraphrases therefrom without the plaintiff's consent, could not be restrained from using the information contained in such documents which had lawfully come into their possession for the purpose of compiling the biography, and the action was dismissed as against all of the defendants.

MARRIAGE UNDER FALSE NAME—WIDOW MARRIED IN MAIDEN NAME —FALSE NOTICE.

In re Rutter, Donaldson v. *Rutter* (1907) 2 Ch. 592. A widow whose interest under her deceased husband's will ceased on her re-marrying, was married before a registrar in her maiden name, the previous statutory notice being false to the knowledge of both spouses in this and other respects. Eady, J., nevertheless, held that the marriage was valid, and that the interest of the lady in her deceased husband's estate had ceased.

TENANT FOR LIFE — REMAINDERMAN—PRIOR ANNUITY—CAPITAL —INCOME.

In re Perkins, Brown v. *Perkins* (1907) 2 Ch. 596. In this case a testator, who had covenanted to pay an annuity, gave half his residue to trustees upon trust for his daughter for life, with remainders over. The residue was bearing interest at three per cent., and the question Eady, J., was called on to decide was, in what proportions the moiety of the annuity payable out of the daughter's share should be born by capital and income, and he held that it should be apportioned on the following basis, viz., ascertain what sum with simple interest at 3 per cent. would meet each instalment, and charge that sum to capital and the balance to income.

Correspondence.

TRIAL BY NEWSPAPER.

To the Editor, CANADA LAW JOURNAL:

DEAR SIR,—The modern practice of the daily press with regard to criminal cases in which strong public interest is taken has long since disgusted all who desire to have justice impartially and dispassionately administered.

The Thaw case was a striking illustration of this abominable tendency to poison the minds of average citizens—from whose ranks, of course, jurymen must be selected—and as an almost inevitable consequence to have prisoners tried not on the evidence given in Court, but on purely sentimental grounds advanced by sensational journalists. The second trial of Thaw generated another irruption of newspaper sensationalism. This kind of thing is now so common that it is probably impossible to stop it.

Numerous instances might be given of the shameless manner in which daily papers lead by their clamourous and indecent comments to verdicts which can scarcely be regarded as just or reasonable. The trial of a young Italian girl more than a year ago for the murder of her uncle and aunt was reported with "realistic" effects at such length and with such descriptive appendages calculated to influence public opinion that the jury, if they saw any of the public prints, had no alternative save to acquit the accused. These "reports"—if such they can be called—not only pollute the fountain of justice, but gratify those instincts of prurient curiosity which are only too keen amongst a certain depraved portion of every community.

Again the trial of Mrs. Bradley for the murder of Senator Brown was reported in the same "sensational" or "realistic" fashion as was the Thaw case. The lady was acquitted, though plain evidence of homicide was given, and, whatever may have been her wrongs, she could not have been exonerated from the charge of killing a man with the utmost deliberation. If newspapers continue to practice this system of sensational report-

ing, the administration of the criminal law will ere long become a perfect mockery. Trial by newspaper is not justice: it is the sacrifice of justice to sensationalism. It would be almost better to have prisoners tried with closed doors than to have the determination of their guilt or innocence dependent on the lurid accounts of trials furnished by hired scribes whose interest it is to distort and exaggerate everything that is said or that takes place in Court.

JUSTICE.

RE ONTARIO K.C. LIST.

To the Editor, CANADA LAW JOURNAL:

DEAR SIR,—An amazing list certainly. Many are good men, and many were on the list issued by the Dominion Government (Conservative) in 1896, but which was cancelled by the Laurier Government. Some of the present list have not been ten years at the Bar, which has always been understood to be a requirement. Some names are positively objectionable. An analysis of the list shews that no proper care has been exercised in preparing it. It is said that it is no worse than the last list, but that does not excuse the present Government. Every Conservative member in the Dominion House who is a lawyer is appointed. There are included in the list a few Liberals, which looks well. The value of a K.C. is pretty well gone, thanks to the appointments made in recent years. The list as a whole is indefensible. The profession looks to you to protest against this kind of thing.

READER.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] ROYAL PAPER MILLS CO. *v.* CAMERON. [Nov. 5, 1907.

Negligence—Master and servant—Dangerous machinery—Want of proper protection—Voluntary exposure—Findings of jury—Charge of judge.

An experienced master mechanic, who was familiar with the machinery in his charge, and had instructions to take the necessary precautions for the protection of dangerous places, in attempting to perform some necessary work, lost his balance and fell upon an unprotected gearing which crushed him to death. In an action for damages, questions were submitted to the jury without objection by the parties, and no objection was raised to the judge's charge at the trial. The jury were not asked to specify the particular negligence which caused the injury, and, by their answers found that deceased was acting under the instruction and guidance of the company's officers who were his superiors, at the time of the accident; that he had control of the work to be done but had not full charge, control and management of the machinery generally; that there was fault on the part of the company, and that he had not unnecessarily or negligently assumed any risk.

Held, affirming the judgment appealed from, Davies, J., dissenting, that as there was no evidence from which the jury could reasonably draw inferences and come to these conclusions as to the facts, and, in the absence of objection to the questions put to them and to the charge of the judge at the trial, the findings of the jury ought not to be interfered with on appeal. Appeal dismissed with costs.

J. E. Martin, K.C., and *Fraser,* K.C. (*Howard* with them), for appellants. *Lafleur,* K.C., and *Cate,* K.C., for respondent.

Ont.] [Nov. 13, 1907.

HARRIS *v.* LONDON STREET RAILWAY COMPANY.

Negligence—Street Railway Co.—Rules—Contributory negligence.

Rule 212 of the rules of the London Street Ry. Co. provides that "when the power leaves the line the controller must be shut off, the overhead switch thrown, and the car brought to a stop . . ." A car on which the lights had been weak and intermittent for some little time passed a point on the line at which there was a circuit breaker when the power ceased to operate. The motorman shut off the controller, but instead of applying the brakes, allowed the car to proceed by the momentum it had acquired and it collided with a stationary car on the line ahead of it. In an action by the motorman claiming damages for injuries received through such collision,

Held, that the accident was due to the motorman's disregard of the above rule and he could not recover. Appeal dismissed with costs.

Blackstock, K.C., for the appellant. *Hellmuth*, K.C., and *Ivey*, for respondents.

B.C.] RED MOUNTAIN RY. CO. *v.* BLUE. [Nov. 20, 1907.

Operation of railway—Unnecessary combustible matter left on "right of way"—Damages by fire—Issue as to point of origin of fire—Evidence—Charge to jury—New trial—Practice—Admission of evidence on appeal—Supreme Court Act, ss. 51, 73.

At the trial the controversy turned upon the question whether or not the place of the origin of the fire which caused the damages complained of was within the limits of the defendants' "right of way," which they were, by the provisions of the Railway Act, 1903, obliged to keep free from unnecessary combustible matter, and the jury found that it did, but the charge of the judge seemed calculated to leave the impression that any space from which trees had been removed, under the powers conferred by section 118(*j*) of that Act, might be treated as included within the "right of way."

Held, that, in consequence of the want of more explicit di-

rections to the jury on the question of law, the defendants were entitled to a new trial.

The Court refused an application for the admission, as evidence, of plans of the right of way which were not produced at the trial but were only discovered after the date of the judgment appealed from. Appeal allowed with costs, and new trial ordered.

A. H. MacNeill, K.C., for appellants. *Nesbitt,* K.C., and *C. R. Hamilton,* K.C., for respondent.

B.C.] McMEEKIN *v.* FURRY. [Nov. 20, 1907.

Location of mineral claims—Contract—Fictitious signature—Unauthorized use of a firm name—Transfer by bare trustee—Statute of Frauds—R.S.B.C. (1897), *c.* 135, *ss.* 50, 130.

Where B. acting as principal and for himself only, signed a document containing the following provision: "We hereby agree to give F. one-half (½) non-assessable interest in the following claims" (describing three located mineral claims) in the name of "J. B. & Sons," without authority from the locatees of two of the claims which had been staked in the names of other persons, without their knowledge or consent.

Held, affirming the judgment appealed from (13 B.C. Rep. 20), that, although no such firm existed and notwithstanding that two of the claims had been located in the names of the other persons, who, while disclaiming any interest therein, had, afterwards transferred them to B., the latter was personally bound by the agreement in respect to all three claims and F. was entitled to the half interest therein.

A subsequent agreement for the reduction of the interest of F. from one-half to one-fifth, which had been drawn up in writing, but was not signed by F. was held void under the Statute of Frauds. Appeal dismissed with costs.

Davis, K.C., for appellants. *Jos. Martin,* K.C., for respondents.

N.S.] HALIFAX ELECTION CASE. [Nov. 27, 1907.

Controverted election—Appeal—Fixing time for trial.

No appeal lies to the Supreme Court of Canada from an order of the judges assigned to try an election petition fixing the date for such trial. Appeal dismissed with costs.

Mellish, K.C., for appellant. *W. B. A. Ritchie*, K.C., for respondent.

Ont.] [Dec. 13, 1907.

CANADIAN PACIFIC RY. CO. *v.* OTTAWA FIRE INS. CO.

Constitutional law—Provincial companies—Powers—Operations beyond province—Insurance against fire—Property insured —Standing timber—Return of premiums—British North America Act, 1867, *s.* 92(11).

Held, per Idington, Maclennan and Duff, JJ., Fitzpatrick, C.J., and Davies, J., contra, that a company incorporated by the Legislature of a Province is not capable of carrying on its business beyond the limits of such Province.

Per Fitzpatrick, C.J. and Davies, J., sub-section 11 of section 92, of the British North America Act, 1867, empowering a legislature to incorporate "companies for provincial objects," not only creates a limitation as to the objects of a company so incorporated, but confines its operations within the geographical area of the Province creating it. And the possession by the company of a license from the Dominion Government under 51 Vict. c. 28 (R.S. 1906, c. 34, s. 4), authorizing it to do business throughout Canada is of no avail for the purpose.

Girouard, J., expressed no opinion on this question.

An insurance company incorporated under the laws of Ontario insured a railway company, a part of whose line ran through the State of Maine "against loss or damage caused by locomotives to property located in the State of Maine not including that of the assured." By a statute in that state the railway company is made liable for injury so caused and is given an insurable interest in property along its line for which it is so responsible.

Held, affirming the judgment of the Court of Appeal (11 O.L.R. 465), which maintains the verdict at the trial (9 O.L.R. 493), that the policy did not cover standing timber along the line of railway which the charter of the insurance company did not permit it to insure.

Held, also, Fitzpatrick, C.J., and Davies, J., dissenting, that the policy was not on that account of no effect, as there was other property covered by it on which the railway company had an insurable interest, therefore the latter was not entitled to recover back the premiums they had paid.

Appeal dismissed with costs.

Ewart, K.C., and *Spence*, for appellants. *Shepley*, K.C., and *Magee*, for respondents. *Newcombe*, K.C., for Dominion of Canada. *Ritchie*, K.C., *Nesbitt*, K.C., and *Mulvey*, K.C., for Ontario. *Lanctot*, K.C., and *Gervais*, K.C., for Quebec. *Jones*, K.C., for New Brunswick. *Nesbitt*, K.C., for Manitoba. *Mulvey*, K.C., for Saskatchewan.

Ont.] [Dec. 13, 1907.

CANADIAN CASUALTY INS. CO. *v.* BOULTER AND HAWTHORNE.

Insurance—Sprinkler system—Damage from leakage or discharge—Injury from frost—Application—Interim receipt.

A policy of insurance covered loss by leakage or discharge from a sprinkler system for protection against fire but provided that it would not cover injury resulting inter alia from freezing. The water in a pipe connected with the system froze and the pipe being burst damage was caused by the consequent escape of water.

Held, affirming the judgment of the Court of Appeal (14 O.L.R. 166), Davies, J., dissenting, that the damage did not result from freezing and the insured could recover on the policy.

In the Hawthorne case the majority of the Court dismissed the appeal on the same grounds. The policy in that case was sent to the brokers who had applied for it on behalf of the assured shortly before, and the latter did not see it until the loss occurred.

Held, per Davies, J., that the contract of insurance was not contained in the policy but in what took place between the brokers and the agent of the insurers on applying for it, and as the latter informed the brokers that damage by frost was insured against the assured could recover.

Appeals dismissed with costs.

Watson, K.C., for appellants. *Blackstock*, K.C., and *Rose*, for respondents.

Ont.] [Dec. 13, 1907.

DESCHENES ELECTRIC CO. *v.* ROYAL TRUST CO.

Contract — Electric lighting — Lessee of hotel — Partnership —Dissolution—"Assigns of lessee"—Cancellation of contract—Notice.

The electric company and S. entered into an agreement for

the supply of electric lighting in a hotel for ten years from 1st May, 1902, and it was pro· ided that either party might cancel the agreement by notice in writing if, after the expiration of five years, neither S. nor his heirs, executors, administrators or assigns should be owner, tenant or occupier of the hotel, alone or with other persons. The lease to S. extended only until 1st May, 1907. It gave him no right to a renewal, and he had no other interest in the building. He sold a half-interest in the lease to two persons with whom he formed a partnership in the hotel business, which was carried on till 1904, when the partnership terminated by his death and the defendants were appointed administrators to his intestate estate. The affairs of the partnership were settled between the defendants and the surviving partners who became transferees of the business, exclusive owners of the lease and sole occupants of the hotel for the unexpired term. They gave notice to the plaintiffs to cancel the agreement, and on 1st May, 1907, obtained a new lease of the premises under which they continued in occupation and possession.

Held, that after 1st May, 1907, the new tenants were not assigns of S. and consequently, were entitled to cancel the agreement for electric lighting by notice according to the proviso. Appeal dismissed with costs.

G. F. Henderson, for appellants. *Orde* and *Powell*, for respondents.

Railway Board.] [Dec. 13, 1907.

GRAND TRUNK RY. CO. *v.* ROBERTSON.

Passenger tolls—Third-class fares—Construction of statutes—Repeal—Amendments by subsequent railway legislation.

The legislation by the late Province of Canada and the Parliament of Canada since the enactment of section 3 of the statute of Canada 16 Vict. c. 37, in 1852, has not expressly or by implication repealed the provisions of that section requiring third-class passenger carriages to be run every day upon the line of the Grand Trunk Railway of Canada, between Toronto and Montreal, on which the fare or charge for each third-class passenger shall not exceed one penny currency for each mile travelled. Appeal dismissed with costs.

Nesbitt, K.C., for appellants. *Curry*, K.C., for respondent. *Baily*, K.C., for Ontario Government.

N.W.T.] [Dec. 13, 1907.

CANADIAN PACIFIC RY. *v.* THE KING, EX REL. KEAYS.

Railways—Constitutional law—Legislative jurisdiction—Application of statute—"The Prairie Fire Ordinance"—Works controlled by Parliament—Operation of Dominion railway.

In so far as they may relate to matters affecting the operation of a railway under the control of the Parliament of Canada, the provisions of c. 87, Con. Ord. N.W.T. (1898), s. 2, sub-s. (*a*) and (2) as amended by the N. W. T. Ordinances, c. 25 (1st sess.) and c. 30 (2nd sess.) of 1903, constitute "railway legislation" strictly so-called, and are beyond the competence of the legislature of the North-West Territories. *Canadian Pacific Ry. Co. v. Notre Dame de Bonsecours* (1899) A.C. 367 and *Madden v. Nelson and Fort Sheppard Ry. Co.* (1899) A.C. 626 referred to.

The judgments appealed from were reversed, Idington, J., dissenting. Appeal allowed with costs.

Nesbitt, K.C. for appellants. *Ford*, K.C., for respondents.

Ex. Ct.] [Dec. 13, 1907.

HILDRETH *v.* MCCORMICK MANUFACTURING CO.

Patent of invention—Canadian Patent Act (R.S.C. 1906, c. 69, s. 38—Manufacture—Sale—Lease or license.

Held, affirming the judgment of the Exchequer Court (10 Ex. C.R. 378) that under the Canadian Patent Act a patent is void unless the patentee commences manufacture of the invention within two years from the date of the patent and carries it on continuously afterwards so that any person desiring to use it may obtain the absolute ownership. The patentee cannot refuse to sell it outright and insist on his right merely to lease it or license its use. Appeal dismissed with costs.

Walter Cassels, K.C., and *Anglin*, for appellant. *Gibbons*, K.C., and *Haverson*, K.C., for respondents.

Ex. Ct.] [Dec. 13, 1907.

DOMINION FENCE CO. *v.* CLINTON WIRE CLOTH CO.

Patent of invention—Novelty—Combination of known elements—Infringement—Mechanical equivalents.

A device resulting in the first useful and successful applica-

tion of certain arts and processes in combination for manufacturing purposes is not unpatentable for want of novelty, merely because some of the elements so combined have been previously used with other manufacturing devices. Judgment appealed from (11 Ex. C.R. 103) affirmed, and appeal dismissed with costs.

J. B. Clarke, K.C., for appellants. *Walter Cassels*, K.C., and *A. W. Anglin*, for respondents.

N.S.] McNEILL v. CORBETT. [Dec. 13, 1907.

Statute of Frauds—Mining areas—Transfer of interest—Part performance—R.S.N.S. (1900), *c.* 141, *s.* 4.

M. transferred to C. a portion of an interest in mining areas which he claimed was held in trust for him by the defendant. In an action by C. claiming a share of the proceeds of the sale thereof, no deed or note in writing of the assignment was produced as required by the fourth section of the Nova Scotia Statute of Frauds, and there was no evidence that, prior to the assignment, there had been such a conversion of the interest in question as would take away its character as real estate.

Held, that the subject of the alleged assignment was an interest in lands within the meaning of the Statute of Frauds and not merely an interest in the proceeds of the sale as distinguished from an interest in the areas themselves, and, consequently, that the plaintiff could not recover on account of failure to comply with that statute. It was shewn that, on settling with interested parties, the defendant had given M. a bond for $500, as his share of what he had received on the sale of the areas.

Held, that as this act was not unequivocally and in its own nature referable to some dealing with the mining areas alleged to have been the subject of the agreement, it could not have the effect of taking the case out of the operation of the Statute of Frauds. *Maddison* v. *Alderson*, 8 App. Cas. 467, referred to.

Judgment appealed from (41 N.S.R. 110) reversed and appeal allowed with costs.

T. H. Bell, for appellant. *Mellish*, K.C., for respondent.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] THE KING *v.* TOWNSEND. [Dec. 14, 1907.

Canada Temperance Act—Certiorari to remove search warrant —Attachment for costs—Code ss. 1096, 1126—*Crown Rules (N.S.)* 28, 32, *Imp. Act* 5 *Geo. II. c.* 19.

Motion under section 1096 of the Criminal Code for leave to issue attachment against the defendant and his sureties on the recognizance filed preliminary to applying for a writ of certiorari to remove a search warrant under the Canada Temperance Act. (See 39 N.S.R. 189.)

The defendant with Sawyer and Smith entered into a recognizance as required by the Nova Scotia Crown Rule 28, to remove a search warrant made by two justices of the peace for the County of Kings. The application was refused by the Court in banco and after taxation of costs a demand was made upon the defendant and his sureties pursuant to 5 Geo. II. c. 19, and payment of costs not being made the Court was moved for an attachment.

Held, that the Nova Scotia Crown Rule 28 under which the recognizance in this case was taken was authorized by section 1126 of the Code, and as this recognizance was not estreatable nor collectible under the Code and the Crown Rules taken together, resort was properly had to the provisions of the Imperial Statute, 5 Geo. II. ch. 19, in attaching for the costs.

Per RUSSELL, J., dissenting, that Crown Rules 28 and 32 under which the recognizance in this case was taken were not authorized by section 1126 of the Code and the application should, therefore, be refused.

Roscoe, K.C., in support of motion. *Power*, K.C., contra.

Full Court.] MCDOUGALL *v.* AINSLIE MINING CO. [Dec. 14, 1907.

Lord Campbell's Act—Claim of damages under—Finding of jury set aside—New trial—Verdict, effect of.

Plaintiff claimed damages under Lord Campbell's Act for the loss of his son who was killed by a fall of stone in defen-

dant's mine. The jury, in answer to a question submitted by the trial Judge, found that the specific act of negligence that caused the injury was the failure of defendant to properly examine the face of the wall from which the rock fell. There was uncontradicted evidence on the part of defendant that several of the officials of the company, before starting work, went carefully over the banks and walls for the purpose of ascertaining whether they were safe.

Held, that the finding of the jury was not justified and that there must be a new trial.

Also, that the jury having placed their verdict on this one ground which could not be justified under the evidence, the Court could not give a wider scope to their answer so as to embrace other acts of negligence pointed out, or to rectify the error or misunderstanding of the jury.

McInnes, K.C., for appellant. *D. McNeil*, for respondent.

Full Court.] McQUEEN v. McQUEEN. [Dec. 14, 1907.

Estoppel—Settlement of controversy—Imperfectly drawn document—Effect given to.

The ancestors of plaintiff and defendant received a joint grant of land from the Crown and used and occupied different parts of the land included in the grant as tenants in common.

N. being in debt, in order to save his property from his creditors, gave a deed to his brother A. of his right and title in the whole grant, but remained in possession, use and enjoyment of the land occupied by him as before. Subsequently he demanded a reconveyance from A. and his heirs, and a controversy which arose was settled by the heirs of A. conveying to N. one portion of the land, and N. executing to the heirs of A. what was intended as a release and quit claim of all his interest in the other portion of the land, including that in question.

Held, that although the release was badly drawn and failed to express in clear and distinct terms the nature of the transaction between the parties, as this was the clear inference to be drawn from the documentary evidence and the surrounding circumstances the Court would give effect to it.

J. J. Ritchie, K.C., for appellant. *Livingstone*, for respondent.

Full Court.] IN RE RUTH WHITE. [Dec. 14, 1907.

Lunatic—Appointment of guardian—Married woman—Capacity to act.

Where a married woman possessed of property in her own right and otherwise qualified is appointed guardian of the person and estate of a person of unsound mind, the appointment will not be set aside on the sole ground of her standing as a married woman.

Since the Married Woman's Property Act, R.S. (1900), c. 112, many of the objections formerly urged against the appointment of a married woman as trustee have been swept away and a married woman may now accept a trust by virtue of her power to contract as a femme sole.

O'Connor, for appellant. *Kenny*, for respondent.

Full Court.] DONNELLY *v.* VROOM. [Dec. 14, 1907.

Fishery—Public right of—Ownership of flats between high and low water mark—Digging clams.

Plaintiff claimed damages from defendants for the conversion of a dory, its oars, and a quantity of clams.

Defendants paid a sum of money into Court in respect to the dory and oars, but counterclaimed for the clams which they claimed were dug upon flats of which they were owners from high to low water mark.

Held, dismissing defendants' appeal, and affirming the judgment of the trial Judge that the digging of the clams in question was done in the exercise of a public right of fishery and that defendants' ownership of the flats was subject to such right.

J. J. Ritchie, K.C., for appellants. *Roscoe*, K.C., and *F. Jones*, for respondent.

Full Court.] [Dec. 14, 1907.

AUSTEN *v.* CANADIAN FIRE ENGINE CO.

Principal and agent—Commission—Right of agent to recover where sale not completed.

Defendant company entered into an agreement in writing to pay plaintiffs a commission of five per cent. upon all sales

effected in the district of H. and vicinity on condition that plaintiffs would give their best services as might be desired from time to time, etc. Plaintiffs assisted defendant to obtain a contract with the city of H. for the purchase of one of their engines, to be constructed according to specifications attached, provided the engine when completed should undergo certain tests to the satisfaction of persons to be appointed by the city for that purpose.

The engine when completed failed to undergo the stipulated tests and was not accepted.

Held, that plaintiffs, notwithstanding, were entitled to their commission.

J. J. Ritchie, K.C., and *Tighe*, for appellant. *Allison*, for respondents.

Full Court.] [Dec. 14, 1907.

RICHARD SS. CO. *v.* CHINA MUTUAL INS. CO.

Marine insurance—Prohibited waters—Breach of warranty.

A policy of insurance issued by the defendant company on the plaintiff steamer "Richard" covered the steamer from July 6th, 1905, to July 6th, 1906. By a clause in the policy, the steamer was prohibited from using certain waters including Cape Breton, between December 1st and May 1st, but by a clause written in on the face of the policy, permission was given to use Cape Breton ports until January 1st, 1906. The steamer left Halifax in ballast on 31st December, 1905, for Port Hastings, in the Island of Cape Breton, and arrived there January 1, 1906. She took in a cargo of coal on January 2nd, and left for Yarmouth on the 3rd, having been prevented by the condition of the weather from leaving sooner.

Held, affirming the judgment of the trial judge, that the use of the Cape Breton port after January 1st, was a breach of a plain term in the policy and a breach of warranty that avoided the policy.

Burchell for appellant. *MacIlreith*, for respondent.

Longley, J.] WALLACE *v.* DAVIS. [Dec. 24, 1907.

Practice—Order—Power of amendment.

When an order is inadvertently drawn in such a way as not to carry out the judgment of the Court, the Court has power to amend it so as to make it conform to the terms of the judgment.

The solicitor whose want of care has made the application for amendment necessary will not be allowed costs of the application.

O'Hearn, for plaintiff. *Kenny*, for defendant.

Laurence, J.] HUBLEY *v.* HUBLEY. [Jan. 7.

Deed—Delivery—Presumption.

Defendant engaged a Crown land surveyor, who was also a justice of the peace, to prepare a plan and description of a lot of land owned by defendant and to draw a deed of the same to his son. The deed was written and executed by defendant and his wife in the presence of the justice who took the wife's acknowledgment of dower and the attestation of the witness and returned the deed to defendant. Defendant's son married plaintiff and erected a house on the lot of land and occupied it with plaintiff until shortly before his death. There was evidence to shew that the deed was read over by the son and his wife in defendant's presence and that defendant agreed to record it, but did not do so and retained possession of the deed until after his son's death when he destroyed it. In an action by plaintiff on behalf of herself and her infant child, claiming a declaration that the lands described in the deed were conveyed by defendant to his son and were the property of the son at the time of his death,

Held, that the retention of the deed by defendant under the circumstances mentioned was not sufficient to rebut the presumption of delivery.

Mellish, K.C., and *Kenny*, for plaintiffs. *Mackay*, K.C., for defendant.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] IN RE MORRIS ELECTION. [Oct. 18, 1907.

Election petition—Preliminary objections—Proof that deposit made in current money of Canada—Affidavit verifying petition—Scrutiny of votes and correction of return—Proof of petitioners' status—Allowing additional evidence to prove status—Want of prosecution.

The following points were decided by Mathers, J., on preliminary objections.

1. It is sufficient proof that the deposit required by section 22 of R.S.M. 1902, c. 34, for security for costs has been made in current money of Canada, when the identical Dominion notes handed to the prothonotary are produced, and the prothonotary swears to such identity, and a bank official with ten years' experience swears that they are genuine Dominion notes, that he recognizes them by the paper and the scroll upon them and by their general appearance, although he does not know by whom the notes should be signed or the genuineness of the signatures.

2. It is not necessary that any affidavit verifying the petition should be presented with it. Such affidavit is not required by the Manitoba Act, although it is required by the corresponding Dominion Act. Section 10 of the Manitoba Act does not empower the judges to make a rule limiting the right of an elector to present a petition to those electors who might be able to make such an affidavit, a that would be inconsistent with section 14 of the Act, which says that an election petition may be presented by any elector who had a right to vote at the election in question. Consequently the provision in the Dominion Act referred to is not, by virtue of section 13, brought into force in Manitoba.

3. Since a deposit in money has been substituted for the recognizance or bond required by rule 11 of the rules made by the judges of the Court under the powers conferred by section 10 of the Act, it is no longer necessary to serve any notice of the furnishing of security.

4. Paragraphs of the petition which do not allege any corrupt practice within the meaning of that term as used in the Act are not demurrable on that ground, and objections to such paragraphs on the ground that they ask for a scrutiny and claim the seat on behalf of the defeated candidate should not be allowed. See sections 16, 67, 90 and 129, also Imperial rule 7 and Manitoba rule 19.

5. It is sufficient proof under section 183 R.S.M. 1902, c. 52, of the right of the petitioner to vote, if it be shewn that his name is on the last revised list of electors for the whole electoral division, or if it be shewn that his name is on the list actually used by the deputy returning officer, and received by him from the returning officer at the election, together with proof of the identity of the petitioner in either case.

6. It is, however, necessary that the petitioner should establish that he is not disqualified as an elector under section 184 of the Election Act, and to shew that he is a male, twenty-one years of age, a British subject by birth or naturalization, and is not disqualified in any of the several other ways enumerated in that section.

7. The petitioners should, however, be allowed to adduce further evidence to meet this last objection upon payment of any costs occasioned by further attendance of the respondent's solicitor. The petitioners were allowed three weeks, or such further time as upon special application might be allowed, to furnish the necessary evidence of their qualification under section 184 of the Act.

An appeal from the above judgment as to allowing additional evidence to be put in to prove the status of the petitioner, dismissed with costs.

O'Connor and *Blackwood,* for the petitioners. *A. J. Andrews,* for the respondent.

Full Court.] YASNE *v.* KROUSAN. [Nov. 25, 1907.

Contract — False representation — Rescission — County Courts Act, R.S.M. 1902, *c.* 36, *s.* 61—*Equitable relief in County Court action.*

The plaintiff's claim was to recover the sum of $85 paid to the defendant under an agreement of sale which he alleged had

been procured by false representation on the part of the defendant. Plaintiff's statement of claim did not ask to have the agreement cancelled.

The County Court judge entered a verdict for plaintiff for the amount claimed, but did not order the cancellation of the contract.

Held, on appeal to this Court, that, without a rescission of the contract, there could be no recovery of the amounts paid under it.

Held, also, that the County Court has no jurisdiction to cancel contracts on the ground of fraud, and that s. 61, sub-s. (6), of R.S.M. 1902, c. 38, which confers equitable jurisdiction when the subject of the action is "an equitable claim and demand of debt, account or breach of contract, or covenant or money demand, whether payable in money or otherwise," does not apply in a case like the present.

Burbidge, for appellant. *Richards*, for respondent.

Full Court.] THORDARSON *v.* JONES. [Nov. 25, 1907.

Commission on sale of land—Exchange of land—Appeal from findings of fact by trial judge.

The plaintiffs were real estate agents and sued for commission on an exchange of lands between the separate defendants which the plaintiffs alleged had been effected through their instrumentality. The trial judge dismissed both actions but the Court of Appeal reversed his finding of facts and held that the evidence shewed that the defendants, who had separately listed the respective properties with the plaintiffs for sale, had been brought together at the plaintiff's office and that the exchange had resulted from that introduction, and that the plaintiffs were entitled to half the usual commission and all costs.

Hoskin, and *Hanneson*, for plaintiffs. *Wilton*, and *McMurray*, for defendants.

Full Court.] ROSEN *v.* LINDSAY. [Nov. 25, 1907.

Action of deceit—Damages—Liability to make representation good.

Judgment of Mathers, J., noted vol. 43, p. 421, reversed with costs on the ground that, as the plaintiff had sustained no actual

loss by making the purchase of the property he could recover no damages in an action of deceit based on false representations as to its value.

Peek v. *Derry*, 37 Ch.D. 541, 14 A.C. 337; *McConnell* v. *Wright* (1903), 1 Ch. 546, and *Steele* v. *Pritchard*, ante, infra, followed.

A. B. Hudson, for appellant. *Managhan* and *Blackwood*, for plaintiff.

Full Court.] STEELE *v.* PRITCHARD. [Nov. 25, 1907.

Action of deceit—False representation—Damages.

Appeal from decision of Mathers, J., noted vol. 43, p. 258, allowed with costs on the following grounds:—

1. The evidence shewed that the plaintiffs Powell and Buell had not made any independent contract with the defendants for the purchase of the lands in question, but had only acquired an interest with the plaintiff Steele in the option which he had secured from the defendants before the making of the alleged false representation and that, if the defendants had made any false representations to the said Powell and Buell at the time they acquired such interest, the only remedy Powell and Buell could have would be an action of deceit based upon the alleged fraud of the defendants in inducing them to enter into the agreement with Steele to acquire an interest with him in the option, to which action Steele would not be a proper party. The deceit alleged in the pleadings and urged at the trial was in negotiating a contract between the three plaintiffs and the Land Company, the defendants acting as agents, and not in the negotiations of a contract between Steele and the other plaintiffs, in which the defendants were not required to take any part and in which, perhaps, they had no interest.

The issues and evidence in the two cases might be widely different and an amendment of the pleadings setting up such new case, asked for first at the hearing of the appeal, should not be allowed: but Powell and Buell might, if so advised, notwithstanding the dismissal of the present action, being a new action on the grounds now urged.

2. Per PHIPPEN, J.A.:—After discovering the alleged fraud the plaintiffs might, if the facts they alleged were true, have sued the company for the return of their $5,000 deposit or brought an action of deceit against the defendants, laying their

damages at the amount paid out. Instead of that, however, they exercised their privilege of making a new contract directing the company to retain, as part of the purchase money thereunder the $5,000 previously paid for the option. The plaintiffs, having thus received back the only money from which they were parted by the alleged misrepresentation, cannot further recover by way of damages.

It being admitted, further, that the plaintiffs suffered no loss by means of this purchase, but made a substantial profit by the resale of the lands, they could recover no damages for having been induced to enter into the contract.

McConnell v. *Wright* (1903), 1 Ch., at p. 554; *Peek* v. *Derry*, 37 Ch.D., at p. 541; *Smith* v. *Bolles*, 132 U.S.R. 125, and *Sigafus* v. *Porter*, 179 U.S.R. 116, followed.

J. Campbell, K.C., and *Wilson*, for plaintiffs. *Robson* and *Johnson*, for defendants.

KING'S BENCH.

Mathers, J.] PONTON v. CITY OF WINNIPEG. [Oct. 18, 1907.

Municipality—By-law or resolution of—Contract of municipality requires by-law—Estoppel by conduct—Real Property Act, R.S.M. 1902, *c.* 148—*Winnipeg charter*, 1902, *c.* 77, *s.* 387—*Meaning of expression "sufficient evidence" in a statute.*

Certain lands of the plaintiff having been sold to the City of Winnipeg for arrears of taxes, the city under the provisions of R.S.M. 1902, c. 117, s. 203, et seq., applied for, and, on April 7, 1902, procured certificates of title under the Real Property Act for the lands. Pursuant to an amendment of the city charter passed in 1903, the City Council on 14th December, 1903, adopted a resolution that all the lots in question be conveyed to the plaintiff on payment of all costs, interest, and taxes to date. The council afterwards, on April 18, 1904, rescinded the resolution; but, two days prior to such rescission, the plaintiff tendered to the City Treasurer the amount specified in the resolution and demanded a conveyance.

Held, that the corporation could not bind itself by resolu-

tion and that, in the absence of a by-law, there was no contract with the plaintiff of which he could have specific performance by the defendants ordered. *Bernardin* v. *North Dufferin*, 19 S.C.R. 581, and *Tracey* v. *North Vancouver*, 34 S.C.R. 132, followed.

As the lots still stood in the plaintiff's name up to April, 1902, the city assessor assessed them to the plaintiff in the roll for 1902 which he had previously prepared; and, there being no appeal from such assessment, the same was confirmed and finally revised in June following. The usual assessment notice was sent to the plaintiff on May 3, 1902, and, in the following November, the tax collector sent the usual notice and demand for taxes of 1902 to the plaintiff. These steps were all taken by the city officials in accordance with their statutory duties and without any special authority or instructions from the City Council.

Held, that the city was not estopped by the sending of such notices from relying on its certificates of title obtained in April, 1902.

It was further contended on behalf of the plaintiff that the steps taken had the effect of making him legally liable to the city for the taxes of 1902, as section 387 of the charter provides that the production of a true copy of the tax roll shall be sufficient evidence of the debt for taxes, and therefore the city was asserting two absolutely inconsistent rights.

Held, however, that "sufficient evidence" does not mean conclusive evidence, and it would be a complete answer to such an action that the plaintiff was not the owner of the lands at the time of the return of the assessment roll and its final revision.

Galt and *Minty*, for plaintiff. *I. Campbell*, K.C., and *Hunt*, for defendants.

Perdue, J.A.] THE KING v. GEORGE SMITH. [Nov. 21, 1907.

Manslaughter—Killing of fugitive suspect by peace officer—Shop-breaking—Criminal Code, 1906, *ss.* 30, 41.

The accused was indicted for manslaughter. It appeared that he, being a peace officer, was endeavouring to arrest, without warrant, a man whom he, on reasonable and probable grounds, believed to have been guilty of the theft of valuable furs from the shop of a merchant tailor in the City of Winnipeg.

The deceased on October 14th, 1907, offered the furs for sale at a price greatly under their value to McFarlane, another merchant tailor, who suspected that they were stolen, and arranged with the deceased to come to the shop the next morning to get his money, and then informed the police. The accused had been informed of the theft of the furs and of the circumstances under which they had been stolen, and the next morning went to McFarlane's shop and waited there expecting that the deceased would come for his money. On the arrival of the deceased at McFarlane's shop on the morning of the 15th of October, he caught sight of the accused and immediately bolted out of the door and ran away. The accused followed him in an endeavour to effect his arrest and fired several shots from his revolver in an effort to frighten the deceased into stopping, but without avail, and the deceased increased his lead until the accused came to the conclusion that the only way of preventing the escape of the deceased at the time was to wound him in the leg. He accordingly aimed at the man's leg for that purpose, but the bullet struck the deceased in the head killing him instantly.

In charging the jury upon the evidence the learned trial judge left two questions to them, first, under section 30 of the Criminal Code, as to whether the accused, on reasonable and probable grounds, believed that an offence for which the offender may be arrested without warrant had been committed and that the fugitive had committed that offence. In discussing this point the jury were told that, if a person opens a door leading to a shop or store by lifting the latch or turning a knob and enters the store, although during business hours, with the intention of stealing something in the store, he may be convicted of shop breaking, so that if the accused believed, on reasonable and probable grounds, that the fugitive had in that manner entered the shop from which the furs had been stolen, he would be justified in believing that the fugitive had committed the offence of shop breaking and theft, for which offence he might have been arrested without a warrant, although not for simple theft out of a store. The jury were also told that if they found that the accused, on reasonable and probable grounds, believed that an offence for which the fugitive might have been arrested without warrant had been committed, and that the fugitive had committed that offence, they would further have to consider the question, arising under section 41 of the Criminal Code, whether the force used by the accused to prevent the escape of the fugitive by such flight was necessary for that purpose, and whether

such escape could have been prevented by reasonable means in a less violent manner, or in other words, whether the accused did the shooting of necessity or not, and whether he exceeded the powers conferred on him by law in firing the revolver at the fugitive. Upon these points the judge proceeded as follows: "If you have got over the first serious difficult question, and find that Smith had a right to arrest Gans, that is that he believed Gans had committed an offence for which he might be arrested without a warrant, then Gans was fleeing to evade arrest, and Smith was justified in using reasonable force in order to apprehend him and prevent his escape. The grave question here is, what is the degree of force which Smith should have used, and the first thing for you to consider is, could Smith have apprehended that man by any other means whatever except by shooting him. If you find he could have apprehended him by any other means, then Smith was not justified in shooting him. Shooting is the very last resort. It is shooting with a dangerous weapon like a revolver which might cause death. A man who is fleeing may be tripped up, thrown down, struck with a cudgel and knocked over and, if he strikes his head on a stone and is killed, the police officer is absolved because he was fleeing from arrest. But when it comes to discharging a dangerous weapon it is the last resort and cannot be justified unless it is shewn no other means could have been taken in effecting the arrest." (The learned judge then reviewed the evidence of the chase, and proceeded), "It is the duty of every citizen, when called upon, to help capture and pursue a criminal when flying from arrest, especially if he is called upon by the police. You will have to reconsider whether Smith, if he had not had that revolver, or had kept it in his pocket could not have called to his assistance passers-by, who would have joined him in the pursuit and have arrested Gans' flight. You will also have to consider whether Smith should have abandoned the pursuit of Gans at that time. He says his breath failed, his wind was gone, and should he not have called upon some of the others who were running behind him, asking them to run and keep Gans in sight until another policeman came up? You will have to consider if that might have been done to stop Gans. It was admitted that the bullet which caused his death was fired by Smith with the intention of wounding him, but unfortunately it struck him on the head and caused his death. Unless Smith was justified at law in the manner I have pointed out he would be guilty of manslaughter."

At the request of counsel for the defence his lordship further explained to the jury that the escape referred to in the Code meant escape from the flight then going on and that the possibility of the fugitive being found and apprehended subsequently need not be considered.

Hagel, K.C., and *Patterson*, for the Crown. *Bonnar, Potts* and *Howell*, for accused.

Mathers, J.] FENSON *v.* BULMAN. [Nov. 27, 1907.

Contract—Performance—Completion prevented by fire—Acceptance of insurance money on property destroyed, effect of.

The plaintiffs contracted to put a passenger elevator into the defendants' four-story block in course of erection for $2,800 to be paid as follows. One-half on delivery of machinery at the building, one-quarter when machine is in place, and the balance on completion. The machinery was delivered at the building in July, 1904, and defendants paid one-half of the price. The building and all its contents were destroyed by fire on the 11th of October following. At that time the "controller," although it was in the basement of the building, had not yet been put in its place.

Held, that the plaintiffs had not earned the second payment stipulated for.

Fairchild v. *Rustin*, 39 S.C.R. 274, and *Ross* v. *Moon*, 17 M.R. 24, followed.

The plaintiffs claimed in the alternative that they were entitled to recover the price of the elevator quantum meruit because the defendants had insured the elevator for its full value and had collected and received the full amount of the insurance, having included the value of the elevator in their proofs of loss sent in to the insurance companies, and should, therefore, be deemed to have accepted it. It appeared, however, that the defendants had left the placing of the insurance upon their property in the hands of their agent and had not instructed him to insure the elevator and were not aware, when their proofs of loss were made, that the elevator had been so included, and that their total loss was much in excess of the total insurance.

Held, that the defendants, having paid $1,400 on the elevator, had an insurable interest in it and a right to receive the insurance money, and that what they had done in connection

with the insurance did not constitute an acceptance of the elevator.

Galt and *Minty*, for plaintiffs. *Munson*, K.C., and *Laird*, for defendants.

Mathers, J.] IN RE MORRIS ELECTION. [Nov. 29, 1907.

Election petition—Want of prosecution.

Motion to dismiss the petition herein on the ground that six months had elapsed without the trial having been commenced or any order made enlarging the time for commencing it. There is no provision in the Manitoba Controverted Election Act, R.S.M. 1902, c. 34, or in any of the rules of Court applicable to election petitions in the Province, limiting the time within which the trial must be commenced. Section 39 of the Dominion Controverted Elections Act does, however, contain such a provision and the respondent's contention was that that section of the Dominion Act is incorporated into the local Act by the effect of sections 10 and 13 of the latter Act.

Section 10 gives power to the judges to make general orders for the effectual execution of the Act and of the intention and object thereof, and the regulation of the practice and procedure with respect to election petitions and the trial thereof, and section 13 says that, "in all cases unprovided for by such rules when made, the principles, practice and rules then in force, by which election petitions touching the election of numbers of the House of Commons of Canada are governed shall be observed, so far as, consistently with this Act, they may be so observed." Since section 39 of the Dominion Act was first enacted, the Manitoba Act has on several occasions been revised and amended.

Held, that, in interpreting an Act which creates new jurisdictions or delegates subordinate legislative or other powers, the principle of strict construction should be applied and a distinct and unequivocal enactment is required for the purpose of either adding to or taking from the jurisdiction of the Court: "It is impossible to suppose that the legislature intended, as it were by a side wind, to bring into operation so important a provision as section 39 of the Dominion Act, and the Court will not assume that such was the intention: *Smith* v. *Brown*, L.R. 6, Q.B. 729. Even if section 13 is sufficiently wide to include the provisions of the Dominion Act, only such provisions of it

as the judges would have jurisdiction to enact as rules of Court under section 10 are brought into force, and the judges would not have power to make such a rule as the one sought to be invoked, which would be something more than a rule of practice or procedure. *The Queen* v. *Powlett*, L.R. 8 Q.B. 491, is very much in point." On appeal to the Court of Appeal the above judgment was upheld.

O'Connor and *Blackwood*, for petitioners. *A. J. Andrews*, for respondent.

Province of British Columbia.

SUPREME COURT.

Hunter, C.J.] REX v. FOUR CHINAMEN. [Nov. 23, 1907.

Criminal law—"Disorderly house" defined—What constitutes —Inmates—Criminal Code, section 228.

The term "disorderly house" includes any house to which persons resort for criminal or immoral purposes, and it is immaterial that the house is conducted quietly so as not to disturb the neighbours. *Queen* v. *France*, 1 Can. C.C. 231; *Ex parte Cook*, 3 Can. C.C. 72, and *Rice* v. *Rice*, 1 Can. C.C. 2, considered.

Killam, for the Crown. *Farris*, for the accused.

Hunter, C.J.] WILLIAMS v. HAMILTON. [Nov. 24, 1907.

Vendor and purchaser—Contract for sale of land—Offer—Acceptance—Correspondence.

Defendant, being in Montreal, and owning property in Vancouver, instructed his agents to obtain a purchaser at $1,400, offers to be first submitted to him. They received an offer and gave a receipt for a deposit of $25, price $1,400, $900 or $950 cash, balance C.P.R. subject to owner's confirmation, and telegraphed defendant, "Deposit on lot Kitsilano, $1,400. Wire approval and instructions." Defendant wired in reply, "$1,400 O.K. letter instructions," at the same time writing that his

papers were in the bank and could not be obtained until his return to Vancouver; that he wanted $1,400, net to him, and if this was satisfactory he would complete the transaction on his return to Vancouver.

Held, that there was no concluded bargain between the parties. And also, that the defendants F. and F. had not represented that they were, nor assumed to act as, the owner's agents.

Macdonell and *Brown*, for plaintiff. *Craig*, *Bourne* and *MacGill*, for various defendants.

Full Court.] BOLE *v.* ROE. [Nov. 28, 1907.

Practice—Appeal—Time for taking appeal under Water Clauses Act, 1897, *R.S. c.* 190, *s.* 39—"*Decision*."

In an appeal to the County Court judge from the decision of the Water Commissioner, objection was taken to the jurisdiction of the County Court judge under section 36 of the Water Clauses Consolidation Act. The objection was overruled. Section 39 of the Act provides for an appeal to the full Court by "any person dissatisfied with the decision of a judge of the Supreme or County Court . . . . provided that notice of appeal be given to the opposite party within twenty-one days from such decision . . . .

Held, that the term "decision" as used in section 39 means the final disposition of the whole case before the Supreme Court judge, especially in view of the provisions in the section that such appeal shall be dealt with by the full Court in the same way as an ordinary appeal from a final judgment in an action in the Supreme Court.

Harris, K.C., for appellants. *Martin*, K.C., for respondents.

Clement, J.] STEVENSON *v.* SMITH. [Nov. 29, 1907.

Principal and agent—Authority of agent—Delegation—Statute of Frauds.

An agent "thereunto lawfully authorized" within the Statute of Frauds, cannot delegate his authority.

An agent who, at the time of making a contract, has failed to bind his principal, by a written note, or memorandum within the statute, cannot sign an effectual note or memorandum after his authority as agent to sell has been withdrawn.

Martin, K.C., for plaintiff. *Wilson*, K.C., for defendant.

Full Court.] [Nov. 28, 1907.

WORLD PRINTING CO. *v.* VANCOUVER PRINTING CO.

Practice—Costs—Successful party—Power to deprive him of costs—"Good cause"—Marginal Rule 976.

In an action for libel between two newspapers arising out of statements as to their respective circulation, the trial judge found on the facts that the statement made by the defendant newspaper was not established; but he came to the conclusion that there had been no special damage suffered by the plaintiff newspaper in consequence of the statement, and gave judgment dismissing the action without costs.

Held, that under the rule governing costs in British Columbia, as distinguished from the English rule, the trial judge must find good cause for depriving a successful party of his costs; and here there was not such good cause.

Davis, K.C., for appellant (defendant company). *Martin*, K.C., and *Wintemute*, for respondent (plaintiff company).

JUDICIAL APPOINTMENTS.

Hon. Sir Thomas Wardlaw Taylor, Kt., to be judge, pro ten., of the Exchequer Court of Canada during the illness of the Hon. Mr. Justice Burbidge. (Jan. 21.)

John Donald Cameron of the City of Manitoba, Barrister-at-law, to be puisne judge of the Court of King's Bench for Manitoba. (Jan. 21.)

Edward Arthur Cracken McLorg, barrister-at-law, to be judge of the District Court of the Judicial District of Saskatoon, in the Province of Saskatchewan. (Dec. 10, 1907.)

The Living Age opens well for the new year. No publication that we know of gives so continuously such good reading as does this compilation, and this is not surprising as it gets its material from all sources. It is refreshing to see something substantial and informing amidst the mass of foolish trash and insane stories which now so generally form the literary food especially of young people. The articles selected are from such publications as the *Fortnightly Review*, *Cornhill*, London *Times*, *Nineteenth Century*, *Blackwood's*, etc.